

NOTICE: NOT FOR PUBLICATION.
UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

VOLNEY FIKE, IV, a single man, *Plaintiff/Appellant*,

v.

DBSI, INC., an Arizona corporation; DBSI REAL ESTATE PROPERTIES,
INC., an Arizona limited liability company; CASH FLOW
MANAGEMENT, INC., an Arizona corporation; JAVPAR 7TH AVENUE,
LLC, an Arizona limited liability company; DEBRA STEWART DILLON
aka Debra T. Stewart-Dillon aka Debra T. Dillon, an Arizona citizen;
JOHN DILLON, an Arizona citizen; JAMES RANSCO II aka James J.
Ransco aka James J. Ransco II, an Arizona citizen; and GEORGE HOWELL
JR., an Arizona citizen, *Defendants/Appellees*.

No. 1 CA-CV 13-0045

FILED 12-19-2013

Appeal from the Superior Court in Maricopa County
No. CV2012-092803
The Honorable David M. Talamante, Judge

AFFIRMED

COUNSEL

Cook & Price, PLC, Tempe
By Jesse D. Cook

Counsel for Plaintiff/Appellant

Dickinson Wright/Mariscal Weeks, Phoenix
By D. Samuel Coffman, Scott A. Holcomb

Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Randall M. Howe, presiding, delivered the decision of the Court, in which Judge Patricia A. Orozco and Judge Andrew W. Gould joined.

H O W E, Judge:

¶1 Volney Fike appeals from the trial court’s dismissal of his complaint. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY¹

¶2 Fike was a shareholder and employee of DBSI Inc., DBSI Real Estate Properties, Javpar, and Cash Flow Management (“CFM”). DBSI Real Estate Properties, Javpar, and CFM are DBSI’s related entities. All companies are Arizona corporations or limited liability companies with their principal place of business in Chandler, Arizona. Debra Dillon was the statutory agent for all of the companies. She was also the President, CEO, and director of DBSI, a managing member of DBSI Real Estate, the President and CEO of CFM, and a managing member of Javpar. John Dillon was DBSI’s Secretary and one of its directors. James Ransco II was DBSI’s Treasurer, one of its directors, a managing member of DBSI Real Estate, CFM’s Secretary and one of its directors, and a managing member of Javpar. George Howell was a managing member and licensed real estate broker of DBSI Real Estate Properties.

¹ This is an appeal from the grant of a motion to dismiss. We therefore consider all material facts as alleged in the complaint to be true for purposes of this appeal. *Norriega v. Machado*, 179 Ariz. 348, 349, 878 P.2d 1386, 1387 (App. 1994).

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¶3 In 2009, John Dillon told Fike that DBSI, DBSI Real Estate, Javpar, and CFM were failing and would soon be bankrupt. Debra Dillon, Ransco, and Howell knew of the falsity of these statements and failed to tell Fike the truth. Relying on this information, Fike negotiated a buyout agreement in which he agreed to leave DBSI's employ and surrender his stock in exchange for \$400,000.

¶4 Despite reaching a buyout agreement, Fike and DBSI disputed its terms and enforceability. To resolve the disputes, DBSI and Fike, each represented by counsel, entered into a Settlement Agreement. Under the Settlement Agreement, DBSI agreed to pay Fike an additional \$1,200,000 in exchange for Fike's agreement to, among other things, remove certain pictures from his website and promise not to compete or to disclose confidential information. The Settlement Agreement also released and forever discharged DBSI, DBSI Real Estate, Javpar, and CFM, as well as DBSI's current and former employees, officers, and directors from any and all "claims, demands, causes of actions, or liability of any kind or character, known or unknown, arising or accruing through the date [of] this Agreement"

¶5 DBSI inadvertently failed to remove Fike as a signatory on one of its accounts, and in July 2010, Fike withdrew \$156,374.06 from that account. In response, on July 27, 2010, DBSI and DBSI Real Estate Properties sued Fike for conversion and breach of the Settlement Agreement. Fike's attorney accepted service of the action on August 27, and on September 1, informed Fike that he would file an answer and counterclaim. The attorney did not file a pleading, however, and the trial court entered a default judgment against Fike on September 30, 2010.

¶6 In October 2010, Fike discovered that DBSI, DBSI Real Estate Properties, Javpar, and CFM were not going bankrupt. Fike believed that the corporate officers of those companies had deliberately deceived him so that he would sell his interest for less than it was worth. He did not act on this information until June 29, 2011, however, when he moved for "Relief of Judgment or Order under Rule 60" seeking to set aside the default judgment. He alleged that the judgment should be set aside because DBSI and its managers committed fraud by misrepresenting the financial status of the company. DBSI opposed the motion and the trial court denied it. Fike did not appeal.

¶7 In May 2012, Fike filed the complaint that is the subject of this appeal against DBSI, DBSI Real Estate Properties, CFM, Javpar, Debra Dillon, John Dillon, James Ransco II, and George Howell Jr. (collectively

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“DBSI”) alleging breach of contract of corporate bylaws and operating agreements, breach of the covenant of good faith and fair dealing, fraud, constructive fraud, securities fraud, negligent misrepresentation, unjust enrichment, aiding and abetting, and accounting. The defendants collectively moved to dismiss the complaint, arguing that Fike’s claims were barred by (1) the Settlement Agreement; (2) the principle of ratification, because Fike ratified the Settlement Agreement by continuing to collect monies paid to him pursuant to the agreement; and (3) res judicata, because Fike failed to raise the claims in the earlier lawsuit.

¶8 The court granted the motion to dismiss “for the reasons set forth in the motion and reply.” On October 10, 2012, defense counsel requested \$31,044 in attorneys’ fees. The fee application explained why the fees were reasonable, the basis for the attorneys’ hourly rate, and the nature of the work performed. Fike opposed the fee application, arguing that certain hours attributed to the work were unreasonable and excessive. On November 16, 2012, the trial court signed the judgment dismissing the complaint and awarding DBSI \$23,580 in attorneys’ fees.

DISCUSSION

¶9 On appeal, Fike argues that the court abused its discretion in granting the motion to dismiss and in awarding attorneys’ fees. For the following reasons, we affirm.

I. The Motion to Dismiss

¶10 We review an order granting a motion to dismiss for an abuse of discretion; however, issues of law are reviewed de novo. *Dressler v. Morrison*, 212 Ariz. 279, 281 ¶ 11, 130 P.3d 978, 980 (2006) (internal citations omitted). Dismissal of a complaint is appropriate only if plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof. *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶ 8, 284 P.3d 863, 867 (2012). We will affirm the trial court’s grant of the motion to dismiss if it is correct for any reason. *Rancho Pescado, Inc., v. NW Mut. Life Ins. Co.*, 140 Ariz. 174, 178, 680 P.2d 1235, 1239 (App. 1984).

¶11 The trial court did not abuse its discretion in dismissing Fike’s complaint because the complaint was barred under the doctrine of res judicata. That doctrine provides that a final judgment entered on the merits in a prior suit involving the same parties or their privies bars a second suit on the same cause of action and is conclusive as to facts which actually were or could have been decided. *Hall v. Lalli*, 191 Ariz. 104, 106,

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952 P.2d 748, 750 (App. 1997), affirmed 194 Ariz. 54, 977 P.2d 776 (1999) (internal quotation marks omitted). Res judicata exists when the current and the prior lawsuits have in common the “identity of the parties, the capacity in which they appear, the subject matter, and the cause of action.” *Id.*

¶12 In the 2012 complaint that is the subject of this appeal, Fike presents several claims that are based on factual allegations that the defendants fraudulently induced him to surrender his ownership interest in DBSI and its affiliated entities and enter into the Settlement Agreement. However, Fike had presented these same factual allegations in 2011 when he moved for relief from judgment under Rule 60(c) after the trial court had entered a default judgment against him in DBSI’s action for conversion. The trial court denied the motion and Fike never appealed the denial. The 2011 denial of Fike’s motion for relief from judgment is thus final and forecloses any relitigation on Fike’s allegations of fraud. *See SE Technologies, Inc. v. Summit Elec. Supply, Inc.*, 392 F. Supp. 2d 399, 401 (D. Conn. 2005) (barring an action that sought to relitigate a claim presented in a previous motion for relief of judgment or order).

¶13 Although the previous action for conversion involved only Fike, DBSI, and DBSI Real Estate Properties as parties, res judicata applies to all of the defendants in the current action because they are in privity with DBSI and DBSI Real Estate Properties. Parties are in privity for purposes of res judicata when they have “a substantial identity of interests and a working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation.” *Hall v. Lalli*, 194 Ariz. 54, 57 ¶ 8, 977 P.2d 776, 779 (1999) (internal quotation marks and citations omitted). Privity depends on the parties’ relationship to the previous action and the commonality of their interests. *Id.* at 58 ¶ 12, 977 P.2d at 780.

¶14 The defendants in this action that were not named as parties in the previous action are in privity with DBSI and DBSI Real Estate Properties. CFM and Javpar are related entities of DBSI, sharing a number of directors and managers with DBSI and DBSI Real Estate Properties. The named individuals are being sued in their capacity as officers of the companies for acts that were committed in their official capacity. Many of the officers held more than one position in DBSI’s related entities. DBSI represented its related entities and officers’ interest in opposing Fike’s Rule 60(c) motion. The Settlement Agreement that Fike wishes to void also protects DBSI’s related entities and officers. The combination of factors demonstrates that the remaining parties are in privity with DBSI and DBSI

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Real Estate. Therefore, res judicata precludes any claim against the related entities arising from the same set of facts. The trial court thus did not abuse its discretion in dismissing Fike's complaint.

II. The Award of Attorneys' Fees

¶15 We review the trial court's award of attorneys' fees under an abuse of discretion. *Nolan v. Starlight Pines Homeowners Ass'n*, 216 Ariz. 482, 490 ¶ 34, 167 P.3d 1277, 1285 (App. 2007). When a party has established its entitlement to fees, the burden shifts to the responding party to demonstrate the impropriety or unreasonableness of the requested fees. *Id.* at 491 ¶ 38, 167 P.3d at 1286 (internal quotation omitted). "[A]n opposing party does not meet [that] burden merely by asserting broad challenges to the application. It is not enough . . . simply to state, for example, that the hours claimed are excessive and the rates submitted too high." *Id.* (quoting *Ariz. v. Maricopa Cnty. Med. Soc'y.*, 578 F. Supp. 1262, 1264 (D. Ariz. 1984)).

¶16 On appeal, Fike argues that defense counsel spent an excessive amount of time on the case. Specifically, he argues that the following claims were excessive: 95.4 hours of time spent on the entire case, 7.8 hours reviewing the complaint, 4.5 hours reviewing the amended complaint, 6.5 hours preparing the motion for attorneys' fees and several large blocks of time researching for the motion to dismiss and reply. The trial court considered these arguments in reducing the fee award from \$31,044 to \$23,580, and nothing indicates that the court abused its discretion in determining that the reduced amount was appropriate.

¶17 DBSI requests an award of attorneys' fees pursuant to the Settlement Agreement, which states that the prevailing party in any litigation shall be entitled to payment of costs and reasonable attorneys' fees. Because DBSI prevailed on appeal, we award attorneys' fees and costs to DBSI upon their compliance with Arizona Rule of Civil Appellate Procedure 21.



Ruth A. Willingham - Clerk of the Court
FILED: mjt