

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

BRUNO FECTAY AND CARINE BIDAUT
DBA THE EARTH'S MEMORY, A FOREIGN COMPANY,
Plaintiffs/Appellees,

v.

BRAHIM TAHIRI,
Intervenor/Appellant.

No. 2 CA-CV 2015-0076
Filed November 30, 2015

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NOT FOR PUBLICATION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 Pima County
No. C20133051
The Honorable Gus Aragón, Judge

REVERSED AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

E C K E R S T R O M, Chief Judge:

¶1 Intervenor Brahim Tahiri appeals from the trial court’s grant of summary judgment in favor of plaintiffs Bruno Fectay and Carine Bidaut (“Fectay”) on his claims of breach of contract, conversion, and fraud. For the following reasons, we reverse and remand for further proceedings consistent with this decision.

Factual and Procedural Background

¶2 “In reviewing a trial court’s grant of summary judgment, we view the facts and reasonable inferences therefrom in the light most favorable to the losing party.” *Wyckoff v. Mogollon Health Alliance*, 232 Ariz. 588, ¶ 2, 307 P.3d 1015, 1016 (App. 2013). In 1998, Fectay and Tahiri entered into a business partnership to sell meteorites. They formalized their agreement in writing in June of 2000. In 2004, Tahiri began to suspect that Fectay was being dishonest and was not delivering his fair share of the profits. Between 2004 and 2012, Tahiri asked Fectay repeatedly for an accounting. Fectay promised to provide one, but never did. In 2012, Tahiri asked Fectay to dissolve the partnership and split the remaining assets. Fectay sent Tahiri an electronic-mail message (e-mail) stating the remaining inventory was worth €100,000 and offering to pay him €50,000 for his share of the partnership. Tahiri accepted this offer.

¶3 In 2014, Tahiri filed an application to intervene in an existing lawsuit between Fectay and a third party. After being granted leave to intervene, Tahiri alleged claims of breach of contract and conversion arising from the partnership operations and fraud arising from the representation that the business was worth €100,000. The trial court granted summary judgment on all counts, concluding Tahiri had not established fraud as a matter of law, the

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settlement agreement was therefore valid, and the other claims were resolved by the settlement agreement. Tahiri appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Reliance

¶4 “In reviewing a grant of summary judgment, we determine *de novo* whether any genuine issues of material fact exist and whether the trial court erred in applying the law.” *United Dairymen of Ariz. v. Schugg*, 212 Ariz. 133, ¶ 26, 128 P.3d 756, 763 (App. 2006). A grant of summary judgment is appropriate if there is so little evidence in support of the claim or defense that reasonable people could not, under the relevant evidentiary standard, find the facts necessary to support the claim or defense. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

¶5 In order to establish a claim for fraud, a party must establish that a representation has been made, the representation was false and material, the speaker either knew it was false or was ignorant of its truth, the speaker intended that the hearer act upon the information, the hearer did not know the representation was false, the hearer relied on the representation, the hearer had a right to rely on the representation, and the hearer was injured. *Green v. Lisa Frank, Inc.*, 221 Ariz. 138, ¶ 53, 211 P.3d 16, 34 (App. 2009). The trial court granted summary judgment in favor of Fectay because it concluded Tahiri had not relied on Fectay’s statement and had no right to have relied on it.

¶6 “Reliance exists in the mind of the relier, and, ordinarily a party’s affidavit in simple, conclusory terms that he relied upon the misrepresentation alleged would be sufficient to withstand a motion for summary judgment.” *Berry v. Robotka*, 9 Ariz. App. 461, 467, 453 P.2d 972, 978 (1969). However, affidavits “that are internally inconsistent . . . [or] that tend to contradict the affiant’s sworn testimony at deposition” may “still be insufficient to withstand a motion for summary judgment.” *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008.

¶7 A person cannot rely on information if he knows it to be false, or if it is obviously false. Restatement (Second) of Torts § 541

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(1977); accord *Dawson v. Withycombe*, 216 Ariz. 84, ¶ 34, 163 P.3d 1034, 1048 (App. 2007). At the same time, however, a party's suspicion that a person has acted dishonestly does not mean the party cannot rely on that person's statements. See, e.g., *Chase v. Dow Chem. Co.*, 875 F.2d 278, 283 (10th Cir. 1989) (party negotiating settlement for claims of fraud not "categorically barred from relying on the representations of the opposing party"); see also *Indus. Commercial Elec., Inc. v. McLees*, 101 P.3d 593, 601 (Alaska 2004); *Sims v. Tezak*, 694 N.E.2d 1015, 1020 (Ill. App. Ct. 1998). "There is nothing particularly attractive in the proposition that . . . anyone . . . may by misrepresentation induce a person to forego rights and then defend on the ground that the fraud is excused because the person defrauded should have known better." *Lubin v. Johnson*, 169 Ariz. 464, 464-65, 820 P.2d 328, 328-29 (App. 1991).

¶8 In his affidavit, Tahiri stated he had relied on Fectay's statement that the partnership was worth €100,000. He claimed he had only agreed to the proposed settlement because of this representation. However, he also stated he had not believed Fectay's statement was truthful. In his deposition, Tahiri was asked whether Fectay had sent an e-mail telling him the remaining partnership inventory was worth €100,000. Tahiri replied, "He sent me the e-mail, but I didn't believe him. He is a liar."

¶9 This case thus first presented the following difficult question to the trial court and, now, to us: Is a person's belief that a representation is false legally equivalent to *knowledge* of its falsity? If so, Tahiri's statement that he relied on Fectay's representation as to the value of the business is directly contradicted by his statement that he did not believe Fectay. See *Berry*, 9 Ariz. App. at 468, 453 P.2d at 979.

¶10 But we are not convinced such can be said as a matter of law. Although Tahiri stated that he had believed Fectay was not being truthful, he had no actual knowledge as to the truth or falsity of Fectay's statement. A "belief" is a "[m]ental acceptance of . . . the truth, actuality, or validity of something." *The American Heritage Dictionary* 164 (5th ed. 2011). "[K]nowledge," on the other hand, is "[t]he state or fact of knowing . . . [t]he sum or range of what has been perceived, discovered, or learned." *The American Heritage*

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Dictionary 973 (5th ed. 2011). Belief is subjective, whereas knowledge is an objective certainty; something that may be proved. *Cf. State v. Ahumada*, 225 Ariz. 544, ¶ 18, 241 P.3d 908, 913 (App. 2010) (probable cause requires justified belief, but not knowledge). Indeed, a lack of belief in truth may merely convey a suspicion rather than a certainty of falsity. And, when one party controls access to the relevant information, as Fectay did here, the other party might believe they have no practical option but to depend on the word of an untrustworthy person. This fact should not give the untrustworthy negotiator a legal defense to acts of fraud. *See Lubin*, 169 Ariz. at 464-65, 820 P.2d at 328-29.

¶11 Summary judgment is appropriate only “when there is no genuine issue of material fact for a jury to resolve and the moving party is entitled to judgment as a matter of law.” *Kadlec v. Dorsey*, 224 Ariz. 551, ¶ 12, 233 P.3d 1130, 1132 (2010). Because we cannot say as a matter of law that belief of falsity is equivalent to knowledge of falsity, the court’s grant of summary judgment on the basis that Tahiri did not rely on Fectay’s representation was improper.

Right to Rely

¶12 The trial court also granted summary judgment on the basis that Tahiri had no right to rely on Fectay’s value estimation because he did not “do his own due diligence.” Because we are obliged to uphold the judgment of the trial court if it is correct for any reason, *Link v. Pima County*, 193 Ariz. 336, ¶ 12, 972 P.2d 669, 673 (App. 1998), we next discuss this ground for the grant of summary judgment.

¶13 “A person may rightfully rely upon a misrepresentation of fact even when he may have discovered the falsity of the statement by a simple investigation.”¹ *Dawson*, 216 Ariz. 84, ¶ 34,

¹The parties have not discussed, and we therefore do not resolve, whether Tahiri was required to prove *reasonable* reliance or *justifiable* reliance. *See Am. Pepper Supply Co. v. Fed. Ins. Co.*, 208 Ariz. 307, ¶ 15, 93 P.3d 507, 510 (2004) (fraud requires “justifiable reliance”); *compare Lerner v. DMB Realty, LLC*, 234 Ariz. 397, ¶ 15, 322

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163 P.3d at 1048, *citing Carrel v. Lux*, 101 Ariz. 430, 435, 420 P.2d 564, 569 (1966). Tahiri had no duty to conduct an independent investigation, a fact Fectay does not dispute. We therefore must conclude the trial court erred when it granted summary judgment on this basis.

Remaining Claims

¶14 The trial court dismissed Tahiri’s claims for conversion and breach of contract because it determined they were resolved by the settlement agreement, and it concluded the settlement agreement was not void for fraud. Because we reverse the trial court’s grant of summary judgment as to the fraud, we must likewise reverse the grant of summary judgment as to the conversion and breach of contract claims. We also reverse the trial court’s award of attorney fees.

P.3d 909, 914 (App. 2014) (discussing “reasonable reliance”), *with Linder v. Brown & Herrick*, 189 Ariz. 398, 405, 943 P.2d 758, 765 (App. 1997) (discussing “[j]ustifiable reliance”). Under a standard of reasonable reliance, a person may have a duty to make further inquiry if circumstances suggest it is necessary. *See St. Joseph’s Hosp. & Med. Ctr. v. Reserve Life Ins. Co.*, 154 Ariz. 307, 316, 742 P.2d 808, 817 (1987). But Fectay did not argue below that such circumstances existed, nor did the trial court make such a finding. Furthermore, the Restatement (Second) of Torts § 545A (1977) explains that “[o]ne who justifiably relies upon a fraudulent misrepresentation is not barred from recovery by his contributory negligence in doing so.” In a comment, it further explains that “the recipient of a fraudulent misrepresentation is not required to investigate its truth, even when a reasonable man of ordinary caution would do so before taking action.” Restatement § 545A cmt. b. It is only when a plaintiff knows a statement is false or when its falsity is obvious to him that reliance is not justified. *Id.*; *see also* Restatement § 541.

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Disposition

¶15 For the foregoing reasons, the judgment of the trial court is reversed, and this case is remanded for further proceedings consistent with this decision.