DIVISION ONE
FILED: 01-28-2010
PHILIP G. URRY, CLERK
BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WAYNE B. LIGHT and JUDITH L. LIGHT, Plaintiffs/Appellants, v. BSM & ASSOCIATES, INC., an Arizona corporation, Defendant/Appellee.	1 CA-CV 09-0074 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Yavapai County

Cause No. V-1300-CV0820050202

The Honorable David L. Mackey, Judge

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED

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P O R T L E Y, Judge

¶1 Appellants Wayne B. Light and Judith L. Light (collectively, "the Lights") challenge the summary judgment

granted to Appellee BSM & Associates, Inc., ("BSM") on their breach of contract claim and the order dismissing their amended complaint. For the reasons that follow, we affirm in part, reverse in part, and remand.

BACKGROUND

¶2 The Lights engaged Kiva Design Associates ("Kiva") and BSM as the architect and general contractor, respectively, to design and build their home in Sedona. Disputes arose during construction. Respective counsel for the Lights and BSM negotiated an agreement on some aspects of the dispute, which resulted in BSM waiving its statutory lien rights[1] in exchange for a final payment by the Lights of $5,000.00. BSM's president, Bruce Miller ("Miller"), executed the waiver agreement on August 21, 2000 (the "Lien Waiver").

¶3 The Lights, alleging construction defects, sued BSM and Kiva on July 22, 2005, for breach of contract and negligence.[2] BSM moved for summary judgment on the breach of contract claim, asserting that the parties had settled their dispute and the Lights had "agreed to waive any warranty of workmanship against BSM, instead agreeing to seek recovery

[1] *See* Ariz. Rev. Stat. ("A.R.S.") § 33-1008 (2007).
[2] The complaint also named a subcontractor and Bruce and Marybeth Miller individually. By stipulation, the subcontractor and individual defendants were dismissed.

directly from the subcontractors."[3] The Lights responded and submitted a copy of their answers to BSM's interrogatories and a copy of a January 29, 2007 "certificate" signed by Wayne Light avowing that he had not "agreed to release and waive claims or causes of action of any type whatsoever against BSM." The court granted BSM's motion, but later clarified that only the breach of contract claim was dismissed.

¶4 Meanwhile, Kiva moved for summary judgment on the negligence claim. The Lights moved for leave to file an amended complaint to add a breach of warranty claim and to allege personal injuries under their negligence claim.[4] The court granted summary judgment to Kiva because the negligence claim was barred by the statute of limitations. The court also denied the Lights' request to amend the negligence claim.

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[3] BSM had unsuccessfully sought to enforce its settlement with the Lights some nine months before it sought summary judgment.

[4] The economic loss doctrine generally bars recovery of economic damages in tort for construction defects except that the aggrieved party may recover for personal injuries or damage to property not constructed by the defendant proximately caused by the defects. *See Carstens v. City of Phoenix*, 206 Ariz. 123, 125-26, ¶¶ 10-11, 75 P.3d 1081, 1083-84 (App. 2003). *But see Hughes Custom Bldg., L.L.C. v. Davey*, 221 Ariz. 527, 532, ¶ 15, 212 P.3d 865, 870 (App. 2009) ("Determination of whether the economic loss doctrine applies does not rest solely on whether there was a personal injury or damage to secondary property."); *Flagstaff Affordable Hous. Ltd. P'ship v. Design Alliance Inc.*, 221 Ariz. 433, 436-37, ¶¶ 9-12, 212 P.3d 125, 128-29 (App 2009) (holding that economic loss doctrine does not apply to a claim for professional negligence against a design professional) (review granted Sept. 22, 2009).

¶5 BSM subsequently moved for summary judgment on the negligence claim. The court denied BSM's motion on February 7, 2008, and also vacated the judgment granted to Kiva.[5] The court also found that it erred when it had denied the Lights' motion to amend the complaint and allowed the Lights to amend their complaint, but stated they could not add a breach of warranty claim against BSM.

¶6 The Lights filed their first amended complaint on March 21, 2008, that included a personal injury negligence claim and a claim for breach of the implied warranty of habitability.[6] BSM moved to dismiss the first amended complaint. After argument, the court granted the motion, concluding that the economic loss rule barred the negligence claim against BSM and the implied warranty of habitability claim as against BSM was an attempt to improperly "resurrect dismissed contract claims." The court, however, allowed the Lights to amend the complaint to raise an allegation of personal property damage. The Lights, as counsel admitted during oral argument, decided not to file an additional complaint alleging personal property damage to their negligence allegation.

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[5] The court found summary judgment on the negligence claim was precluded by factual issues, including when the Lights should have discovered the design and construction defects.

[6] The Lights also unsuccessfully requested permission to file a second amended complaint to add the individual managers of Kiva as defendants.

¶7 The court subsequently entered a formal judgment in favor of BSM, which contained a finding pursuant to Arizona Rule of Civil Procedure 54(b). The Lights appealed, and we have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

I. Breach of Contract Claim

¶8 The Lights first argue that the superior court erred by granting BSM summary judgment on the breach of contract claim.[7] Specifically, the Lights contend that the letters between the parties' respective counsel, which the court found had resolved the dispute, were inadmissible pursuant to Arizona Rule of Evidence 408 and should not have been considered. The Lights also claim that even if the letters were admissible they do not constitute an enforceable agreement to waive their construction defect claims against BSM.

¶9 We review a grant of summary judgment de novo and view the facts in the light most favorable to the non-moving party. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). A court may grant summary judgment "if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

[7] Although the first amended complaint superseded the complaint, *Francini v. Phoenix Newspapers, Inc.*, 188 Ariz. 576, 586, 937 P.2d 1382, 1392 (App. 1996), the superior court did not allow the breach of contract claim to go forward.

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). The determination of whether a genuine issue of material fact exists is based on the record made in the trial court. *Phoenix Baptist Hosp. & Med. Ctr., Inc. v. Aiken*, 179 Ariz. 289, 292, 877 P.2d 1345, 1348 (App. 1994).

¶10 We first address the admissibility of the letters. Rule 408 states that offers to furnish or promises to accept "a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount." The Rule only precludes evidence of settlement offers or agreements to prove liability. Rule 408 does not require exclusion when the evidence is being offered for another purpose. Because the letters demonstrated a purported agreement by the Lights to not pursue any warranty claims against BSM, Rule 408 did not prevent the trial court from considering them when ruling on the motion for summary judgment. *See Campbell v. Mahany*, 127 Ariz. 332, 334, 620 P.2d 711, 713 (App. 1980) (holding that Rule 408 does not apply to preclude judicial notice of a settlement agreement because the agreement was not considered for purposes of proving liability).

¶11 We also find that the letters establish an enforceable agreement. To prove a binding settlement agreement, BSM must

establish all elements of a valid contract: offer, acceptance, consideration, a sufficiently specific statement of the parties' obligations, and mutual assent. *Muchesko v. Muchesko*, 191 Ariz. 265, 268, 955 P.2d 21, 24 (App. 1997). The crux of the Lights' challenge to the agreement's enforceability focuses on the lack of mutual assent; they contend they did not accept BSM's offer of settlement and they also point to Wayne Light's January 2007 avowal that he did not agree to waive claims against BSM.

¶12 The purpose of contract interpretation is to determine and enforce the parties' intent. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993). "Whether contract language is reasonably susceptible to more than one interpretation so that extrinsic evidence is admissible is a question of law for the court." *Id.* at 158-59, 854 P.2d at 1144-45.

¶13 Here, the December 23, 1999 letter from the Lights' attorney states: "Wayne will forego any warranty of workmanship as against Miller and will look only to the subcontractors for their warranties. In other words, Wayne wants a complete break from Miller and is willing to pay the $5000.00 to him rather than pay future attorney's fees to achieve this result." The language is only subject to one interpretation: Wayne Light agreed to waive any warranty claims against BSM in connection with construction of the house. Thus, as a matter of law, the

2007 avowal does not change the fact that Wayne Light agreed in 1999 to waive contract claims against BSM. *See id.*; *Muchesko*, 191 Ariz. at 270, 955 P.2d at 26 ("Mutual assent is based . . . on the objective evidence, not on [a party's] subjective intent."). Mutual assent is present.

¶14 The letters also establish the remaining elements of an enforceable agreement. BSM offered to fully warrant the workmanship and perform warranty work on the house at no additional charge on December 22, 1999, in exchange for a payment of $15,000.00, an amount purportedly less than what BSM was owed. The next day, Wayne Light rejected the offer, and made a counteroffer – he would pay $5,000 and waive warranty claims against BSM as consideration for BSM's waiver of its lien rights. *See K-Line Builders, Inc. v. First Fed. Sav. & Loan Ass'n*, 139 Ariz. 209, 212, 677 P.2d 1317, 1320 (App. 1983) ("An offer is '. . . a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.'") (quoting Restatement (Second) of Contracts § 24 (1981)). The letter the Lights' counsel wrote to BSM's counsel on January 24, 2000, demonstrates that BSM accepted the counteroffer: "I understand Gary has assisted both sides in resolving their

financial differences by Wayne paying $5000.00 to Bruce."[8] In fact, Wayne Light performed his obligation by executing the Lien Waiver. *See K-Line Builders*, 139 Ariz. at 212, 677 P.2d at 1320 ("[A]cceptance is '. . . a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.'") (quoting Restatement (Second) of Contracts § 50 (1981)); *see also* Restatement (Second) of Contracts § 32 (1981) (stating that an offer can be accepted by rendering performance).

¶15 Thus, the Lights obtained the benefit of their bargain: a reduction in payment to BSM and a waiver of BSM's lien rights in exchange for a promise by the Lights to not pursue warranty claims against BSM. *See K-Line Builders*, 139 Ariz. at 212, 677 P.2d at 1320 ("Consideration is a benefit to the promisor or a loss or detriment to the promisee . . . . A promise for a promise is adequate consideration." (internal citation omitted)). The terms of the agreement are sufficiently specific to affirmatively answer "the overriding question [of] whether the parties intended to contract." *AROK Constr. Co. v. Indian Constr. Servs.*, 174 Ariz. 291, 295, 848 P.2d 870, 874

[8] The letter also reiterates Wayne Light's promise to "look to the subcontractors for their warranty obligations."

(App. 1993). The settlement agreement between the Lights and BSM regarding warranty claims was enforceable.[9]

¶16 Because the letters could be considered by the trial court and because they were proof of an enforceable agreement, the court did not err in granting BSM summary judgment on the breach of contract claim.

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[9] We do not address the Lights' cursory argument that the settlement agreement with BSM was unenforceable because "[t]he defects at issue were latent." The Lights provide no authority to support their position that an agreement to forego claims relating to unknown defects is unenforceable. The argument is therefore insufficient for appellate review. An appellant must present *significant* arguments, set forth his or her position on the issues raised, and *include relevant citations to relevant authorities*, statutes, and portions of the record. *See* ARCAP 13(a)(6), (b)(1). The failure to present a proper argument usually constitutes abandonment and a waiver of that issue. *State v. Moody*, 208 Ariz. 424, 452 n.9, 94 P.3d 1119, 1147 n.9 (2004); *see also Cullum v. Cullum*, 215 Ariz. 352, 355 n.5, ¶ 14, 160 P.3d 231, 234 n.5 (App. 2007) (holding appellate courts "will not consider argument posited without authority."). Similarly, we reject the Lights' contention that the letters did not constitute a fully integrated settlement agreement. Their reliance on *Reed v. Hinderland*, 135 Ariz. 213, 660 P.2d 464 (1983), is misplaced. *Reed* confronted an issue about the admissibility and evidentiary value of a party's attorney's letter that was characterized as an admission, but did not address whether letters between attorneys constitute an integrated agreement on behalf of their clients. *Hinderland*, 135 Ariz. at 216-17, 660 P.2d at 467-68. In fact, the case affirmatively states that statements an attorney makes in a letter to a third party binds the client as the principal. *Id*. at 216, 660 P.2d at 467. Consequently, the fact that the Lights did not sign the letters does not dissolve the enforceability of the agreement. *See Muchesko*, 191 Ariz. at 268, 955 P.2d at 24.

II. Breach of Warranty and Negligence Claims

¶17 The Lights also contend that the trial court erred by dismissing their breach of warranty claim after finding that the economic loss doctrine defeats the claim. The Lights presumably are referring to the implied warranty of habitability claim included in their first amended complaint. The trial court, however, did not dismiss the claim based on the economic loss doctrine. Rather, the court noted the Lights were trying to "resurrect" a contract claim that had been dismissed.[10] Because we have already determined that the court properly granted summary judgment on the breach of contract claim, we find no error in the dismissal of implied warranty of habitability claim.

¶18 Finally, the Lights argue that the court erred in dismissing their negligence claim in the first amended complaint. We agree.

¶19 We review the decision to grant a motion to dismiss for an abuse of discretion. *See Keenen v. Biles*, 199 Ariz. 266, 267, ¶ 4, 17 P.3d 111, 112 (App. 2001) (citing *State v. Hansen*, 156 Ariz. 291, 294, 751 P.2d 951, 954 (1988)). In reviewing motions to dismiss for failure to state a claim, we assume that the allegations in the complaint are true and then determine if

[10] The Lights did not dispute that warranty claims sound in contract.

the plaintiff is entitled to relief under any theory of law. *Acker v. CSO Chevira*, 188 Ariz. 252, 255, 934 P.2d 816, 819 (App. 1997); *McAlister v. Citibank*, 171 Ariz. 207, 211, 829 P.2d 1253, 1257 (App. 1992). "When testing a motion to dismiss for failure to state a claim, well-pleaded material allegations of the complaint are taken as admitted, but conclusions of law or unwarranted deductions of fact are not." *Aldabbagh v. Ariz. Dep't of Liquor Licenses & Control*, 162 Ariz. 415, 417, 783 P.2d 1207, 1209 (App. 1989).

¶20 In paragraph 20 of their first amended complaint, the Lights allege they incurred personal injuries as a result of BSM's negligence. Specifically, the allegation states: "As a result of the defendant's negligence, the Lights' residence was subject to massive water intrusion and pervasive mold infestation . . . . The Lights suffered injuries to their person as a result of the mold infestation." Because the economic loss doctrine does not bar a tort claim where the aggrieved party suffered physical harm in the form of personal injury or property damage, *supra* note 4, the court erred in dismissing the claim. *See Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, 50, ¶ 27, 156 P.3d 1149, 1155 (App. 2007) (stating that a legal error constitutes an abuse of discretion).

¶21 Paragraph 21 of the first amended complaint, however, attempts to restate claims that are within the breach of contract claim that was dismissed. Moreover, the claims within that paragraph – to have the mold remediated, the home deconstructed and reconstructed to be habitable – are claims barred by the economic loss doctrine. Therefore, the trial court did not err in dismissing the negligence alleged within paragraph 21 of the first amended complaint.

¶22 Both parties request their attorneys' fees pursuant to A.R.S. § 12-341.01 (2003). In the exercise of our discretion, we deny both requests without prejudice. The ultimately prevailing party may request an award of fees from the superior court which includes fees incurred in this appeal. We, however, will grant the Lights their appellate costs upon compliance with ARCAP 21.

CONCLUSION

¶23 Based on the foregoing, we affirm the summary judgment dismissing the breach of contract claim against BSM and affirm the dismissal of the implied warranty of habitability and paragraph 21 of the negligence claim in the first amended complaint. We reverse, however, the order dismissing the

personal injury negligence claim and remand the matter for further proceedings consistent with this decision.

/S/_____
MAURICE PORTLEY, Judge

CONCURRING:

/S/
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DIANE M. JOHNSEN, Presiding Judge

/S/
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DANIEL A. BARKER, Judge