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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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WINDGATE RANCH COMMUNITY ASSOCIATION,  
*Plaintiff/Appellee,*

*v.*

MENA BISHARA,  
*Defendant/Appellant.*

No. 1 CA-CV 16-0248  
FILED 2-28-2017

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Appeal from the Superior Court in Maricopa County  
No. CV2015-093895  
The Honorable Robert H. Oberbillig, Judge

**AFFIRMED**

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COUNSEL

Maxwell & Morgan, P.C., Mesa  
By Samuel C. Richardson  
*Counsel for Plaintiff/Appellee*

Mena Bishara, Scottsdale  
*Defendant/Appellant*

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**MEMORANDUM DECISION**

Judge James P. Beene delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Margaret H. Downie joined.

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**B E E N E**, Judge:

¶1 Mena Bishara appeals the superior court’s grant of summary judgment and attorney’s fees and costs in favor of Windgate Ranch Community Association (“Windgate”) and denial of her motion for reconsideration. For the reasons that follow, we affirm.

**FACTS AND PROCEDURAL HISTORY**

¶2 According to a warranty deed recorded on April 11, 2008, Bishara is the owner of a home subject to Windgate’s covenants, conditions and restrictions (“CC & Rs”). Bishara failed to pay her HOA fees, accruing an overdue balance of approximately \$21,000 as of June 1, 2015. In June 2015, Windgate sued Bishara for breach of contract to recover the overdue fees. In September 2015, Bishara quit-claimed the property to a third party; the quit-claim deed was recorded in mid-September, 2015. The third party filed for bankruptcy on September 28, 2015. Windgate filed a proof of claim in the third party’s bankruptcy proceeding, seeking the same past-due amount.

¶3 Windgate moved for summary judgment in the superior court action. In response, Bishara did not dispute the calculated balance of past-due fees, but argued that she filed bankruptcy in September 2015, and was protected against Windgate’s collection efforts by virtue of the automatic stay. The superior court granted Windgate’s summary judgment motion and awarded it reasonable attorney’s fees and costs pursuant to the CC & Rs.

¶4 Bishara then moved for reconsideration, arguing, without evidence, that she had quit-claimed the property in 2009. In her reply memorandum in support of that motion, she argued for the first time that Windgate’s claim was barred by the statute of limitations. The superior court denied the motion for reconsideration, finding Bishara “materially misrepresented the date the Quit Claim Deed was signed and recorded” and the statute of limitations defense was not timely raised.

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¶5 Bishara timely appealed the superior court’s final judgment. We have jurisdiction pursuant to Arizona Revised Statutes (“A.R.S.”) section 12-2101(A) (2017).<sup>1</sup>

**DISCUSSION**

**A. Motion for Summary Judgment**

¶6 We review a grant of summary judgment *de novo*, viewing the evidence and all reasonable inferences therefrom in the light most favorable to the party against whom the judgment was entered. *Felipe v. Theme Tech Corp.*, 235 Ariz. 520, 528, ¶ 31 (App. 2014). Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a). In considering the superior court’s grant of summary judgment, we view only the evidence presented to the court when it ruled on the motion. *Phx. Baptist Hosp. & Med. Ctr., Inc. v. Aiken*, 179 Ariz. 289, 292 (App. 1994).

¶7 In order to prevail on summary judgment for its breach of contract claim, Windgate was required to prove that a contract existed between it and Bishara, that Bishara breached that contract, and Windgate suffered damages as a result of Bishara’s breach. *Goodman v. Physical Res. Eng’g, Inc.*, 229 Ariz. 25, 28, ¶ 7 (App. 2011).

¶8 The summary judgment record shows no genuine issue of material fact. It is undisputed that the CC & Rs are a contract between Windgate and Bishara. *See Powell v. Washburn*, 211 Ariz. 553, 555, ¶ 8 (2006) (“A deed containing a restrictive covenant that runs with the land is a contract.”); *Ahwatukee Custom Estates Mgmt. Ass’n, Inc. v. Turner*, 196 Ariz. 631, 634 (App. 2000) (“CC & Rs constitute a contract between the subdivision’s property owners as a whole and individual lot owners.”). It is also undisputed that Bishara breached her contract with Windgate beginning in May 2009, and Windgate suffered damages totaling approximately \$21,000 as a result of the breach. The superior court correctly granted summary judgment to Windgate, because, as the superior court found, Bishara “failed to raise a valid defense to the nonpayment of the amounts due.”

¶9 On appeal, Bishara argues that Windgate is trying to recover twice for the same injury. Because Bishara did not raise this issue in the superior court, her argument is waived on appeal. However, even if we

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<sup>1</sup> Absent material revisions after the relevant date, we cite a statute’s current version.

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were to consider Bishara's argument, it is unsupported by evidence in the record. Bishara's argument relies on Arizona's anti-deficiency statutes, which prohibit a lender from simultaneously recovering through a deficiency judgment and suing on the note. See *Mid Kan. Fed. Sav. & Loan Ass'n of Wichita v. Dynamic Dev. Corp.*, 167 Ariz. 122, 126 (1991). Although Windgate filed a proof of claim in the third party's bankruptcy proceeding, Windgate was not attempting to recover twice. Rather, Windgate was protecting its options for recovery. HOA liens are foreclosed in the same manner as mortgages. A.R.S. § 33-1807(A) (2017). The lienholder of a mortgage has the option to pursue separate actions to recover. A.R.S. § 33-722 (2017) ("If separate actions are brought on the debt and to foreclose the mortgage given to secure it, the plaintiff shall elect which to prosecute and the other shall be dismissed."). Accordingly, once Windgate obtained recovery against Bishara, it withdrew its proof of claim in the bankruptcy proceeding in July 2016. Therefore, Bishara's argument that Windgate is seeking double recovery is unavailing. See *In re Evergreen Ventures*, 147 B.R. 751, 762 (Bankr. D. Ariz. 1992).

**B. Motion for Reconsideration**

¶10 Bishara argues that the superior court erred when it denied her motion for reconsideration because she quit-claimed the property to a third party in 2009, and therefore, is not liable for any fees accrued after that time. Further, Bishara contends that, even if she did not quit-claim the property in 2009, Windgate's 2015 suit fell outside the six-year statute of limitations period because her debt originated in May 2009 and Windgate did not file suit until June 2015. These arguments were raised for the first time in the motion for reconsideration and generally we do not consider arguments raised for the first time in a motion for reconsideration. *Ramsey v. Yavapai Family Advocacy Ctr.*, 225 Ariz. 132, 137-38, ¶ 18 (App. 2010); *Tilley v. Delci*, 220 Ariz. 233, 238, ¶ 17 (App. 2009). However, in this case we address Bishara's contentions.

¶11 "We review a [superior] court's denial of a motion for reconsideration for an abuse of discretion." *Tilley*, 220 Ariz. at 238, ¶ 16. "'Abuse of discretion' is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.*

¶12 On the record before us, the superior court did not abuse its discretion when it denied Bishara's motion for reconsideration. The record reflects that Bishara's quit-claim deed of the property was executed in September 2015, not 2009 as Bishara asserts. Windgate filed its complaint in June 2015, three months prior to the filing of the quit-claim deed, thereby

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vitiating any argument that she was not responsible for the fees because she did not own the property. Even if Bishara executed a quit claim deed in 2009, it would not be effective against Windgate. Pursuant to A.R.S. § 33-412(A) (2017), “[a]ll bargains, sales and other conveyances whatever of lands, . . . shall be void as to creditors and subsequent purchasers for valuable consideration without notice, unless they are acknowledged and recorded in the office of the county recorder . . . .” Therefore, even if the 2009 quit-claim deed existed, it would not be effective against Windgate because it was not recorded until September 2015.

¶13 As to Bishara’s statute of limitations argument, Bishara failed to assert this defense prior to a grant of summary judgment, and the superior court properly ruled it untimely. *See Lewis R. Pyle Mem’l Hosp. v. Gila Cty.*, 161 Ariz. 82, 84 (App. 1989) (county waived statute of limitations defense where it waited until partial summary judgment was entered to assert its defense). *See also* Ariz. R. Civ. P. 8(c)(1)(P) (“In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including . . . statute of limitations.”). Even if Bishara timely raised her argument, the statute of limitations does not bar Windgate’s entire amount claimed. The statute of limitations would only preclude the past due amount that fell outside the statute of limitations period. A.R.S. § 12-548(A) (2017). The amount Windgate sought in its complaint fell within the six-year statute of limitations period.

**C. Attorney’s Fees and Costs**

¶14 Bishara also contests the superior court’s award of Windgate’s attorney’s fees and costs pursuant to the CC & Rs, and asserts that she is entitled to recovery for her attorney’s fees. “Unlike fees awarded under A.R.S. § 12-341.01(A), the court lacks discretion to refuse to award fees under [a] contractual provision.” *Chase Bank of Ariz. v. Acosta*, 179 Ariz. 563, 575 (App. 1994); *see also Sirrah Enter., LLC v. Wunderlich*, 240 Ariz. 163, 168, ¶ 11 (App. 2016) (“Because [the parties] contractually provided for the recovery of attorney’s fees here, A.R.S. § 12-341.01 does not apply.”). However, we will not enforce an unreasonable award of attorney’s fees. *Elson Dev. Co. v. Ariz. Sav. & Loan Ass’n*, 99 Ariz. 217, 223 (1965). When parties contract for attorney’s fees and costs, the non-prevailing party has the burden of proving that the fees and costs were unreasonably excessive. *See McDowell Mountain Ranch Cmty. Ass’n, Inc. v. Simons*, 216 Ariz. 266, 271, ¶ 21 (App. 2007). We review the amount of attorney’s fees awarded by the superior court for an abuse of discretion. *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, 521, ¶ 21 (App. 2009).

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¶15 Under the Windgate CC & Rs, “[a] judgment or decree in any action brought under this section shall include costs and reasonable attorney fees for the prevailing party.” The CC & Rs, therefore, required the non-prevailing party to pay fees and costs. Windgate requested and was awarded \$2,900 in attorney’s fees and \$455.69 in costs. Bishara’s blanket assertion that Windgate inflated its accounting is unsupported by evidence. Therefore, Bishara failed to carry her burden, and the record supports that Windgate’s attorney’s fees and costs were not unreasonably excessive. The superior court did not err when it awarded Windgate its reasonable attorney’s fees and costs pursuant to the CC & Rs.

¶16 Because Windgate is the successful party on appeal, this Court grants its request for reasonable attorneys’ fees and costs on appeal, contingent upon its compliance with ARCAP 21.

CONCLUSION

¶17 Based on the foregoing, we affirm the judgment of the superior court.



AMY M. WOOD • Clerk of the Court  
FILED: AA