IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

MARCEL MATTLE, A SINGLE MAN IN HIS INDIVIDUAL CAPACITY,
Plaintiff/Appellee,

v.

BORDER CITIES LAND CORP., AN ARIZONA CORPORATION,
Defendant/Appellant.

No. 2 CA-CV 2022-0130
Filed July 27, 2023

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Cochise County
No. S0200CV201800652
The Honorable Timothy B. Dickerson, Judge

AFFIRMED

COUNSEL

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By Stephen M. Weeks
Counsel for Plaintiff/Appellee

Borowiec & Borowiec P.C., Sierra Vista
By Joel P. Borowiec
Counsel for Defendant/Appellant

MEMORANDUM DECISION

Presiding Judge Brearcliffe authored the decision of the Court, in which Judge Eckerstrom and Judge Kelly concurred.

B R E A R C L I F F E, Presiding Judge:

¶1 Border Cities Land Corporation (BCLC) appeals from the trial court's entry of judgment and denials of its motions for judgment as a matter of law and for a new trial. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In November 2018, Marcel Mattle sued BCLC for fraud, breach of contract, and, in the alternative, quantum meruit/unjust enrichment. BCLC moved for summary judgment under Rule 56(a), Ariz. R. Civ. P., arguing that Mattle had no capacity to sue BCLC because "[t]here was no agreement or contract signed between Mattle, in his individual capacity, and . . . BCLC." That is, that Mattle was not a real party in interest. Additionally, BCLC argued that there had been "no offer, acceptance, consideration, or sufficient specification of terms so that obligations involved [could] be ascertained between BCLC and Mattle." And BCLC claimed that even if there were a contract between them, Mattle had "repudiated the contract in the first place." Finally, BCLC argued that Mattle was not entitled to relief under a quantum meruit theory because he had provided no services to BCLC.

¶3 Mattle filed his own motion for partial summary judgment under Rule 56(a) on the breach of contract claim, arguing that BCLC's board-meeting minutes showed that BCLC's then-president, Scott Ries, had been given authority to dispose of BCLC's properties "through methods including, but not limited to, negotiating Purchase and Sales Agreements, Joint Venture Agreements, . . . and any and all other instruments necessary to serve the purpose of the disposition of the property." With this authorization, Mattle argued, Ries formed a joint venture between a company called Historic Hospitality Group (HHG) and BCLC for the purpose of enhancing the value and marketability of the BCLC properties. To accomplish this, Mattle asserts, the joint venture contracted with him to fund improvements to the BCLC properties and, in return, to receive a priority payout from BCLC's income and sales proceeds. Finally, Mattle

alleged that BCLC members had decided to anticipatorily breach its agreement with him during a March 2018 board meeting.

¶4 The trial court denied summary judgment for both parties on the breach of contract claim, finding a genuine, disputed issue of material fact. The court also denied BCLC's motion for summary judgment on the fraud count, again, finding a genuine, disputed issue of material fact. The matter was then tried to a jury.

¶5 At the conclusion of Mattle's presentation of evidence, BCLC moved for a "directed verdict" pursuant to Rule 50, Ariz. R. Civ. P., on all counts. *See Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, n.4 (App. 2008) (the terms "directed verdict" and "judgment as a matter of law" are used "interchangeably"). The trial court granted the motion as to the fraud count, but otherwise denied the motion.

¶6 At the close of trial, the jury found BCLC liable for breach of contract and assessed damages for Mattle of $53,600. The trial court also ordered BCLC to pay a portion of Mattle's attorney fees and costs. BCLC filed a motion renewing its motion for judgment as a matter of law (JMOL) under Rule 50, Ariz. R. Civ. P., and, making a motion for new trial pursuant to Rule 59, Ariz. R. Civ. P., raising many of the same arguments from its motion for summary judgment. The court denied the motion, and BCLC appealed the judgment and the order denying the motion for JMOL and motion for new trial. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1), (A)(5)(a).

Discussion

¶7 BCLC argues the trial court erred in denying its Rule 50 motion for JMOL and Rule 59 motion for new trial.[1] We review the denial

[1]BCLC also requests review of the trial court's interlocutory denial of its motion for summary judgment. We do not have jurisdiction to do so. *See Ryan v. Napier*, 245 Ariz. 54, ¶ 14 (2018) ("A denial of summary judgment is not an appealable order" and "a denial based on disputed issues of material fact also is not reviewable on appeal from a final judgment after trial."). Once a motion for summary judgment is denied based on a factual dispute and the matter has proceeded to trial, the proper remedy is to file a motion for JMOL during and after trial, then to seek appellate review of *those* motions should they be denied. *See John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, ¶ 19 (App. 2004) (citing *Richards v. City of Topeka*, 173 F.3d 1247, 1252 (10th Cir. 1999)); *see also Navajo Freight Lines, Inc. v. Liberty Mut. Ins. Co.*, 12 Ariz. App. 424, 428 (App. 1970) ("[A]n order denying a motion for summary judgment is strictly a pretrial order that

of a Rule 50 motion for JMOL de novo, viewing the evidence in the light most favorable to Mattle as the non-moving party. *Glazer v. State*, 237 Ariz. 160, ¶¶ 28-29 (2015). Such a motion should be granted when "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Ariz. R. Civ. P. 50(a)(1); *see Orme Sch. v. Reeves*, 166 Ariz. 301, 309 (1990) (motion for JMOL "should be granted if the facts . . . 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"). We review the court's denial of a Rule 59 motion for new trial on the ground that the verdict is against the weight of the evidence for abuse of discretion. *Dawson v. Withycombe*, 216 Ariz. 84, ¶ 25 (App. 2007).

Denial of Motion for Judgment as a Matter of Law and for New Trial

¶8 BCLC argues the trial court erred in denying its motion for new trial and for JMOL because "Mattle did not produce sufficient evidence that he entered into a contract with BCLC, and, if so, that BCLC unequivocally anticipatorily breached the contract." We disagree.

Contract

¶9 BCLC contends there is insufficient evidence of any offer, acceptance, or consideration exchanged between itself and Mattle. *See Savoca Masonry Co. v. Homes & Son Constr. Co.*, 112 Ariz. 392, 394 (1975) ("[F]or an enforceable contract to exist there must be an offer, an acceptance, consideration, and sufficient specification of terms so that the obligations involved can be ascertained."). However, on the record before us, we cannot say the trial court erred in denying BCLC's motion for JMOL and new trial because there was sufficient evidence for the jury to conclude that Ries, with authority granted to him by BCLC's board of directors, had entered into a series of contractual agreements among BCLC, HHG, and Mattle.

¶10 On January 14, 2014, a BCLC board member moved "to authorize . . . Ries to dispose of" BCLC properties, "through methods including, but not limited to, negotiating Purchase and Sales Agreements,

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decides only one thing—that the case should go to trial."). BCLC reasserted its summary judgment arguments in its Rule 50 motion for JMOL and its Rule 59 motion for new trial and thereby preserved those issues for appeal. *See John C. Lincoln Hosp. & Health Corp.*, 208 Ariz. 532, ¶ 19. Consequently, we need not address the denied motion for summary judgment to dispose of BCLC's arguments.

Joint Venture Agreements, . . . and any and all other instruments necessary to serve the purpose of the disposition of the property." At trial, Ruben Teran, who was a board member of BCLC in 2014 and would become its president in 2018, acknowledged his deposition testimony that he had "personally authorized . . . Ries to enter into any and all other instruments necessary to serve the purpose of the disposition of the properties," and "ha[d] authority to form joint ventures with other companies" and "with other individuals." Pamela Deane, a BCLC shareholder, testified that Ries was not "required to come back to the board to seek approval before entering into an agreement." Mattle testified that Ries had communicated that he had "full authority to create all agreements and to sign them."

¶11 Ries and Mattle, among others, signed multiple agreements. One, titled "Executive Summary," explains: "The purpose of [HHG] is to financially stabilize the commercial real estate properties" that are "owned by [BCLC]." Further: "The Goal of said collaboration between HHG and BCLC is to maximize BCLC shareholder value, including Ries, and maximize Mattle['s] Return on Investment (ROI)." Deane testified that this agreement had been "part of a transaction to bring . . . Mattle in as an investor."

¶12 Another of the agreements, titled "Collaborative Operating Agreement," states: "This agreement, by and between [HHG], and [BCLC] is entered . . . with the sole inten[t] to enhance the value and marketability of the two . . . commercial properties owned by BCLC . . . ." Yet another, titled "Historic Hospitality Group LLC/Marcel Mattle Priority Payout Formula," states: "The undersigned agree that they shall use their collective best business efforts to reimburse . . . Mattle the $200,000 cash investment made by Mattle in [HHG] by improving the financial performance of the . . . propert[ies] . . . owned by [BCLC]." Additionally, this agreement states: "The above said cash investment shall be considered a cost of improvements to the properties, and therefore Mattle shall hold a priority payout position," which would be "20% of the Free Cash Flow per month . . . until the properties are sold, whereupon the remaining balance will be paid from the proceeds of the sale." And "[i]n the event the properties are not sold, payments shall continue until the total of $200,000 is paid to Mattle." Deane testified that this priority payout agreement had been signed by Ries on behalf of both BCLC and HHG, and was "an agreement between [BCLC] and HHG to reimburse [Mattle] directly."

¶13 Another document included within these agreements, titled "HHG BCLC $3,250,000 Example of Sale Proceeds paid at COE," was prepared by Ries and depicts how Mattle would receive a reimbursement of $200,000, as well as a return on investment. And, finally, Deane testified

that yet another agreement, titled "Agreement in Principal (AIP)," had been "used as part of obtaining Mattle's investment in [BCLC] properties."

¶14 Mattle testified that "[t]he whole purpose" of the agreements he had signed was to "bring the [BCLC] properties up to code, and the whole thing should end up in a sale to compensate both me and the shareholders." Deane also testified that the agreements had created a "partnership with an investor" who "would contribute to the [BCLC] building and bring it up to code," and that Mattle was "an outside investor who was going to help with . . . bringing the building up to a saleable entity." Mattle testified that subsequent to signing these agreements, he had been "given office space at the [BCLC] shopping center" where he was "in th[e] building almost on a weekly basis when [he] was in the United States." He "measure[d] the lease spaces at the plaza" to implement a "triple net lease," which Mattle explained was "one of the most secure investment possibilities for an investor or a buyer." He also testified that he had invested "$70,000" into HHG, for "improvements in the building of BCLC."

¶15 A reasonable jury could conclude from this evidence that Ries, on behalf of BCLC, had entered into agreements with Mattle to secure funds and services from Mattle, and in return give Mattle the promise of certain benefits, such as a priority payout. Such evidence is sufficient to find that a contract existed between Mattle and BCLC. From this evidence, it was for the jury to determine whether a contract was formed, whether it was breached, and Mattle's damages, if any. The jury verdict was not without reasonable support, and the trial court therefore did not err or abuse its discretion in denying BCLC's motion. *See* Ariz. R. Civ. P. 50(a)(1); *Orme Sch.*, 166 Ariz. at 309; *Dawson*, 216 Ariz. 84, ¶ 25.

Anticipatory Repudiation

¶16 Contrary to BCLC's argument, there was also sufficient evidence for a jury to conclude that it had anticipatorily breached its agreements with Mattle. "[I]n order to constitute an anticipatory breach of contract there must be a positive and unequivocal manifestation on the part of the party allegedly repudiating that he will not render the promised performance when the time fixed for it in the contract arrives." *Diamos v. Hirsch*, 91 Ariz. 304, 307 (1962). Denying that a contract exists can constitute anticipatory repudiation under this standard. *Healy v. Coury*, 162 Ariz. 349, 355-56 (App. 1989) (citing the test for anticipatory breach in *Diamos*, 91 Ariz. at 307).

¶17 Ruben Teran took over as president of BCLC in a March 2018 board meeting. Teran testified at trial that he had expressed an opinion at

that meeting that "[BCLC] did not have an agreement with HHG or Mr. Mattle and that it was [his] opinion that [BCLC] . . . [was] not obligated to Mr. Mattle or HHG" because "there was no offer, there was no consideration, and there was no acceptance." According to Teran's testimony, BCLC "never took a vote" to "rescind any agreement that BCLC may or may not have with HHG or Mr. Mattle" because "the board members ended up listening to [him]" that no contract or obligations existed.

¶18 Deane testified that she had become aware that BCLC "wanted to invalidate" any contracts between it, HHG, and Mattle. Her understanding arose from the discussions of the BCLC board, relayed to her by a board member. Mattle testified that he had withdrawn his involvement from any agreements after learning from Deane that BCLC "was not going to honor the HHG agreements."

¶19 On cross-examination by BCLC's counsel, Mattle acknowledged that "information . . . Dean[e] relayed to [him]" had originally been relayed to Deane by a BCLC board member. However, when asked, "In dealing with that information that you got from Pamela Dean[e], you don't know if that information is true or not true, do you, Mr. Mattle?" Mattle responded, "Correct."

¶20 On appeal, BCLC points to this cross-examination testimony to argue that insufficient evidence existed to prove that BCLC had unequivocally withdrawn from any purported agreement. But when considering a motion for JMOL, "the trial court 'may not weigh the credibility of witnesses or resolve conflicts of evidence and reasonable inferences drawn therefrom[,]' but 'must give full credence to the right of the jury to determine credibility, weigh the evidence, and draw justifiable conclusions therefrom.'" *Dupray v. JAI Dining Servs. (Phx.), Inc.*, 245 Ariz. 578, ¶ 11 (App. 2018) (citation omitted) (quoting *McBride v. Kieckhefer Assocs. Inc.*, 228 Ariz. 262, ¶ 11 (App. 2011)). Because a reasonable jury could find that BCLC anticipatorily breached its contract with Mattle, the court did not err in denying the motion for JMOL.[2] *See id.* We also conclude the court

[2]Because it lacks citation to any legal authority, we also reject as waived BCLC's argument that Deane's communication to Mattle of BCLC's denial of the contract was "hearsay" and is therefore insufficient to prove anticipatory repudiation. *See* Ariz. R. Civ. App. P. 13(a)(7) (appellant must provide supporting legal authority for each contention); *see also Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62 (App. 2009) (arguments unsupported by legal authority are abandoned and waived).

did not abuse its discretion in denying the alternative motion for new trial. *See Dawson*, 216 Ariz. 84, ¶ 25.

Attorney Fees

¶21 Both parties request attorney fees and costs on appeal pursuant to Rule 21(a), Ariz. R. Civ. App. P., and A.R.S. § 12-341.01. We grant Mattle his fees pursuant to § 12-341.01 and his costs as prevailing party upon his compliance with Rule 21(b). *See Doherty v. Leon*, 249 Ariz. 515, ¶ 24 (App. 2020).

Disposition

¶22 For the foregoing reasons, we affirm.