NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FINOVA CAPITAL CORPORATION, a Delaware corporation, Plaintiff - Appellee, v. RICHARD A. ARLEDGE, INC., a Texas corporation doing business as Arledge Motor Co.; RICHARD A. ALREDGE, individually and as the husband of Peggy L. Arledge; PEGGY L. ARLEDGE individually and as the wife of Richard A. Arledge, Defendants - Appellants, v. LEUCADIA NATIONAL CORPORATION, Third-party-defendant - Appellee.	No. 07-16384 D.C. No. CV-02-01277-RCB MEMORANDUM *

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the District of Arizona
Robert C. Broomfield, District Judge, Presiding

Argued and Submitted December 9, 2008
San Francisco, California

Before: TASHIMA, W. FLETCHER, and BERZON, Circuit Judges.

Arledge Motor Company ("AMC"), Richard Arledge ("Arledge"), and Peggy Arledge (collectively "Appellants") appeal the district court's judgment after a bench trial in favor of FINOVA Capital Corporation ("Finova"). They also appeal the district court's grant of summary judgment in favor of Leucadia National Corporation ("Leucadia"). We affirm.

I. Judgment in Favor of Finova

A. Materiality of Finova's failure to permit AMC to cure its alleged violation of the Minimum Net Cash Flow Covenant

Appellants argue that the district court erred in finding that AMC breached the Minimum Net Cash Flow Covenant ("MNCFC") in the loan agreement between AMC and Finova. We see no need to address this contention. Regardless of whether AMC breached the MNCFC, the district court held that Finova breached the loan agreement by failing to permit AMC to cure its alleged breach of the MNCFC, and Finova has not appealed that holding. The consequences to AMC of Finova's failure to allow a cure were precisely the same as would have been the consequences of any error by Finova in determining the breach of the MNCFC in the first place. As Finova's breach in failing to permit AMC to cure any breach of the MNCFC is now a given, it does not matter whether Finova was wrong in determining that AMC did breach the MNCFC. One way or another, Finova should not have treated AMC as having breached the MNCFC, and AMC is entitled to damages as a result.

More important for our purposes is determining whether Finova's failure to permit a cure affected the vitality of the agreement as a whole, such that the district court erred in awarding Finova damages for some or all of AMC's subsequent breaches. Appellants claim that the cure provision was a material inducement to enter into the loan agreement with Finova, and therefore Finova's violation of the cure provision necessarily constituted a material breach excusing Appellants' future performance of all its duties under the loan agreement. We disagree.

Arizona law permits contracting parties to designate certain provisions of a contract as material in the sense that their violation constitutes a material breach. *See Mining Inv. Group, LLC v. Roberts*, 177 P.3d 1207, 1211-12 (Ariz. Ct. App. 2008). The cure provision in the loan agreement is not so designated. Consequently, Appellants cannot establish that the cure provision is "inherently" material.

To determine whether Finova’s violation of the cure provision constituted a material breach we consider these factors:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated [by damages] for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Found. Dev. Corp. v. Loehmann's, Inc. (hereafter *Loehmann's*), 788 P.2d 1189, 1197-98 (Ariz. 1990) (citation omitted).

With respect to factor (a), only one action by Finova can be traced exclusively to Finova’s refusal to let Appellants cure the asserted violation of the MNCFC: Finova’s failure to honor Appellants’ June 2002 request for a $34,000 advance. At the time of the request for the advance, AMC had been losing money for a year. The value of its collateral had fallen by about $6,000,000 in the previous 14 months. AMC had been making monthly payments to Finova of between $160,000 and about $480,000. Ten days after refusing to advance the

$34,000, Finova received a payment from AMC of $263,100. A $34,000 advance would not have substantially improved AMC's tenuous financial situation. This is true whether Appellants' request was for $34,000 or, as Appellants claim in their brief, $70,000.

With respect to factor (b), any benefit Appellants were denied as a consequence of Finova's failure to advance the $34,000 was financial in nature and redressable with damages.

With respect to factor (c), terminating the loan agreement could substantially hinder Finova's efforts to collect on moneys already advanced to Appellants, especially if termination implied that the subordination and custodian agreements were invalid.

With respect to factor (d), no evidence in the record suggests that Finova intended to cure its violation by permitting Appellants to cure the MNCFC violation.

With respect to factor (e), there is no evidence that Finova's refusal to advance AMC $34,000 (or $70,000) was in bad faith. Finova had some basis for believing that AMC had violated the MNCFC, and AMC, despite its protests, did not provide any calculations to the contrary. Nor is there any evidence that Finova's understanding of the agreement as not permitting a cure of the MNCFC was in bad faith. Finally, given AMC's financial situation and Finova's position that AMC had violated the MNCFC, the failure to advance AMC the money requested does not evidence bad faith.

Other than (d), the *Loehmann's* factors tip in favor of Finova. Therefore, the district court did not err in concluding that Finova's violation of the cure provision did not constitute a material breach of the loan agreement.

B. Materiality of Finova's breach in failing to respond to Arledge's request to sell leases

Appellants claim that Finova materially breached the loan agreement by failing to respond to Arledge's request to sell leases. To assess this argument we again consider the *Loehmann's* factors.

With respect to factor (a), Appellants claim that Finova's failure to respond denied them the opportunity to sell leases, generate funds to repay Finova in full, and so avoid the foreclosure sale that put AMC out of business. However, many other factors—including AMC's refusal to permit Finova to conduct an audit, failure to make mandatory payments, and failure to deliver collateral as required—also contributed to Finova's decision to foreclose on AMC. In addition, the loan agreement did not obligate Finova to approve a request to sell leases where an unspecified portion of the resulting proceeds would be used to purchase a new car franchise rather than repay Finova. Finova’s failure to respond to Appellants’ request, while perhaps unprofessional, was tantamount to a denial of this request. Finova clearly had a right under the loan agreement to make such a denial.

With respect to factor (b), Finova’s failure to respond to the request to sell leases could not adequately be compensated with damages.

With respect to factor (c), the same analysis as above applies: terminating the loan agreement could substantially hinder Finova’s efforts to collect from Appellants.

With respect to factor (d), as the failure to respond was tantamount to a denial, the question whether Finova offered to or did cure its breach has little relevance.

With respect to factor (e), Finova had the right to deny Appellants’ request to sell leases for the reasons discussed. Finova’s failure to respond officially to the request did not amount to unfair or bad faith behavior.

The *Loehmann's* factors tip in favor of Finova. Therefore, the district court did not err in concluding that Finova’s failure to respond to the request to sell leases did not constitute a material breach of the loan agreement.

C. Materiality of Finova's purported breach in failing to advance funds to AMC in June 2002

Appellants claim that the district court held that Finova's failure to advance funds in June 2002 constituted a breach of the loan agreement, and that this breach was material. This argument is misplaced. The district court did not hold, as a matter of law, that Finova's failure to advance funds breached the loan agreement, but rather found, as a matter of fact, that had Finova advanced the funds, AMC's ability to repay Finova would not have significantly improved. Appellants do not challenge this factual finding. Even if the district court had held as Appellants claim, the *Loehmann's* analysis would be identical to that in Part I.A, and Appellants' appeal would fail.

D. AMC's duty to monitor compliance with the MNCFC

The district court held that while "Finova has the primary obligation to monitor the MNCFC . . . there is no reason why" Appellants "could not also monitor the MNCFC." *FINOVA Capital Corporation v. Richard A. Arledge, Inc.*, No. CIV 02-1277-PHX RCB at 16 (D. Ariz. Aug. 31, 2006). Appellants interpret the court's language as improperly placing a burden upon them that did not exist under the loan agreement.

Other than the statement quoted in part above, the district court made no reference to this supposed burden. Appellants fail to identify any harm suffered as a consequence of this supposed burden. We conclude that the district court's holding in this respect, even if erroneous, was harmless.

E. Exclusion of evidence

The district court precluded Appellants from submitting evidence that AMC never violated the MNCFC. For the reasons already stated, it does not matter to the outcome of this appeal whether AMC violated the MNCFC. We therefore do not consider whether the district court abused its discretion in making that ruling.

F. Damages

Appellants claim that when Finova breached the loan agreement in May 2002 by failing to let AMC cure its violation of the MNCFC, AMC's receivables were worth more than the debt owed to Finova. Appellants claim that the district court erred in failing to award this difference to AMC in damages.

While Finova breached the loan agreement in May 2002, it took no action with respect to AMC's receivables or other collateral until October 2002. During the interim the value of AMC's receivables fell below the value of the debt owed to Finova. Arledge himself acknowledged this, testifying that when Finova sold the collateral there was "no equity in the receivables."

Appellants claim that Finova is responsible for this drop in value of the receivables. But absent an explanation for how Finova's failure to advance $34,000 (or $70,000) in the face of significantly larger debts and failure to respond to a request to sell leases (which would have diminished further the value of the receivables) caused the drop in value of the receivables, Appellants' argument is without merit.

The district court did not clearly err in finding that Appellants failed to show lost profits from receivables.

II. Summary Judgment in Favor of Leucadia

Appellants challenge the district court's grant of summary judgment in favor of Leucadia with respect to their claims for intentional interference with contract and tortious interference with contract under the "lent employee" doctrine.

A. Intentional interference with contract[1]

Arizona law requires Appellants to establish five elements to make a prima facie case of intentional interference with contract: "(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

[1] For purposes of this claim we assume, *arguendo*, that Leucadia was not an agent of Finova.

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. 201*, 38 P.3d 12, 31 (Ariz. 2002). Leucadia challenged only Appellants' ability to establish elements (3) and (5).

With respect to element (3), Appellants argue that but for Leucadia's employee Lawrence Hershfield becoming CEO of Finova and "interfering," Finova would have permitted AMC to cure its violation of the MNCFC, responded to Appellants' request to sell leases, and honored Appellants' request for an advance. Appellants offer no evidence to support this argument. Appellants also overstate Hershfield's role. Hershfield and another Leucadia employee, Randall Jenson, testified that neither of them individually, nor Leucadia as a company, had directed Finova with respect to any aspect of the loan agreement with AMC. Finova employees testified similarly. Appellants offer no evidence to the contrary.

With respect to element (5), Arizona courts consider seven factors in deciding whether the defendant in an interference with contract suit acted improperly:

> (a) the nature of the actor's conduct,
> (b) the actor's motive,
> (c) the interests of the other with which the actor's conduct interferes,
> (d) the interests sought to be advanced by the actor,

> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
> (f) the proximity or remoteness of the actor's conduct to the interference and
> (g) the relations between the parties.

Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025, 1042-43 (Ariz. 1985), *superceded in part by* A.R.S. § 23-1501.

Appellants devote less than one page of their brief to these factors. With respect to (a), Appellants argue that Leucadia's conduct was improper because it caused Finova to breach the loan agreement. But if "the interferer is to be held liable for committing a wrong, his liability must be based on more than the act of interference alone." *Id.* at 1043. Appellants have made no allegation of wrongdoing other than the interference. Similarly, with respect to (b), Appellants argue that Leucadia was motivated by its own self-interest in protecting loans made as part of its agreement with Finova. But Arizona courts ordinarily do not find a "business-driven motive" to be improper. *Neonatology Assocs., Ltd. v. Phoenix Perinatal Assoc., Inc.*, 164 P.3d 691, 695 (Ariz. Ct. App. 2007). With respect to (c) and (d), Appellants argue that their interests in the loan agreement were substantial, and Leucadia's interests "secondary." While it is true that Appellants had substantial interests in the loan agreement, it is not clear that Leucadia's purported interference had a substantial effect on AMC's business prospects.

Insofar as any interference by Leucadia was motivated by its interest in securing repayment from a flagging borrower, that interest is substantial and proper. With respect to factor (e), Appellants assert without explanation that the social interests in protecting their contractual rights outweigh the interests in protecting Leucadia's freedom to act. With respect to factor (f), Appellants claim that Leucadia directly caused multiple breaches of the loan agreement. Appellants do not attempt to account for the testimony of Hershfield, Jenson, and the Finova employees who testified that Leucadia had little or no role in decision-making with respect to the AMC loan. Appellants do not address factor (g).

Appellants failed to establish elements (3) and (5). Therefore, the district court did not err in granting summary judgment in favor of Leucadia with respect to Appellants' claim for intentional interference with contract.

B. Lent employee doctrine[2]

Appellants argue alternatively that Leucadia is liable for tortious interference with the loan agreement under the "lent employee" theory. To succeed on this claim, Appellants must show that: (1) Hershfield (or others) were lent by Leucadia as general employer to Finova as special employer; (2) the lent employees behaved

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[2] For purposes of this claim we assume, *arguendo*, that Leucadia was an agent of Finova.

tortiously; and (3) Leucadia controlled the details of the lent employees' work when the alleged tort(s) took place. *See Ruelas v. Staff Builders Pers. Servs., Inc.*, 18 P.3d 138, 140 (Ariz. App. Ct. 2001) (citation omitted).

With respect to element (2), Appellants argue that one or more lent employees behaved tortiously by refusing to permit AMC to cure its MNCFC violation, withholding permission to sell leases, and denying Appellants' request for an advance. Again, Appellants present no evidence that Leucadia or any of its lent employees caused Finova to reach these decisions.

With respect to element (3), Appellants assert employees lent to Finova were subject to Leucadia's control at all times. Appellants' only citation in support of this claim is to the cover page of their own statement of facts submitted to the district court. Even if Leucadia generally did "control" the lent employees, Appellants present no evidence that Leucadia controlled "the details of the particular work being done at the time of" the alleged tort. *Id.*

The district court did not err in granting summary judgment in favor of Leucadia with respect to Appellants' claim for tortious interference with contract.

AFFIRMED.