

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



DIVISION ONE
FILED: 03/06/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SOL JAFFE,) No. 1 CA-CV 10-0850
)
Plaintiff/Appellant,) DEPARTMENT D
)
v.) Not for Publication
) (Rule 28, Arizona Rules
) of Civil Appellate Procedure
EMPIRIAN PROPERTY MANAGEMENT,)
INC.; ISTA NORTH AMERICA, INC.;)
ISTA GMBH; CHRISTOPH HEYMANN,) **MEMORANDUM DECISION**
WALTER SCHMIDT, HELMAR FINK;)
KERNIE BRASHIER; CHRISTIAN)
TERLINDE,)
)
Defendants/Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-030307

The Honorable Gary E. Donahoe, Judge, Retired

AFFIRMED IN PART, DISMISSED IN PART

Sol Jaffe
In Propria Persona Plaintiff/Appellant

Phoenix

Mark D. Fullerton, P.C.
By Mark D. Fullerton
C. Andrew Campbell

Mesa

Attorneys for Empirian Property Management, Inc., Empire
American Holdings, LLC; Bush Realty at Steele Park, LLC;
Bush Realty Associates, LLC; Empirian at Steel Park LLC;
Ezra Beyman; Henry Heinemann; Neil Rackoff; Blimi Mayost;
Katie Brender; Jonathan Coates; Dominique Montoya and
Sam Weiss

G E M M I L L, Judge

¶1 Sol Jaffe ("Jaffe") appeals the grant of summary judgment and dismissal of his claims against Empirian Property Management, Inc. ("Empirian"), Bush Realty at Steele Park, LLC, Bush Realty Associates, LLC, Empirian at Steele Park, LLC, Empirian at Steele Park MM, LLC, Empire American Holdings, LLC, Ezra Beyman, Sam Weiss, Henry Heinemann, Neil Rackoff, Blimi Mayost, Katie Brender, Jonathan Coates, and Dominique Montoya (collectively "Empirian Defendants"); ista North America, Inc. and ista GMBH (collectively "ista"), Christoph Heymann, Helmar Fink, Walter Schmidt, Kernie Brashier, and Christian Terlinde (collectively "ista Defendants"). For the following reasons, we affirm the trial court's rulings except as to defendant Weiss, and we dismiss the appeal as to Weiss.

FACTS AND PROCEDURAL HISTORY

¶2 In December 2008, Jaffe filed a complaint against the Empirian Defendants and ista Defendants. The complaint stemmed from events that took place at his place of residence, Empirian at Steele Park Apartments ("Empirian at Steele Park"), located in Phoenix, Arizona. Against all defendants except ista and its employees, Jaffe alleged violations of the Arizona Landlord Tenant Act, including: gross negligence, negligent

misrepresentation, breach of contract, fraud, concealment, and breach of express warranty. Jaffe asserted various violations, such as a lack of normal "maintenance and repairs" and healthy and safety code violations, including "fire hose boxes [that] are not working . . . [and a lack of] water pressure to the hose," "urine and defecation matter all[]over the property," "exposed wiring fixtures waiting for someone to electrocute themselves," a "cracked glass wall waiting to fall on someone and kill them," and a "pool area flooded near electrical outlets waiting to electrocute someone." Against all defendants, Jaffe alleged fraudulent water/sewer/trash billings, including allegations of negligent misrepresentation, breach of contract, fraud, concealment, breach of express warranty, and conversion. Jaffe asserted that the Empirian Defendants used an outside billing company, ista, to provide billing for water, sewer, and trash, and this was paid separately from the rental contract. Jaffe believed "the amount of water used was too high for a single person living alone" because he showered at the YMCA, and he believed Empirian Defendants and ista fraudulently claimed the apartments were separately metered for water. In a third section of claims, Jaffe further alleged malicious prosecution, negligent misrepresentation, breach of contract, fraud, concealment, and breach of express warranty against all defendants except ista and its employees. Jaffe argued that a

2008 complaint filed by Empirian Defendants against Jaffe in justice court "relied upon perjury and fraudulent information" and caused him emotional and bodily injury, and Empirian Defendants "misrepresented" its apartment rental services when it offered Jaffe a free month of rent and "then decided on their own to rescind the offer by trying to evict Jaffe."

¶13 Jaffe requests "medical damages, in money, emotional and bodily harm" and "employment damages." Specifically, Jaffe states that he has suffered emotional distress, an aggravation to his hypertension, and had to take additional medication for the hypertension. Further, Jaffe states that he "is a [d]octor engaged in high level [m]anagement [c]onsulting . . . [and] [t]aking his time with one problem after another because of the [d]efendants['] actions warrants a substantial award." The complaint states "[t]he employment damages are estimated in the thousands of dollars according to proof at time of [the] trial."

¶14 Declaratory relief is also requested in the complaint, including for the following: "to report the criminal mail fraud claim [] to the Attorney General of the United States for criminal investigation,"¹ 2) "to appoint an expert master panel to oversee [Empirian Defendants'] violations of [Arizona Revised

¹ Jaffe asserts in the complaint that the Empirian and ista Defendants "used the United States Postal Service in committing their fraudulent acts" in relation to the billing of water/sewer/trash.

Statutes ("A.R.S.") section 33-1324], in order to bring the building into compliance with governmental codes," 3) "to terminate the Defendants' billings for water/sewer and trash collection, as an addition to rent, because they cannot calculate the true charges to each unit."

¶15 Jaffe filed various motions, including numerous motions to compel discovery, motions to compel answers to subpoena, motions to "deny strike" defendants' motion to dismiss, extraordinary motions for sanctions, motions for partial summary judgment, motions for reconsideration, motions to strike defendants' statement of facts, motions to strike defendants' partial motion for summary judgment, motion to remove case from arbitration, extraordinary motions to remove judge, motions for reconsideration of arbitrator's decision, a motion for summary judgment, and motions to amend complaint.

¶16 In March 2009, the Empirian Defendants, with the exception of Empirian and Sam Weiss, filed a motion to dismiss, based on Arizona Rule of Civil Procedure ("Rule") 12(b)(6), for failure to state a claim. The motion was filed because "the named defendants are members, managers, agents, or employees of certain limited liability companies [and] [t]here is no personal liability for owners, officers and directors for the actions of the corporation." In April 2009, ista Defendants filed a motion to dismiss for failure to state a claim upon which relief may be

granted. Sam Weiss filed a motion to dismiss in June 2009, arguing that Jaffe failed to comply with Rule 4.2(c), service of process to persons outside of the state. In July 2009, the court granted Empirian Defendants' motion to dismiss, and the court dismissed all of Jaffe's claims against ista Defendants, except negligent misrepresentation, by granting ista's motion to dismiss. Also in July 2009, an arbitrator was appointed.

¶7 Empirian filed two motions for partial summary judgment in November and December 2009. The first motion was filed with the arbitrator and dealt with the claims against Empirian for fraudulent and negligent water/sewer/trash billings. The second involved the claims against Empirian for Landlord Tenant Act violations and claims for malicious prosecution. The arbitrator granted Empirian's first motion for summary judgment. Jaffe appealed the arbitrator's award. The superior court "deem[ed] th[e] filing to be an attempt to file a Notice of Appeal."

¶8 In December 2009, ista moved for summary judgment on the remaining claim, negligent misrepresentation. On February 10, 2010, the court reviewed ista's motion. The court noted that Jaffe previously asserted that no sub-meter existed, but Jaffe later "concede[d] that the sub-meter exist[ed], but strenuously assert[ed], without factual support, that the readings are inaccurate." Because "Jaffe has produced no

competent evidence that the sub-meter is not functioning properly or that his actual measured water consumption is less than measured by the sub-meter," the court granted the motion. Jaffe filed a motion for reconsideration, which the court denied.

¶19 Empirian filed a motion for summary judgment on the fraud issue in September 2010. Jaffe then filed a "Rule 56(f) Statement," stating that he could not answer the summary judgment motion because the court had "no standing to hear [the] motion," "[a]ny further rulings on this matter from . . . [the court] will result in additional motions to other [courts] to strike same," and Jaffe "filed a Rule 77 pleading and needs rulings on his own motions before he can answer any summary judgment motion from [Empirian]."

¶10 The court ruled on October 18, 2010, granting Empirian's motion for summary judgment regarding fraud, denying Jaffe's motion for partial summary judgment, and denying Jaffe's request for a continuance. The court also granted Weiss' motion to dismiss without prejudice. The court entered a final judgment in favor of Empirian in November 2010.

¶11 Jaffe timely appeals, and we have jurisdiction pursuant to A.R.S. § 12-2101(B) (Supp. 2010).

DISCUSSION

¶12 As an initial matter, we note that Jaffe does not

adequately develop and support his arguments in his opening brief. See ARCAP 13(a)(6) (The appellant's brief should include "[a]n argument which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."). Because we "prefer to decide each case upon its merits rather than to dismiss summarily on procedural grounds," *Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 342, 678 P.2d 525, 527 (App. 1984), we construe Jaffe's arguments to be that the trial court erred by: dismissing all defendants except Empirian Property Management and Weiss; dismissing all causes of action, except negligent misrepresentation, against ista Defendants; denying his motions for a continuance and summary judgment; granting Empirian's motions for summary judgment; and granting Weiss' motion to dismiss without prejudice.²

Summary Judgment

¶13 We review a grant of summary judgment *de novo*. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). Summary judgment may be granted when no genuine issues

² To the extent Jaffe is attempting to appeal from the dismissal without prejudice of Weiss, such a dismissal is not a final order and is not appealable. See *McMurray v. Dream Catcher USA, Inc.*, 220 Ariz. 71, 74, ¶ 4, 202 P.3d 536, 539 (App. 2009). We therefore have no jurisdiction to act in regard to the dismissal without prejudice except to dismiss the appeal as to Weiss.

of material fact exist and the moving party is entitled to judgment as a matter of law. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); Ariz. R. Civ. P. 56c(1). Summary judgment is appropriate only "if the facts produced in support of the [other party's] claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008.

A. Empirian's Motion for Summary Judgment

¶14 Pursuant to A.R.S. § 33-1324 (2007), the Arizona Residential Landlord Tenant Act (the "Act"), a landlord must:

1. Comply with the requirements of applicable building codes materially affecting health and safety.
2. Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.
3. Keep all common areas of the premises in a clean and safe condition.
4. Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air-conditioning and other facilities and appliances, including elevators, supplied or required to be supplied by him.
5. Provide and maintain appropriate receptacles and conveniences for the removal of ashes, garbage, rubbish and other waste incidental to the occupancy of the dwelling unit and arrange for their removal.

6. Supply running water and reasonable amounts of hot water at all times, reasonable heat and reasonable air-conditioning or cooling where such units are installed and offered, when required by seasonal weather conditions, except where the building that includes the dwelling unit is not required by law to be equipped for that purpose or the dwelling unit is so constructed that heat, air-conditioning, cooling or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection.

¶15 As exhibits to Jaffe's complaint, he included copies of service requests he made to the City of Phoenix regarding needed repairs, such as replacement of a stolen fire extinguisher. While Jaffe also included pictures of certain items in the apartment complex, such as pictures depicting what is described as "defective pool equipment," open security gates, cracks in the cement of the garage, and a missing fire extinguisher, etc., he provided no actual evidence proving that these items violated the Arizona Landlord Tenant Act. See A.R.S. § 33-1324. Additionally, he included a copy of pages from Maricopa County's Environmental Services website listing a health code violation identified during a county inspection of the premises regarding the lack of a self-closing pool gate. The county provided recommendations and, as the inspection report noted, the apartment management had voluntarily addressed the issue by closing the pool. The inspection report instructed

the apartment complex to correct the issue prior to the next inspection. There is no date specified of the inspection, so there is no proof regarding when the violation occurred. This evidence shows no issue of material fact, as any possible health code violation was already being addressed by the county authorities and the apartment manager. Also included as exhibits to his complaint were copies of pages from an internet site in which people reviewed Empirian at Steele Park. While the apartment complex did not receive complimentary reviews on the website, this does not serve as admissible evidence of actual wrongdoing on the part of Empirian.

¶16 Upon this record, Jaffe provides no evidence upon which a reasonable juror could conclude that Empirian violated the Act. Summary judgment in favor of Empirian was appropriate on this issue.

¶17 Further, Jaffe alleged claims against Empirian for malicious prosecution. "The essential elements of malicious prosecution are (1) a criminal prosecution, (2) that terminates in favor of plaintiff, (3) with defendants as prosecutors, (4) actuated by malice, (5) without probable cause, and (6) causing damages." *Slade v. City of Phoenix*, 112 Ariz. 298, 300, 541 P.2d 550, 552 (1975) (citing *Overson v. Lynch*, 83 Ariz. 158, 317 P.2d 948 (1957)).

¶18 Jaffe's complaint asserted that Empirian Defendants

misrepresented a one month free of rent, following a renewal of the lease, and then filed a forcible detainer action against him when he attempted to use the one month of free rent. Included as an exhibit to his complaint is an advertisement for "an extra month FREE renewal concession" if a lease was renewed by August 21, 2008. On August 26, 2008, Jaffe wrote a note to Empirian at Steele Park stating that he "decided to take a vacation at the end of September so [he would] be taking [his] one month free rent next month." The note further explained that "[o]n or before 10/1/08 [he would] enclose \$28.17 for [his] rent for the month."³ On October 3, 2008, Empirian instituted a forcible detainer action against Jaffe because he failed to pay rent for October in the amount of \$707.17. Jaffe's lease included a provision requiring rent to be paid on the first day of each month, and a late charge was to be added if not paid in full. On October 5, 2008, Jaffe wrote a letter to Empirian, stating that he was given one month's free of rent to "take at anytime" and that he had informed them he would take it in October. On October 8, 2008, an attorney, who represented Empirian at Steele Park, sent Jaffe a letter explaining that Jaffe's lease extension did not commence until December 23, 2008, and Jaffe could not use the one month's rent concession "until [the] new

³ It is unclear in the record how Jaffe calculated a difference of \$28.17. The difference between his monthly rent, \$707.88, and the renewal concession, \$679.00, is \$28.88.

lease [began]." The letter informed Jaffe that he could not "unilaterally decide that [he] want[ed] to use it under [his] current lease." These dates are confirmed by a review of the renewal lease agreement, also included as an exhibit, which clearly outlines the new lease term as beginning December 23, 2008 and concluding December 23, 2009. Although Jaffe argues that the justice court denied the detainer, Jaffe fails to meet the other required elements of malicious prosecution. Jaffe has not provided any evidence to show Empirian acted maliciously or without probable cause. The situation asserted by Empirian's attorney regarding the dates was confirmed by a review of the record and no malice has been indicated. In addition, while Jaffe alleges he has suffered emotional distress and medical expenses, Jaffe provides no evidence of any actual damage, as Jaffe fails to include a medical report from a physician or any receipts.

¶19 Upon this record, summary judgment in favor of Empirian was appropriate on the malicious prosecution claims.

¶20 Empirian also filed a motion for summary judgment on the fraud claims. Empirian submitted an affidavit of Dan Muenchow, an officer of Next Step Communication, who also did service work as a subcontractor for ista North America. Muenchow declared that he had worked on sub-metering systems for fifteen years. Muenchow located the apartment's sub-metering

system, which was on the apartment's balcony near the water heater, and noted that "[t]he meter [was] attached to the incoming waterline, so all water that flow[ed] into the apartment [was] metered." If the transmitter quit working for any reason, Muenchow declared "the resident's water usage [would] just not be transmitted, so it [would] appear that the resident [was] using no water." He further declared that he performed two tests to determine whether Jaffe's water meter was working properly. Muenchow's affidavit concluded: "[i]n sum, I determined that the meter in Mr. Jaffe's apartment is installed correctly and is accurately measuring Mr. Jaffe's water usage." Muenchow further concluded "that the transmitter [was] also correctly transmitting the water usage to the data collector, which is directly accessed by the billing company via phone line."

¶21 Jaffe submitted a sworn statement from Guadalupe Warren, a water customer services supervisor for the City of Phoenix. Warren stated that the meters at Empirian at Steele Park "do not capture water usage for individual units." Jaffe concedes, however, that, to his knowledge, Warren has never actually been to the apartment complex. Jaffe also submitted City of Phoenix utility bills for the apartment property as evidence the apartments were not individually metered. These statements, however, list units billed, amounts due, amounts

paid, and dates for the apartment complex as a whole, and, in no way indicate whether the apartments were or were not individually metered. Jaffe also testified that another City of Phoenix employee actually came out to the property to inspect the property, and that employee said the apartment "was not metered." This other city employee never entered Jaffe's apartment, but rather "walked around the apartments." The city employee also did not find the water line that fed into Jaffe's apartment because the employee "thought that was silly" and that it "[did not] make a difference."

¶22 Upon this record, Jaffe does not provide evidence upon which a reasonable jury would find Empirian committed fraud. The only person who actually inspected Jaffe's apartment's water sub-meter concluded that it was working "correctly." The meter was attached directly to the incoming waterline, so all water flowing through the system was metered. There is no genuine issue of material fact, and summary judgment was appropriate.⁴

B. *ista*

¶23 The Restatement (Second) of Torts § 552(1) (1977)

⁴ The sworn statements from Muenchow and Warren are not inconsistent when understood. Warren, an employee of City of Phoenix, stated that each meter measures the water usage of four or more units or apartments, and that the meters do not capture water usage for individual units. Warren is talking about the City of Phoenix meters. Muenchow, however, describes the sub-meters that measure the water flow into each apartment. These are different meters.

defines negligent misrepresentation as follows:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

¶24 As previously mentioned, Jaffe failed to produce sufficient evidence of a genuine issue of material fact regarding fraud in his water/sewer/trash billing. See supra ¶¶ 20-22. Accordingly, he has not provided any evidence that ista negligently misrepresented the water billing system. Summary judgment in favor of ista was appropriate.

C. Jaffe's Motion for Summary Judgment

¶25 Jaffe argues that the court should not have denied his motion for partial summary judgment, dated May 1, 2009. The motion, however, makes no argument upon which the court could find that there was no genuine issue of material fact. Rather, Jaffe reiterates allegations against Empirian Defendants and ista Defendants, mentions that he has requested in discovery that "Defendants supply [Jaffe] with copies of their water bills, trash bills, and sewage bills and they have refused to do so," and states, in a summary section of the motion, that "[t]he [Defendants] committed FRAUD, and used the US MAILS to

perpetrate the fraud; and are, therefore liable to [Jaffe] and the Government for same." The trial court correctly denied Jaffe's motion for partial summary judgment in conjunction with granting the defendants' motions.

Motions to Dismiss

¶26 We review a trial court's grant of a motion to dismiss for failure to state a claim de novo. *North Peak Const., LLC v. Architecture Plus, Ltd.*, 227 Ariz. 165, 167, ¶ 13, 254 P.3d 404, 406 (App. 2011). We uphold the dismissal if Jaffe "would not be entitled to relief under any facts susceptible of proof in the stated claim." *Menendez v. Paddock Pool Constr. Co.* 172 Ariz. 258, 261, 836 P.2d 968, 971 (App. 1991).

¶27 Pleadings that set forth a claim for relief must contain:

1. A short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it.
2. A short and plain statement of the claim showing that the pleader is entitled to relief.
3. A demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Ariz. R. Civ. P. 8(a).

A. Ista Defendants

¶28 Ista Defendants asserted that Jaffe's complaint failed "to show how the plaintiff could be entitled to relief." The

motion further asserted that “[e]ven assuming that factual allegations in the [c]omplaint are true and indulging all reasonable inferences flowing from those allegations, it is clear [Jaffe] should be denied relief as a matter of law.” Following oral argument, the court granted the motion as to all claims against ista Defendants except the negligent misrepresentation claim.

¶29 The dismissed claims against ista Defendants included breach of contract, fraud, concealment, breach of express warranty, and conversion. The complaint did not provide for the existence of an existing contract between Jaffe and ista Defendants. While Jaffe did provide a copy of his lease agreement, that contract was between Jaffe and Empirian. The complaint also contained copies of bills received by Jaffe from ista, but this is not sufficient evidence of an existing contract. Because Jaffe failed to provide for the existence of a contract, his breach of express warranty claim also fails.

¶30 Fraud requires a showing of:

(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker’s knowledge of its falsity or ignorance of its truth; (5) the speaker’s intent that it be acted upon by the recipient in the manner reasonably contemplated; (6) the hearer’s ignorance of its falsity; (7) the hearer’s reliance on its truth; (8) the right to rely on it; (9) his consequent and proximate injury.

Echols v. Beauty Built Homes, Inc., 132 Ariz. 498, 500, 647 P.2d 629, 631 (1982); see also Ariz. R. Civ. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."). The complaint stated that Jaffe entered into:

agreements with the Defendants for an apartment rental and billing for water/sewage/trash services, because the Defendants represented to [Jaffe] that they could and would provide [Jaffe] with billing for said services as he used them; and that said, their services would not be fraudulent. . . . [Jaffe] now believes . . . Defendants knew that they could not guarantee billing for services as they agreed to provide; and they entered into the agreement in order to get [Jaffe's] money.

. . .

When [D]efendants made their representations, they knew them to be false; and these representations were made by the Defendants with the intent to defraud and deceive [Jaffe] to act in a manner herein alleged.

. . .

[Jaffe], at all times of the aforementioned representations were made by the Defendants, believed them to be true; and therefore was induced to, and did allow the Defendants to provide water/sewage/trash services for him; and to pay them for same. In the end services caused [Jaffe] [d]amages according to proof at time of trial; and in addition to the monetary issues, [Jaffe] has also suffered emotional and physical damages and pain and suffering. Had [Jaffe] known the actual facts about the Defendants services et al, he would not have contracted for

same. [Jaffe's] reliance upon the Defendants representations was justified as they, the [D]efendants, provided no information to the contrary.

. . .

For Damages see DAMAGE SECTION which follows.

The complaint fails to state with particularity the circumstances upon which ista Defendants' actions constituted fraud, as it does not provide a showing of the falsity of the representation that the ista Defendants would provide Jaffe with the billing of his water/sewer/trash services. He also fails to provide how these services were fraudulent. It also does not provide with particularity how Jaffe suffered "emotional and physical damages and pain and suffering" as a result of the alleged fraud.

¶31 Additionally, we presume Jaffe intended to allege fraudulent concealment when he brought forth the claim of concealment in his complaint. The Restatement (Second) of Torts § 550 (1977) defines fraudulent concealment as:

One party to a transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other, for pecuniary loss as though he had stated the nonexistence of the matter that the other was thus prevented from discovering.

See also Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement

Masons Local No. 395 Pension Trust Fund, 201 Ariz. 474, 496, ¶ 87, 38 P.3d 12, 34 (2002). The concealment section of the complaint alleges:

[Jaffe] entered into a contract for an apartment rental and water/sewage/trash services with the [D]efendants; and they made representations to [Jaffe] that they would/could provide separate water/sewer/trash services billings separately from his rent; and that he would only have to pay for his usage alone; and they did not [] mention the events found in paragraphs 1 through 104 above; and all following paragraphs below. At all times that [Jaffe] was subjected to the Defendant's [fraud] actions, herein alleged, [Jaffe] was ignorant of the existence of the facts that the Defendants had suppressed, and or failed to disclose. If [Jaffe] had been aware of the existence of the facts, not disclosed by the Defendants, he would not have entered into any contractual relationship with them for any type of services what so ever.

[Jaffe's] reliance upon the Defendants^[,'] false and misleading representations has caused [Jaffe] emotional and physical and monetary damages.

For damages requested see damage section which follows.

Jaffe has not alleged that ista Defendants have intentionally prevented Jaffe from acquiring material information. He has also not asserted a pecuniary loss as a result of being prevented from discovering any information. Thus, the complaint fails to assert any facts to support a claim of fraudulent concealment against ista Defendants.

¶132 Conversion is defined under Arizona law as “[a]n intentional exercise of dominion or control over a chattel which so *seriously interferes* with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.” *Focal Point, Inc. v. U-Haul Co. of Ariz., Inc.* 155 Ariz. 318, 319, 746 P.2d 488, 489 (App. 1986) (quoting Restatement (Second) of Torts § 222(A)(1) (1965)). The complaint alleges Jaffe “received fraudulent bills for water/sewer/trash services to his apartment . . . [and he] paid the bills as they came due not knowing they were fraudulent.” In addition, Jaffe asserts that “the defendants overcharged [Jaffe] for water/sewer/trash services and they have converted the funds not due them for their own purposes.” The complaint fails to state a claim for conversion because it does not allege *ista* Defendants exercised intentional control over a chattel. In addition, money can be the subject of conversion only if it “can be described, identified or segregated, and an obligation to treat it in a specific manner is established.” *Autoville, Inc. v. Friedman*, 20 Ariz. App. 89, 91, 510 P.2d 400, 402 (1973). Jaffe has not sufficiently described, identified, or segregated the funds he claims *ista* converted.

¶133 Therefore, the trial court correctly granted *ista* Defendants’ motion to dismiss.

B. Empirian Defendants, except Empirian Property Management

¶34 In Jaffe's complaint, he alleges the following: Bush Realty at Steele Park, LLC, is a twenty-five percent owner of Empirian at Steele Park Apartments; Bush Realty Associate, LLC, is the sole member of Bush Realty at Steele Park, LLC; Empirian at Steele Park, LLC, is a seventy-five percent owner of Empirian at Steele Park Apartments; Empirian at Steele Park MM, LLC, is the sole member of Empirian at Steele Park, LLC; Ezra Beyman is the managing member of both Empirian at Steele Park, MM, LLC and Empirian at Steele Park, LLC; Henry Heinemann is the sole owner of Empirian; Neil Rackoff is the president of Empirian; Blimi Mayost is a director of Empirian; and Katie Brender, Jonathan Coates, and Dominique Montoya are all employees of Empirian. Under A.R.S. § 29-651 (1998):

a member, manager, employee, officer or agent of a limited liability company is not liable, solely by reason of being a member, manager, employee, officer or agent, for the debts, obligations and liabilities of the limited liability company whether arising in contract or tort, under a judgment, decree or order of a court or otherwise.

¶35 Therefore, as members, managers, employees, or officers of a limited liability corporation, Jaffe's claims against Bush Realty Associate, LLC, Empirian at Steele Park MM, LLC, and Ezra Beyman cannot survive because the complaint does not allege specific acts of wrongdoing, but, rather, lists them

as defendants solely for their association with the limited liability corporation.

¶136 Officers and directors of a corporation are not generally personally liable for the corporation's tortuous acts unless "the officer or director personally participates in the tort." *Warne Invs., Ltd. v. Higgins*, 219 Ariz. 186, 197, ¶ 51, 195 P.3d 645, 656 (App. 2008) (citing *Dawson v. Withycombe*, 216 Ariz. 84, 101, ¶ 46, 163 P.3d 1034, 1051 (App. 2007)). Shareholders of a corporation are not personally liable for the corporation's acts or debts. A.R.S. § 10-622(B) (2004).

Furthermore, the lease agreement provided:

[t]o the maximum extent permitted by applicable law, Resident specifically agrees to look solely to the owner's interest in the Community for the recovery of any judgment against Lessor, it being agreed that Lessor and any of its related and affiliated entities (and any of its past, present or future officers, directors, trustees, employees, partners, shareholders, insurers, agents and representatives) shall never be personally liable for such judgment."⁵

¶137 Therefore, Jaffe's claims against Neil Rackoff and Blimi Mayost, as the president and director of Empirian, respectively, fail because the complaint does not allege any personal participation in any tortuous wrongdoing. In addition, Henry Heinemann, as sole owner of Empirian is not personally

⁵ Under the lease agreement, Jaffe is the Resident and Empirian is the Lessor.

liable, as Jaffe has not alleged the court should “pierce the corporate veil,” nor has he alleged Heinemann personally committed tortuous acts. See *Standage v. Standage*, 147 Ariz. 473, 476, 711 P.2d 612, 615 (App. 1985) (“[W]here the corporation is shown to be the alter ego or business conduit of a person, and where observing the corporate form would work an injustice, a court may properly ‘pierce the corporate veil.’”). Katie Brender, Jonathan Coates, and Dominique Montoya, as employees of Empirian, are also not personally liable.

¶138 Empire American Holdings, LLC, was added as a defendant through an amendment to the complaint. Jaffe alleged that Empire American Holdings, LLC, was a “holding company that created and controls all the employees and entities named in the original complaint against [Empirian Defendants] in all its forms.” Besides asserting that Empire American Holdings, LLC, was the “main conspirator in this group” and shared the same corporate office with Empirian Defendants, Jaffe fails to assert any specific tort claim against Empire.

¶139 On this record, the trial court correctly granted Empirian Defendants’ motion to dismiss.

Motion for Continuance Pursuant to Rule 56(f)

¶140 Under Rule 56(f):

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by

affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

A party seeking delay should provide "specific reasons" for the delay. *Boatman v. Samaritan Health Servs., Inc.*, 168 Ariz. 207, 212, 812 P.2d 1025, 1030 (App. 1990). We review a trial court's Rule 56(f) ruling for an abuse of discretion. *Birth Hope Adoption Agency, Inc. v. Doe*, 190 Ariz. 285, 287, 947 P.2d 859, 861 (App. 1997).

¶41 Jaffe moved for additional time to conduct discovery, pursuant to Rule 56(f), in September 2010. Jaffe stated that "this case is in the initial stages of a new trial with a myriad of pleadings to be ruled on relating to information before trial and/or dispositive motions can be ruled on." Jaffe filed the complaint, however, in December 2008, approximately 21 months earlier. The trial court did not abuse its discretion in denying Jaffe's request.

Attorneys' Fees

¶42 Empirian requests attorneys' fees on appeal pursuant to A.R.S. § 12-341.01 (2003), the lease agreement, and Arizona Rule of Civil Appellate Procedure 21. Section 12-341.01(A) provides: "In any contested action arising out of a contract, express or implied, the court may award the successful party

reasonable attorney fees." The lease agreement provides that Empirian, as Lessor, may recover "reasonable attorneys' fees, court costs, and other fees and charges incurred by Lessor in enforcing this Lease and collecting outstanding amounts hereunder." Because Empirian is defending itself in this litigation rather than strictly enforcing the lease, we will apply A.R.S. § 12-341.01(A) rather than the provision in the lease agreement. In accordance with § 12-341.01(A), we will award an amount of reasonable attorneys' fees and taxable costs to Empirian upon its compliance with ARCAP 21(a).

CONCLUSION

¶43 For the foregoing reasons, we affirm dismissals and judgments in favor of the Defendants, except as to defendant Weiss, and we dismiss the appeal regarding Weiss for lack of jurisdiction.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
JON W. THOMPSON, Presiding Judge

_____/s/_____
MAURICE PORTLEY, Judge