NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
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PHILIP G. URRY,CLERK
BY: RWillingham

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JAMES C. SELL, as receiver for (1) AMERICAN NATIONAL MORTGAGE PARTNERS, L.L.C.; and (2) NORMANDALE TOWER, L.L.C.; and (3) WBMM L.L.C.,	1 CA-CV 09-0087
Plaintiffs/Appellees,	DEPARTMENT B
v.	**MEMORANDUM DECISION**
DON RIESTERER and KATHY RIESTERER, husband and wife,	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
Defendants/Appellants.	

Appeal from the Superior Court in Maricopa County

Cause No. CV 2005-015050

The Honorable Mark F. Aceto, Judge

AFFIRMED

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By Lauren L. Garner
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N O R R I S, Judge

¶1 Don and Kathy Riesterer (the "Riesterers") appeal from a judgment entered by the superior court after a bench trial, in favor of James C. Sell, as receiver for American National Mortgage Partners, L.L.C. ("ANMP"), Normandale Tower, L.L.C., and WBMM, L.L.C., arising out of their failure to pay two promissory notes they executed in ANMP's favor. The Riesterers argue the superior court should have found they had discharged their obligations under the notes through an accord and satisfaction or, alternatively, given them a $512,107 credit against the amount they owed ANMP. Based on the evidence presented to the superior court, its rejection of the Riesterers' accord and satisfaction defense and credit claim was supported by substantial evidence. Accordingly, we affirm.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 On August 23, 2002, the Riesterers signed a promissory note agreeing to pay ANMP $558,402.33. Under the note, the Riesterers were to pay monthly interest and credit enhancement fees beginning on December 1, 2002, with payment in full on or before October 1, 2003. The note stated it was secured by a

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[1]This is the second appeal in this case. *See Sell v. Riesterer,* 1 CA-CV 06-0579 (Ariz. App. May 22, 2007) (mem. decision). In summarizing the basic facts of the transactions between the parties, we rely in part on our previous memorandum decision as substantiated in the record developed on appeal for this case.

"Collateral Assignment of Beneficial Interest of 8310 Creekside Circle Trust."

¶3 On September 13, 2002, the Riesterers signed a second promissory note agreeing to pay ANMP $305,516.26. Similar to the first note, the Riesterers were to pay monthly interest and credit enhancement fees beginning on December 1, 2002, but with payment in full on or before January 1, 2003. This note stated it was secured by a "Collateral Assignment of Beneficial Interest of the 2801 Wayzata Blvd. Trust."[2]

¶4 The Riesterers defaulted on the promissory notes by failing to make the December 2002 payments. On February 4, 2003, the Riesterers paid ANMP $315,000. At trial, Don Riesterer testified he paid this money to ANMP in satisfaction of all amounts owed under the two notes pursuant to an oral agreement he had reached with his contact person at ANMP, Larry Dunning.[3] He also testified that as part of this agreement, he had promised to pay Dunning an additional $50,000, a payment he never made.

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[2]At trial, Don Riesterer testified he never received and thus never executed the documents required to secure the second note.

[3]The Riesterers signed a third promissory note on November 5, 2002, agreeing to pay ANMP $57,222.22. ANMP applied a portion of the $315,000 payment to satisfy the total amount owed under this promissory note. *Sell,* 1 CA-CV 06-0579, at 2 n.1, ¶ 2. Therefore, this third note is not at issue on appeal.

¶5 On March 10, 2003, ANMP filed for protection under Chapter 11 of the United States Bankruptcy Code.[4] *See generally* 11 U.S.C. §§ 1101 to -1129. In a separate action filed against ANMP by the Arizona Corporation Commission, the superior court appointed Sell as ANMP's receiver. In his capacity as receiver, Sell then sued the Riesterers for breach of contract based on their failure to comply with the terms of the notes. The court granted summary judgment in Sell's favor, and the Riesterers appealed. This court reversed and remanded finding issues of material fact concerning the Riesterers' defense of accord and satisfaction. *Sell,* 1 CA-CV 06-0579, at 5-6, 8, ¶¶ 8-10, 15-16.

¶6 On remand, after a bench trial, the superior court ruled in favor of Sell, and rejected the Riesterers' accord and satisfaction defense. The superior court determined, in relevant part:

> [I]n order to establish accord and satisfaction to be a viable defense, Defendants would have to establish that when the purported agreement was reached, Dunning was acting as an agent or apparent agent of ANMP.
>
> At times, Dunning had acted as an agent of ANMP. However, [the Riesterers] have not convinced the Court that, at the time of the purported $315,000.00/$50,000.00 agreement,

[4]ANMP was comprised of numerous business entities used as a vehicle for a sophisticated Ponzi scheme. The bankruptcy and other actions concerning ANMP include all of the related business entities.

> Dunning was acting as an agent of ANMP. As far as a possible apparent agency theory, the Court would also not find that it would be reasonable for [the Riesterers] to believe that Dunning was acting as an agent of ANMP at the time of the purported $315,000.00/$50,000.00 loan forgiveness accord.

The court also rejected the Riesterers' alternative argument they were entitled to a credit against the unpaid balances owed under the notes. After the court entered judgment in favor of Sell, the Riesterers timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) and -2101(B) (2003).

DISCUSSION

¶7 On appeal, the Riesterers argue the superior court should have found Dunning had actual or apparent authority on ANMP's behalf to enter into an accord and satisfaction regarding the unpaid balances of the notes. Whether a person has actual or apparent authority is a question of fact. *Ruesga v. Kindred Nursing Ctrs., L.L.C.*, 215 Ariz. 589, 595, 597, ¶¶ 21, 28, 161 P.3d 1253, 1259, 1261 (App. 2007). We will uphold the superior court's factual findings unless such facts are clearly erroneous. *Pence v. Glacy*, 207 Ariz. 426, 428, ¶ 10, 87 P.3d 839, 841 (App. 2004). A finding of fact is not clearly erroneous if substantial evidence supports it, even if substantial conflicting evidence exists. *Kocher v. Dep't of*

Revenue of State of Ariz., 206 Ariz. 480, 482, ¶ 9, 80 P.3d 287, 289 (App. 2003). Thus, the issue before us is whether the court's findings are supported by substantial evidence.[5]

¶8 An accord is a contract under which an obligee promises to accept a stated (substitute) performance in satisfaction of the obligor's existing duty. Restatement (Second) of Contracts § 281(1) (1981). Satisfaction takes place, and the previously existing duty is discharged, when the accord or contract is performed. *Solar-West, Inc. v. Falk,* 141 Ariz. 414, 419-20, 687 P.2d 939, 944-45 (App. 1984); Restatement (Second) of Contracts § 281 cmt. a (1981). To establish an accord and satisfaction, the following elements are required: "(1) a proper subject matter; (2) competent parties; (3) an assent or meeting of the minds of the parties; and (4) consideration." *Flagel v. Sw. Clinical Physiatrists, P.C.,* 157 Ariz. 196, 200, 755 P.2d 1184, 1188 (App. 1988). A person purporting to settle a claim must have the authority to do so. *Max of Switz., Inc. v. Allright Corp. of Del.,* 187 Ariz. 496, 499-500, 930 P.2d 1010, 1013-14 (App. 1997).

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[5]We reject, for the same reasons we rejected it in the first appeal, Sell's argument the Riesterers forfeited their right to raise the affirmative defense of accord and satisfaction because they did not assert it in their answer. *Sell,* 1 CA-CV 06-0579, at 4 n.2, ¶ 6. Further, after the remand, this issue was listed in the parties' joint pretrial statement and was one of the primary issues disputed by the parties at trial.

¶9 Actual authority may be proven by "direct evidence of express contract of agency between the principal and agent or by . . . facts implying such contract or the ratification thereof." *Ruesga,* 215 Ariz. at 597, ¶ 29, 161 P.3d at 1261 (citing *Corral v. Fidelity Bankers Life Ins. Co.,* 129 Ariz. 323, 326, 630 P.2d 1055, 1058 (App. 1981); Restatement (Third) of Agency § 2.01 cmt. b (2006)); *see also Land-Air, Inc. v. Parker*, 103 Ariz. 1, 9, 435 P.2d 838, 847 (1967). An express contract of agency grants an agent authority stated "in very specific or detailed language." *Ruesga,* 215 Ariz. at 597, ¶ 29, 161 P.3d at 1261 (citing Restatement (Third) of Agency § 2.01 cmt. B (2006)). Actual authority may be implied when an agent (1) does what is necessary, usual, and proper to accomplish an agent's express responsibilities; or (2) "act[s] in a manner [the] agent believes the principal wishes the agent to act based on the agent's reasonable interpretation of the principal's manifestation in light of the principal's objectives and other facts known to the agent." Restatement (Third) of Agency § 2.01 cmt. b (2006). The burden of proving an agency relationship falls on the party asserting it. *Brown v. Ariz. Dep't of Real Estate,* 181 Ariz. 320, 326, 890 P.2d 615, 621 (App. 1995).

¶10 Here, the parties presented conflicting evidence regarding Dunning and his authority to act for ANMP in connection with the alleged accord and satisfaction. Don

Riesterer testified he exclusively dealt with Dunning when "dealing" with ANMP, and Dunning had agreed to settle the Riesterers' loans for a payment of $315,000 to ANMP and a $50,000 payment to Dunning because Dunning and ANMP "were one and the same." Riesterer also presented evidence that in a report submitted to the bankruptcy court, Sell had stated ANMP "was primarily controlled by Larry Dunning" and three other people; and "no material transaction occurred without Larry Dunning's approval." However, Sell testified ANMP was owned by Frank Caspare as a sole member limited liability company. Sell also testified ANMP's books and records failed to show the principal balances of the notes had been satisfied by the $315,000 payment, nor was there any correspondence "in the file to evidence" the agreement described by Riesterer. Indeed, one month after Riesterer had wired the $315,000 to ANMP, he received a "loan statement" from ANMP that described the first note and its full principal balance. Additionally, Riesterer acknowledged each note contained an explicit statement any payment "submitted as payment in full for [a] disputed amount is not binding absent a separate written agreement executed by both parties," and he had understood "this" when he signed the notes.

¶11 Further, Don Riesterer never met Dunning, and of importance here, testified he had assumed "Dunning was American National Mortgage Partners, L.L.C." Finally, Don Riesterer's

promise to pay Dunning $50,000 undercut the Riesterers' argument ANMP had authorized Dunning to compromise the loans. Although Don Riesterer described this $50,000 payment as a "commission" to Dunning because he was going to be "able [to] do something with that [money] in order to make my debt go away," he acknowledged he would not have accepted a payment to himself as satisfaction of a corporate obligation. *See, e.g., Tovrea Land & Cattle Co. v. Linsenmeyer,* 100 Ariz. 107, 122-23, 412 P.2d 47, 57-58 (1966) (director or officer violates the business opportunity doctrine by seizing a business opportunity, in which a business has an interest or claim, for himself).

¶12 "It is not our prerogative to weigh evidence and determine credibility of witnesses. This is the task of the trial judge who sees and hears the witnesses." *Lehman v. Whitehead*, 1 Ariz. App. 355, 358, 403 P.2d 8, 11 (1965). Indeed, a court is not compelled to believe the uncontroverted evidence of an interested party. *Estate of Reinen v. N. Ariz. Orthopedics, Ltd.,* 198 Ariz. 283, 287, ¶ 12, 9 P.3d 314, 318 (2000). Based on this record, the court's finding Dunning lacked actual authority is supported by substantial evidence and therefore, not clearly erroneous.

¶13 Alternatively, relying on much of the same evidence, the Riesterers argue the superior court should have found Dunning had apparent authority to bind ANMP to an accord and

satisfaction. Apparent authority exists "when the principal's conduct leads a third party to reasonably believe that he has authorized his agent to take the actions or make the representations in question." *Anchor Equities, Ltd. v. Joya*, 160 Ariz. 463, 466, 773 P.2d 1022, 1025 (App. 1989); *see also* Restatement (Third) of Agency § 3.03 (2006). Here, the superior court expressly determined it was not reasonable for the Riesterers to believe Dunning was acting as an agent at the time of the purported agreement. Substantial evidence also supports this finding.

¶14 First, Don Riesterer presented no evidence showing ANMP led him to believe Dunning had apparent authority to enter into an accord and satisfaction. Riesterer just assumed Dunning and ANMP were "one and the same" in part because he never dealt with anyone other than Dunning.[6] *See Miller v. Mason-McDuffie Co. of S. Cal.*, 153 Ariz. 585, 590, 739 P.2d 806, 811 (1987) (third party must show reliance upon agent's apparent authority was reasonable); *Hudlow v. Am. Estate Life Ins. Co.*, 22 Ariz. App. 246, 249, 526 P.2d 770, 773 (1972) (third party dealing with known agent has responsibility to exercise reasonable diligence to ascertain extent of agent's authority).

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[6] Riesterer also admitted he never did any "due diligence" to determine if Dunning owned ANMP.

¶15 Second, although Riesterer testified the $50,000 was a "commission," the superior court was entitled to disbelieve this testimony and to view the $50,000 as something other than a legitimate commission. Riesterer took no steps to document his agreement with Dunning, and despite being an experienced mortgage lender, entered into an arrangement in which he agreed to pay a total of $365,000 to purportedly relieve a $910,000 debt without any written documentation, and sent Dunning "the money on faith."

¶16 Alternatively, the Riesterers appear to argue even if Dunning lacked authority to negotiate an accord and satisfaction, one nevertheless occurred because ANMP received the Riesterers' $315,000 payment. Although the superior court did not expressly rule on this argument, we may infer the court rejected it. *See Coronado Co. v. Jacome's Dep't Store, Inc.,* 129 Ariz. 137, 139, 629 P.2d 553, 555 (App. 1981) (any findings necessary to sustain the judgment may be inferred if supported by the evidence and not in conflict with the express findings).

¶17 Generally, when a debt is disputed and the debtor remits a check to the creditor notated with words such as "payment in full," the cashing of such check by the creditor constitutes an accord and satisfaction. *See Flagel,* 157 Ariz. at 202-03, 755 P.2d at 1190-91; *Baker v. Emmerson,* 153 Ariz. 4, 7-8, 734 P.2d 101, 104-05 (App. 1986). Here, the Riesterers

failed to present any evidence they communicated to ANMP the $315,000 was tendered as payment in full. Thus, there was no accord and satisfaction based on the $315,000 payment to ANMP.

¶18 Finally, the Riesterers argue the superior court should have at least given them a $512,107.53 credit against the amounts they owed under the notes.[7] At trial, Don Riesterer testified he had "assigned" a condominium unit to securitize the first note, and argued he had done so because ANMP had required the Riesterers to enter into a pawnshop type of arrangement whereby the Riesterers actually sold their ownership rights to the condominium unit to ANMP for $512,107.53. Accordingly, they asserted they were entitled to a $512,107.53 credit against the amount they owed to ANMP under the notes. The superior court expressly rejected this argument at the end of the trial. Again, the issue before us is whether substantial evidence supports the court's rejection of this argument.

¶19 Here, two out of the three documents the Riesterers relied on to support their argument they had "assigned" ownership of the condominium to ANMP (or its affiliated entity, Normandale Tower, L.L.C.), an "Agreement for Transfer of Beneficial Interest" and a "Mortgage," do not show or otherwise

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[7]The purported security for the second promissory note, the Wayzata property, is not at issue because the Riesterers never signed any documents to secure the property, thus the second note was unsecured. Additionally, the $315,000 payment consisted of proceeds from the sale of the Wayzata property.

reflect acceptance of this arrangement by either ANMP or Normandale. Indeed, Sell testified the "Agreement for Transfer of Beneficial Interest," which the Riesterers argued at trial was "the agreement where Don Riesterer says in exchange for $512,000 I promise to transfer my rights," came from the Riesterers and not ANMP. The third document the Riesterers relied on, a "Warranty Deed" for the condominium, was never recorded. Finally, Sell testified he had not found any record in ANMP's books and records it had an "ownership interest" in the condominium unit.

¶20 However, even assuming the Riesterers actually "assigned" the condominium unit to ANMP, the Riesterers' argument still fails due to the subsequent foreclosure of the condominium unit by the first lienholder. ANMP received no value from the property and thus, the Riesterers were not entitled to a credit for it.

¶21 Relying on a provision in the notes requiring the "maker . . . to pay reasonable attorney fees and costs incurred by the holder" and A.R.S. § 12-341.01, Sell requests attorneys' fees and costs on appeal. Because Sell has prevailed on appeal we award him his reasonable attorneys' fees and costs subject to his compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶22 For the foregoing reasons, we affirm the judgment of the superior court.

/s/

PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/

SHELDON H. WEISBERG, Judge

/s/

MARGARET H. DOWNIE, Judge