

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 10/13/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

GREGORY BEST,) No. 1 CA-CV 10-0700
)
Plaintiff/Appellant,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
BETHLYN and GARY MOSELY; JAMES) Rule 28, Arizona Rules of
and IRENE PRESTON; BETHESDA) Civil Appellate Procedure)
COMMUNITY BAPTIST CHURCH,)
)
Defendants/Appellees.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-003435

The Honorable J. Richard Gama, Judge

AFFIRMED

| | |
|---|---------|
| Gregory Best Plaintiff/Appellant <i>In Propria Persona</i> | Phoenix |
| Penilla Metzger & Biggers Law Firm By David R. Penilla and Garvey M. Biggers Attorneys for Defendants/Appellees Preston and Bethesda Community Baptist Church | Phoenix |
| ASU Civil Justice Clinic Sandra Day O'Connor College of Law By Marcy Karin, Robert Lamb (Rule 38 Law Student), Melissa E. Posner (Rule 38 Law Student), Adam T. Reich (Rule 38 Law Student), | Tempe |

B R O W N, Judge

¶1 Gregory Best appeals the trial court's order dismissing his claims against several defendants pursuant to Arizona Rule of Civil Procedure 12(b)(6). For the following reasons, we affirm.

BACKGROUND

¶2 In December 2003, the City of Phoenix ("City") adopted the Rio Salado Beyond the Banks Area Plan ("Area Plan") in an effort to revitalize an area of South Phoenix. The City solicited redevelopment proposals, and Best submitted a plan for consideration. In conjunction with his proposed plan, he entered into purchase option contracts with several South Phoenix property owners, including Appellee Bethlyn Mosley.

¶3 In February 2009, Best filed a complaint containing ninety-nine allegations against Mosley and a number of other defendants, claiming tortious interference, defamation, conspiracy to defraud, and RICO violations.¹ According to Best, the City and its employees devised a conspiracy, which was furthered by the State and its employees and others, to ensure Best's development plan would not succeed. Best alleged that

¹ Best's complaint also included allegations against several city and state employees. None of these other defendants are a party to this appeal.

the city and state employees and property owners whom Best had contracted with held meetings to defame Best and destroy his business.

¶4 Mosley moved to dismiss the complaint in November 2009. After oral argument, the trial court granted the motion to dismiss, but granted Best leave to amend his complaint. In February 2010, Best filed an amended complaint, which added twenty-two allegations to the original complaint, including some additional verbiage against Mosley. The amended complaint also added Appellee James Preston as a defendant, who is the Pastor of Bethesda Community Baptist Church ("Church"). Best alleged that Preston allowed the church facilities to be used for meetings in which Mosley and others defamed and conspired against Best.

¶5 In April 2010, Preston moved to dismiss Best's amended complaint under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Shortly thereafter, Mosley filed a separate motion to dismiss the second amended complaint under the same rule. Best subsequently filed a motion to strike/motion for sanctions, motion for admissions of allegations of complaint, and a supplement to the motion for admissions. The trial court granted the motions to dismiss filed by Mosley and Preston with prejudice and certified its ruling under Rule 54(b). Best timely appealed.

DISCUSSION

¶16 This court reviews an order granting a motion to dismiss for abuse of discretion. *Dressler v. Morrison*, 212 Ariz. 279, 281, ¶ 11, 130 P.3d 978, 980 (2006). In relation to a Rule 12(b)(6) motion to dismiss, we “look only to the pleading itself and consider the well-pled factual allegations contained therein.” *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7, 189 P.3d 344, 346 (2008). We assume the truth of all well-pled factual allegations and construe all reasonable factual inferences in favor of the plaintiff. *Id.* However, “mere conclusory statements are insufficient to state a claim upon which relief can be granted.” *Id.*

¶17 In his reply brief, Best argues that this court “can review whatever the ruling judge reviewed in making [its] decision,” citing *Backus v. State*, 220 Ariz. 141, 204 P.3d 399 (App. 2008) (noting that we review de novo a decision granting a motion to dismiss when the decision is based on materials outside the pleadings). We disagree.

¶18 In its ruling, the trial court noted that it considered Best’s “Motion for admissions of allegations of complaint and amended complaint for Defendant[s] Bethlyn and Gary Mosley and Motion to Strike subsequent pleading.” One of those pleadings, the motion for admissions, quoted portions of Mosley’s deposition and included a copy of a contract. In

addition, Best filed a supplement to the motion for admissions, attaching Mosley's deposition.

¶9 Ordinarily, reliance on material extrinsic to the pleadings requires the court to treat the motion to dismiss as a motion for summary judgment. See Ariz. R. Civ. P. 12(b); *Smith v. CIGNA HealthPlan of Ariz.*, 203 Ariz. 173, ¶ 8, 52 P.3d 205, 208 (App. 2002). However, "[t]he element that triggers the conversion (from a motion to dismiss to one for summary judgment) is a challenge to the sufficiency of the pleader's claim supported by extra-pleading material." *Brosie v. Stockton*, 105 Ariz. 574, 576, 468 P.2d 933, 935 (1970) (internal quotations and citation omitted). "The rationale underlying the conversion rule is that a plaintiff must be given an opportunity to respond when a motion to dismiss for failure to state a claim includes material extraneous to the complaint." *Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 64, ¶ 14, 226 P.3d 1046, 1050 (App. 2010). Here, even assuming the trial court considered material outside the pleadings, that material was not submitted by the moving parties and therefore plaintiff was not deprived of the opportunity to respond. Moreover, Best never requested that the trial court treat the motions to dismiss as motions for summary judgment, nor did he make any assertion in his opening brief that we should examine

the motions as if they are governed by Rule 56. Thus, our review is limited to the allegations of the amended complaint.

A. Tortious Interference

¶10 Best alleges that Mosley tortiously interfered with contractual relations he had with other property owners. There exists at common law a duty "not to interfere with the contract of another." *Bar J Bar Cattle Co., Inc. v. Pace*, 158 Ariz. 481, 486, 763 P.2d 545, 550 (App. 1988). When this duty is breached, the non-breaching party may bring an action for intentional interference with contractual relations. See *Snow v. W. Sav. & Loan Ass'n*, 152 Ariz. 27, 33, 730 P.2d 204, 211 (1986). "A prima facie case of intentional interference requires: (1) existence of a valid contractual relationship, (2) knowledge of the relationship on the part of the interferor, (3) intentional interference inducing or causing a breach, (4) resultant damage to the party whose relationship has been disrupted, and (5) that the defendant acted improperly." *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 493, 38 P.3d 12, 31 (2002) (quoting Restatement (Second) of Torts § 766 (1977)).

¶11 Best alleged he had a contract with the Cortezes to purchase their property and that Mosley knew of this contractual relationship. He also alleged Mosley intentionally interfered with this relationship by providing the Cortezes with a

"cancellation document" and telling the Cortezes that Best was "cheating them."

¶12 Best did not allege, however, that Mosley's action resulted in the Cortezes breaching their contract with him. The amended complaint claimed that Mosley "provided the Cortezes a cancellation document which they *attempted* to use to break their contract" with Best. (Emphasis added.) Best also vaguely asserted that "Mosley is believed to have tortuously [sic] interfered with numerous other property owners under contract with [Best]." Neither statement alleges that a breach occurred as a result of Mosley's alleged actions. See *Cullen*, 218 Ariz. at 419, ¶ 7, 189 P.3d at 346. Therefore, because Best fails to allege that a contract was actually breached as a result of Mosley's alleged interference, he has failed to plead a claim for tortious interference with a contractual relationship.

B. Business Expectancy

¶13 We assume Best intended to plead a claim for intentional interference with a business expectancy when he alleged that the defendants "encourage[ed] other area property owners not yet under contract with [Best] from entering agreements with [him]." "Before recovery can be had for interference with prospective business relations or for preventing a contract, it must appear that a relationship or contract would otherwise have been entered into." *Marmis v.*

Solot Co., 117 Ariz. 499, 502, 573 P.2d 899, 902 (App. 1977) (citation omitted). Best failed to allege any facts suggesting that the other property owners he refers to would have entered into contracts with him to sell their property if it had not been for Mosley's alleged interference. Accordingly, Best has failed to state a claim for intentional interference with a business expectancy.

C. Defamation

¶14 Best alleged that Mosley "defamed [him] for the purpose of breaking trust [he] had earned with property owners and associates under contract." Specifically, he alleged that Mosley told the Cortezes, a couple whom Best states he had a contract with, that Best was "cheating them." Best also claimed that the defendants (presumably including Mosley) told other persons under contract with Best that he was "stealing their properties."

¶15 To plead a claim for defamation, a plaintiff must allege that (1) the defendant made a statement concerning the plaintiff to a third party; (2) the statement was false; (3) the defendant acted knowingly, recklessly, or negligently in disregarding the falsity of the statement; and (3) the statement harms the plaintiff's reputation for honesty or integrity, or otherwise brings the plaintiff into disrepute. See *Rowland v. Union Hills Country Club*, 157 Ariz. 301, 306, 757 P.2d 105, 110

(App. 1988); *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 341, 783 P.2d 781, 787 (1989).

¶16 Best did claim there was a publication when he asserted that Mosley told the Cortezes that Best was "cheating them." However, Best failed to allege that Mosley's statements were false. He claimed Mosley's alleged comments "were malicious [and] unwarranted" and they were "without justification or excuse," but a statement can fit each of those descriptions and still be true. Furthermore, although Best generally claimed that he suffered financial damages, suggesting that Mosley made the statements "for the purpose of breaking trust [Best] had earned with property owners," he does not state whether any contracts were actually breached as a result of Mosley's statements. Therefore, Best has failed to properly plead a claim for defamation.

D. Conspiracy to Defraud

¶17 Best's overarching claim is that "the defendants" engaged in a conspiracy to defraud him and destroy his business. "For a civil conspiracy to occur two or more people must agree to accomplish an unlawful purpose or a lawful object by unlawful means." *Wells Fargo*, 201 Ariz. at 498, ¶ 99, 38 P.3d at 36 (internal quotations and citations omitted). The defendant must also accomplish the underlying tort. *Id.* Damages in a claim for civil conspiracy do not arise out of the conspiracy itself, but

are those "arising out of the acts committed pursuant to the conspiracy." *Tovrea Land & Cattle Co. v. Linsenmeyer*, 100 Ariz. 107, 131, 412 P.2d 47, 63 (1966).

¶18 Best alleged that "with common intent, design and purpose" Mosley and the other defendants conspired to "do unlawful and injurious harm" to Best "with the purpose of destroying . . . his business" and impairing his right to succeed. There is no legally recognized "right to succeed" in business. Similarly, causing injury to another's business is not unlawful per se, and "an alleged conspiracy to do same is not a conspiracy to accomplish an unlawful purpose." *Savard v. Selby*, 19 Ariz. App. 514, 517, 508 P.2d 773, 776 (1973). Furthermore, Best has not successfully alleged that any specific unlawful act has been accomplished.

¶19 As far as we can tell, the only factual allegation Best has made against Preston is that he "allowed [the] use" of his church "for the purpose of allowing the conspiracy against [Best] to be carried out." Best asserts that because of this alleged action, Preston and his church are "liable for all the acts by all the other Defendants in furtherance of the conspiracy."

¶20 A person is subject to liability for harm resulting to a third person if he

(a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Restatement (Second) of Torts § 876 (1979).

¶21 Best failed to allege facts tending to show that Preston committed any of the three acts described above. Moreover, as explained above, *supra* ¶ 18, for there to be an actionable claim for conspiracy, the parties must have agreed to accomplish, and have actually accomplished, an unlawful purpose or act. Best has claimed neither.

E. Arizona RICO Claim

¶22 Best stated that he filed his action "pursuant to the Arizona Racketeering Act, [Arizona Revised Statutes ("A.R.S.") section] 13-2301 et seq." ("Arizona RICO"). Arizona RICO authorizes "a person who sustains reasonably foreseeable injury to his person, business or property by a pattern of racketeering activity, or by a violation of § 13-2312 involving a pattern of racketeering activity" to bring suit for damages in superior court. A.R.S. § 13-2314.04(A) (2010).

¶23 Racketeering is defined as an act "that is chargeable or indictable under the laws of the state or country in which the act occurred[,] . . . that would be punishable by imprisonment for more than one year under the laws of this state . . . regardless of whether the act is charged or indicted," and involves at least one of several enumerated acts. A.R.S. § 13-2301(D)(4) (2010). Section 13-2312 (2010) provides that a person commits the crime of illegal control of an enterprise by acquiring or maintaining, through racketeering or its proceeds, control of any enterprise.

¶24 A complaint is sufficient to state a claim under A.R.S. § 13-2314.04(A) when it alleges that (1) the plaintiff has suffered damage or injury as the result of a pattern of racketeering activity, and (2) "the act which caused the injury was performed for financial gain, was one of the illegal acts enumerated in the statute, and was chargeable and punishable in accordance with the requirements of the statute." *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 595, 596-97, 667 P.2d 1304, 1310, 1311-12 (1983). Furthermore, a complaint sufficiently alleges a violation of A.R.S. § 13-2312 "when it alleges that the injury was caused by defendant's illegal control or conduct of an enterprise by or through racketeering." *Id.* at 597, 667 P.2d 1312.

¶125 Although Best alleged he was financially damaged by the acts of Mosley and other defendants, he did not connect this damage to any alleged racketeering activity. Best did assert that Mosley, along with others, "bribed [other defendants] in exchange for their cooperation in furthering the conspiracy to defame and defraud." To the extent Best may have intended his allegation of bribery to serve as the basis for a racketeering claim, the allegation clearly fails because it is conclusory. Furthermore, Best does not allege that any of the acts committed by Mosley were chargeable and punishable by more than one year of prison.

F. Breach of Duty of Good Faith

¶126 Best also alleged that Mosley "violated her duty to deal in good faith" with Best because she interfered with contracts between Best and others while Mosley was herself under contract with Best. In every contract, the law implies a covenant of good faith and fair dealing. *Rawlings v. Apodaca*, 151 Ariz. 149, 153, 726 P.2d 565, 569 (1986); see also Restatement (Second) of Contracts § 205 (1981). "The essence of that duty is that neither party will act to impair the right of the other to receive the benefits which flow from their agreement or contractual relationship." *Rawlings*, 151 Ariz. at 153, 726 P.2d at 569. Here, this duty applies to the contractual relationship between Best and Mosley. Nowhere in

the amended complaint does Best allege that Mosley attempted to prevent him from exercising his rights under his contract with her. Therefore, Best has failed to plead a breach of the duty of good faith.

CONCLUSION

¶27 Based on the foregoing, we find the trial court did not abuse its discretion in granting the motions to dismiss filed by Mosley and Preston and dismissing Best's claims against them with prejudice.² We therefore affirm the judgments of the trial court. In the exercise of our discretion, we deny Mosley's request for attorneys' fees; however, both Mosley and Preston are entitled to an award of costs upon compliance with Arizona Rule of Civil Appellate Procedure 21(a).

/S/

MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/S/

PATRICIA K. NORRIS, Judge

/S/

PHILIP HALL, Judge

² In light of our conclusion on the motions to dismiss, we need not address Best's argument that the trial court erred in its treatment of Best's motion for admissions, which questioned the honesty of Mosley's answer.