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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 08/26/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

GRANT H. GOODMAN and TERI B.) 1 CA-CV 09-0504
GOODMAN, husband and wife,)
individually, as shareholders,) DEPARTMENT C
and as Guarantors-Sureties for)
GTI Capital Holdings, LLC, and) **MEMORANDUM DECISION**
G.H. Goodman Invest. Co., LLC;) (Not for Publication -
GHG INC. (managing agent for) Rule 28, Arizona Rules of
STIRLING BRIDGE, LLC [a Delaware) Civil Appellate Procedure)
limited liability company]);)
STIRLING BRIDGE, LLC (a Delaware)
limited liability company);)
NORTHERN HIGHLANDS I, II)
(Arizona limited liability)
companies),)
)
Plaintiffs/Appellants,)
)
v.)
)
COMERICA BANK; GREENBERG TRAUERIG,)
LLP,)
)
Defendants/Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-031668

The Honorable Sam J. Myers, Judge

AFFIRMED

Grant H. Goodman PLLC Phoenix
By Grant H. Goodman
Appellant *in propria persona* and attorneys for Appellants

Gallagher & Kennedy PA Phoenix
By John R. Clemency
And Todd A. Burgess
Attorneys for Defendant/Appellee Comerica Bank

Greenberg Traurig LLP Phoenix
By Jennifer M. Dubay
And Julie Barton
Attorneys for Defendant/Appellee Greenberg Traurig LLP

S W A N N, Judge

¶1 Grant and Teri Goodman and their business entities¹ (collectively, "Appellants") filed a complaint against Comerica Bank ("Comerica") and Greenberg Traurig, LLP ("GT"). The superior court entered judgments in favor of Comerica and GT, dismissing with prejudice all claims for relief and awarding attorney's fees to Comerica. This appeal followed. For the reasons set forth below, we conclude that we lack jurisdiction to review the judgments in favor of Comerica and we affirm the judgment in favor of GT.

¹ GTI Capital Holdings, LLC ("GTI"); G.H. Goodman Investment Company, LLC ("GHGI"); Stirling Bridge, LLC ("SB"); Northern Highlands I, LLC ("NH-I"); and Northern Highlands II, LLC ("NH-II").

Factual and Procedural Background²

I. Prior Litigation

¶2 We describe Appellants' business dealings and prior litigation to the extent it is relevant to our resolution of this appeal. We take judicial notice of all relevant pleadings, judgments, and appellate determinations,³ including those not available to the trial court at the time it entered judgment. See Ariz. R. Evid. 201; *State v. McGuire*, 124 Ariz. 64, 66, 601 P.2d 1348, 1349 (App. 1978).

A. Comerica Litigation

¶3 Beginning in September 2001, Imperial Bank (Comerica's predecessor in interest) made a series of loans to GTI, GHGI, NH-I, and SB. The bank later reclassified several of the loans, refused to extend further credit to GTI, GHGI, or SB, and alleged that GTI, GHGI, and NH-I had defaulted on loans. In March 2003, GTI, GHGI, and SB filed an action against Comerica in the Superior Court in Maricopa County, alleging breach of contract, tortious conduct, and fraud. In April 2003, Comerica filed a

² Comerica and GT contend that the statement of facts in Appellants' opening brief is incomplete and misleading. We rely on our review of the record for our recitation of the facts.

³ Our citation to memorandum decisions is appropriate pursuant to ARCAP 28(c)(1).

receivership action against GTI and GHGI, and a separate guarantor action against the Goodmans.

¶14 The superior court granted summary judgment for Comerica in both the Goodman entities' initial action and the guarantor action. We affirmed those judgments in December 2007 and February 2008 memorandum decisions,⁴ and the Arizona Supreme Court denied petitions for review.

B. Quarles & Brady Litigation

¶15 Quarles & Brady, LLP ("Q&B") represented Imperial Bank and Comerica in the loan transactions and the subsequent litigation until November 2003, when attorney John Clemency moved his practice from Q&B to GT and remained counsel for Comerica at his new firm.

¶16 In 2005, NH-I, NH-II, SB, Triad Commercial Company, and the Goodmans, as shareholders and guarantors for those business entities, filed a legal malpractice suit against Q&B and several current and former Q&B attorneys, including Clemency, in the Superior Court in Maricopa County. The plaintiffs alleged that they were Q&B clients, and that Q&B's representation of Imperial Bank and Comerica created a non-waivable conflict of

⁴ *GTI Capital Holdings, LLC v. Comerica Bank-Cal.*, 1 CA-CV 06-0688, 2007 WL 5462292 (Ariz. App. Dec. 18, 2007) (mem. decision); *GTI Capital Holdings, LLC v. Comerica Bank-Cal.*, 1 CA-CV 07-0264, 2008 WL 4149632 (Ariz. App. Feb. 21, 2008) (mem. decision).

interest. The plaintiffs further alleged that Q&B breached its duty to them by failing to perfect security interests in the loan collateral and by failing to advise them of such. According to the complaint, Clemency continued to engage in malpractice when he joined GT because the plaintiffs were GT clients as well, and Clemency "engaged in conduct intended to conceal the malfeasance [by Q&B]; to liquidate Plaintiffs in order to prevent them from being able to pursue claims against Defendants; and to mitigate the damages against it [sic] of any claims of legal malpractice brought by Imperial/Comerica Bank."

¶17 In October 2006, the superior court granted summary judgment for Clemency. The court found, *inter alia*, that the plaintiffs had consented in writing to Q&B's representation of Imperial and Comerica and that Clemency owed no duty to the plaintiffs because he was opposing counsel in the loan transactions. The court granted summary judgment for the remaining defendants in June 2007, and final judgment in the action was entered in September 2007. We affirmed in a December 2009 memorandum decision,⁵ and the Arizona Supreme Court denied plaintiffs' petition for review.

⁵ *Stirling Bridge, LLC v. Quarles & Brady, LLP*, 1 CA-CV 08-0255, 2009 WL 4753956 (Ariz. App. Dec. 10, 2009) (mem. decision).

C. Porter Litigation

¶8 In 2005, GHGI, NH-I, NH-II, SB, Triad Commercial Company, New York Newport Assurance, West Highland Water & Power, and the Goodmans filed suit against Robert Porter, the plaintiffs' former in-house counsel, in the Superior Court in Maricopa County. In connection with that suit, the plaintiffs served a subpoena duces tecum on GT in December 2005. The subpoena alleged that many of the plaintiffs had been GT clients, and demanded the production of, *inter alia*:

1. All documents contained within and constituting plaintiffs' client files; please include all employee and attorney generated documents placed within the client files, or related to the client files, from you, those under your direct control or access, and/or company employees, related to the plaintiffs' client files within your possession, control, or constructive control.

(Emphases omitted.)

¶9 GT produced materials in response to the subpoena, and objected to production of certain materials. In May 2006, the special discovery master denied the plaintiffs' motion to compel further compliance. The special master stated:

The law firm of [GT] is a non-party in this action, but represents Comerica in the consolidated cases. It previously represented [SB] in 2002-2003 in unrelated matters. In 2002, [GT] also represented another party in litigation in which [SB] was a co-defendant and as to which [SB] gave [GT] a conflict waiver. [GT] did not represent Comerica at the time because the forgoing [sic] representations of [SB] preceded John Clemency's withdrawing from [Q&B] and

joining [GT], bringing with him the representation of Comerica.

At the hearing, [GT]'s counsel, Jennifer Dubay, represented without contradiction that pursuant to the subpoena duces tecum, [GT] had previously produced to [SB] 2700 pages relating to [GT]'s above referenced representations of [SB] other than internal practice management records which are privileged. See *National Sales & Service [sic] Co. v. Superior Court*, 136 Ariz. 544, 667 P.2d 738 (1983) and State Bar of Arizona Ethics Opinion 04-01.

Order

It is ordered denying [SB]'s Motion to Compel Production pursuant to the subpoenas duces tecum and granting [GT]'s motion to quash the subpoenas served on its custodian of records and information technology department on grounds that (1) [GT] has complied with the subpoena duces tecum with respect to production of [SB]'s client papers, (2) Comerica's non-privileged documents in [GT]'s possession have already been produced, and (3) [GT]'s documents relating to its representation of Comerica in the consolidated cases have already been produced and/or are protected from disclosure by attorney-client and/or work product privileges, ER 1.6 and Arizona Ethics Opinion 2000-11.

¶10 The plaintiffs did not seek review of the special master's ruling. In the underlying litigation, the court eventually entered summary judgment for Porter, and we affirmed in an August 2009 memorandum decision.⁶ The Arizona Supreme Court denied the plaintiffs' petition for review.

D. Federal Court Litigation

¶11 In 2007, GHGI, NH-I, NH-II, SB, Triad Captive Company, West Highland Water & Power, and the Goodmans filed suit against

⁶ *Stirling Bridge, LLC v. Porter*, 1 CA-CV 08-0348, 2009 WL 2603122 (Ariz. App. Aug. 25, 2009) (mem. decision).

Comerica, GT, and other defendants in the United States District Court for the District of Arizona. The plaintiffs alleged nine claims, styled:

COMPLAINT FOR VIOLATIONS OF:

- (I) FEDERAL SECURITIES LAWS;
- (II) FEDERAL ANTITRUST LAWS;
- (III) FEDERAL § 1983 CIVIL RIGHTS;
- (IV) INDEPENDENT CAUSE OF ACTION FOR FRAUD ON THE COURT BY OFFICERS OF THE COURT, FED. R. CIV. P. 60(b)[;]
- (V) LEGAL MALPRACTICE;
- (VI) VIOLATIONS OF THE COMPUTER FRAUD AND ABUSE ACT (FEDERAL); THE STORED COMMUNICATIONS ACT (FEDERAL);
- (VII) VIOLATIONS OF THE UNIFORM FRAUDULENT TRANSFER ACT (UFTA);
- (VIII) VIOLATIONS OF THE LIMITED LIABILITY COMPANY ACT;
- (IX) VIOLATIONS OF THE DECEPTIVE TRADE PRACTICES ACT (A.R.S. § 44-1522 et seq.,/Del. Code, title 6, § 2513 et seq.

(Emphases omitted.)

¶12 In December 2007, the District Court dismissed the case in its entirety with prejudice. The court held that the plaintiffs' complaint failed to state a cause of action pursuant to Fed. R. Civ. P. 12(b)(6) and therefore failed to establish federal subject matter jurisdiction over the remaining claims pursuant to Fed. R. Civ. P. 12(b)(1). The court held that the plaintiffs had failed to state claims for violations of federal securities laws, federal antitrust laws, the Computer Fraud and Abuse Act, and the Stored Communications Act. The court further held:

Plaintiffs have repeated numerous allegations against all of the Defendants that have been litigated or are continuing to be litigated at least once and generally numerous times at the state court level: (1) breach of express or implied terms and covenants of the loans and improperly declared defaults; (2) breach of oral promises; (3) improper use of the bankruptcy/receiver process; (4) improper appointment of the bankruptcy examiner; conspiracy to sell assets below market price; (5) fraud and destruction of evidence; (6) failure to perfect a security interest in certain assets; (7) forged certificates of title; (8) improperly attached funds; and (9) intentional destruction of Plaintiffs' business interests.

These claim[s] are ancillary state law based claims that this Court lacks jurisdiction to address because federal jurisdiction is completely lacking. These claims will be dismissed rather than remanded to state court, because the principles of res judicata and collateral estoppel appear to bar the repeated litigation of these claims in state courts.

¶13 The United States Court of Appeals for the Ninth Circuit affirmed the District Court's ruling in an April 2009 memorandum.⁷ The Ninth Circuit held, in relevant part:

3. The record shows that the issues raised before the district court were the same that Appellants raised in the state court and bankruptcy litigation. Those proceedings ended with a final judgment on the merits. Moreover, the parties against whom collateral estoppel is sought are the same. Therefore, the district court did not err in holding that collateral estoppel bars Appellants' claims. . . .

. . . .

5. Having properly concluded that the federal claims should be dismissed, the district court did not abuse

⁷ *Northern Highlands I, II, LLC v. Comerica Bank*, 328 F. App'x 358 (9th Cir. 2009).

its discretion in declining to exercise supplemental jurisdiction over the state claims.

E. Bankruptcy Court Litigation and Settlement Agreement

¶14 In May 2003, GTI and GHGI filed voluntary Chapter 11 bankruptcy petitions in the United States Bankruptcy Court for the District of Arizona. In April 2007, the jointly administered matters were converted to Chapter 7 bankruptcy cases and a Chapter 7 Trustee was appointed. In February 2008, the Trustee and Comerica entered a Settlement Agreement. The agreement provided that upon the Bankruptcy Court's approval of the settlement agreement and Comerica's payment of a settlement amount, a release would become effective in accordance with the following terms:

1. The Trustee, on behalf of itself, the GTI Debtors, and the bankruptcy estates of the GTI Debtors (collectively, the "GTI Releasing Parties") hereby does remise, release, and forever discharge Comerica and each of Comerica's former, present, and future officers, directors, attorneys, agents, partners, predecessors, successors, assigns, parents, affiliates, subsidiaries, control persons, representatives and employees (the "Comerica Released Parties") of and from any and all sums of money, claims, rights, demands, suits, debts, dues, accounts, promises, damages, and causes of action known or unknown or suspected or unsuspected, including claims for attorneys' fees, which any of the GTI Releasing Parties now or hereafter owns, holds, has or claims to have by reason of any matter, cause or thing whatsoever from the beginning of time to the date of this Release and which arise out of or are in any way connected with or related to transactions, occurrences, events, acts or omissions arising from, relating to or concerning in any way the relationships between or among any of the GTI Releasing Parties and

the Comerica Released Parties (including claims pending in the Bankruptcy Cases, in the Bankruptcy Appellate Panel, and in any other state or federal court), provided however, that this Release does not extend to obligations of the Comerica Released Parties under the Settlement Agreement.

2. This Release is intended to be as broad as legally possible, and the Trustee agrees to the immediate dismissal with prejudice of all actions brought by the GTI Releasing Parties against the Comerica Released Parties in the Bankruptcy Cases, in the Bankruptcy Appellate Panel, and in any other state or federal court.

(Emphases in original.)

¶15 The Bankruptcy Court entered an order approving the Settlement Agreement in March 2008. The Goodmans, representing GTI and GHGI (the debtors), SB, Triad Commercial Captive, and New York-Newport Assurance Company, appealed to the United States Bankruptcy Appellate Panel of the Ninth Circuit. In a December 2008 memorandum,⁸ the Appellate Panel affirmed the Bankruptcy Court's order. The court observed that the release, by its plain language, affected only claims between Comerica and the bankruptcy estates.

II. Litigation From Which This Appeal is Taken

¶16 In December 2008, Appellants filed a complaint against Comerica and GT in the Superior Court in Maricopa County. The complaint set forth five causes of action, styled:

⁸ *In re GTI Capital Holdings, LLC*, AZ-08-1079-MkEMO (B.A.P. 9th Cir. Dec. 9, 2008).

- (I) Arizona Racketeering ("AzRac") A.R.S. § 13-2314.04(A); 13-2310; Arizona Securities Fraud[;]
- (II) A.R.S. §§ 44-1991(A); 44-2001(A); 44-2002(A); 13-2301(D)(4)(b)(xix); 44-1998; 44-1999(A); 44-2003(A); 44-2004;
- (III) Rule 60 Ariz. R. Civ. P. 60(c)(3)(4)(5)(6)/Savings Clause;
- (IV) Civil Rights Violations 42 U.S.C. § 1983[;]
- (V) Aiding-and-Abetting Fraud A.R.S. § 44-3241(A)

Regarding Count III, the complaint appeared to allege that Appellants were entitled to relief from all judgments against them because (1) the judgments had been obtained by fraud upon the court, and (2) the judgments had been released by the Settlement Agreement.

¶17 In response to the complaint, Comerica and GT moved for dismissal, asserting claim and issue preclusion. The defendants described the litigation history that we have described above and provided the court with copies of all available prior judgments, orders, pleadings and public records.

¶18 The court heard oral argument on March 19, 2009. In an unsigned minute entry dated March 25, 2009, the court found that Appellants' complaint failed as a matter of law, and that the defects in the complaint could not be cured by amendments. Taking judicial notice of the relevant documents, the court found that claim and issue preclusion barred the majority of the claims against Comerica and GT. The court further found that the Settlement Agreement did not release Appellants from judgments against them, and found that Comerica and GT were not "state

actors" for purposes of 42 U.S.C. § 1983. Finally, the court found that to the extent the § 1983 claim asserted legal malpractice, Appellants had failed to allege facts to demonstrate the elements of legal malpractice. The court entered orders granting the defendants' motions to dismiss with prejudice and granting Comerica's request for attorney's fees and sanctions.

¶19 The court entered a signed judgment dismissing the claims against Comerica on May 26, 2009. That judgment expressly provided: "Comerica Bank's award of attorneys' fees and sanctions pursuant to A.R.S. § 12-349 shall be treated as a separate claim in accordance with Ariz. R. Civ. P. 54(b)." On July 27, 2009, the court entered a separate judgment awarding Comerica over \$34,000 in attorney's fees. The court entered a formal judgment dismissing the claims against GT on June 17, 2009. GT did not request or receive attorney's fees.

¶20 Appellants filed a single notice of appeal on July 14, 2009.

Discussion

I. Appellate Jurisdiction

¶21 We have an independent duty to examine our jurisdiction. *Sorensen v. Farmers Ins. Co.*, 191 Ariz. 464, 465, 957 P.2d 1007, 1008 (App. 1997). Pursuant to ARCAP 9(a), Appellants' notice of appeal was timely as to the judgment in favor of GT, but it was tardy as to the judgment in favor of

Comerica on the merits. That judgment contained Rule 54(b) language, and therefore was appealable upon entry. Appellants' failure to file a notice of appeal within thirty days from the date the judgment was entered deprives us of jurisdiction over an appeal from that judgment.

¶22 Additionally, the notice of appeal was premature as to the judgment awarding attorney's fees to Comerica. Though we may accept jurisdiction over premature appeals where the trial court has made its substantive decision and only a formal signed judgment is lacking, *Barassi v. Matison*, 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981), here the court had not determined the amount of Comerica's fee award until the day on which that judgment was entered. Because the notice of appeal was filed before the court announced its substantive decision, it was insufficient to confer appellate jurisdiction. Appellants never filed a notice of appeal after entry of the fee award.

¶23 Accordingly, we lack jurisdiction to review either of the judgments in favor of Comerica. We have jurisdiction to review the judgment in favor of GT pursuant to A.R.S. §§ 12-120.21(A)(1) (2003) and 12-2101(B).

II. The Judgment Dismissing the Complaint as to GT

A. Standard of Review

¶24 We review a trial court's decision to dismiss a complaint for abuse of discretion, but we review issues of law *de*

novo. *Dressler v. Morrison*, 212 Ariz. 279, 281, ¶ 11, 130 P.3d 978, 980 (2006). Generally, we must accept as true the facts alleged in the complaint. *Fidelity Sec. Life Ins. Co. v. State Dep't of Ins.*, 191 Ariz. 222, 224, ¶ 4, 954 P.2d 580, 582 (1998). The exception is when there is a conflict between a fact alleged in the complaint and a fact of which judicial notice may be taken. *See Lakin Cattle Co. v. Engelthaler*, 101 Ariz. 282, 284, 419 P.2d 66, 68 (1966) (trial court must accept as true a judicially noticed fact that conflicts with an allegation in the complaint).

B. Claim Preclusion and Issue Preclusion

¶25 Whether claim preclusion or issue preclusion applies is a question of law that we review *de novo*. *Better Homes Constr., Inc. v. Goldwater*, 203 Ariz. 295, 298, ¶ 10, 53 P.3d 1139, 1142 (App. 2002) (claim preclusion); *Campbell v. SZL Props., Ltd.*, 204 Ariz. 221, 223, ¶ 8, 62 P.3d 966, 968 (App. 2003) (issue preclusion). A prior decision's preclusive effect is dictated by the law of the court - i.e., state or federal - that issued the decision. *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 212 Ariz. 64, 69, ¶ 13, 127 P.3d 882, 887 (2006). To determine the preclusive effect of a federal judgment, therefore, we look to Ninth Circuit jurisprudence. *Howell v. Hodap*, 221 Ariz. 543, 547, ¶ 18, 212 P.3d 881, 885 (App. 2009) (because the United States Supreme Court has never

precisely defined the test for determining whether there is an identity of claims for purposes of claim preclusion, we look to the controlling federal law in the circuit in which the federal judgment was entered).

¶26 The basic requirements for claim preclusion are the same in both Arizona and Ninth Circuit jurisprudence. A claim is precluded if there was a former judgment on the merits, the current action involves the same parties or their privies, and the current claim was or could have been determined in the former proceeding. *Hall v. Lalli*, 194 Ariz. 54, 57, ¶ 7, 977 P.2d 776, 779 (1999); *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001). Regarding the latter element, Arizona uses the restrictive "same evidence" test: "If no additional evidence is needed to prevail in the second action than that needed in the first, then the second action is barred." *Phoenix Newspapers, Inc. v. Dep't of Corrs.*, 188 Ariz. 237, 240, 934 P.2d 801, 804 (App. 1997). In the Ninth Circuit, however, the guiding principle is whether the former and current claims are based on the same transactional nucleus of facts. *Howell*, 221 Ariz. at 547, ¶¶ 19-20, 212 P.3d at 885.

¶27 Issue preclusion applies when an issue was actually litigated in a prior proceeding, the parties had a full and fair opportunity and motive to litigate the issue, the resolution of the issue was essential to a valid and final resolution on the

merits, and there is a common identity of the parties. *Campbell*, 204 Ariz. at 223, ¶ 9, 62 P.3d at 968. There is a common identity of the parties when either the parties or their privies were involved in the prior litigation. See *Farmers Ins. Co. v. Vagnozzi*, 138 Ariz. 443, 446, 675 P.2d 703, 706 (1983). Additionally, issue preclusion may be asserted when a plaintiff has previously unsuccessfully litigated the issue against a different defendant. *Campbell*, 204 Ariz. at 223, ¶ 10, 62 P.3d at 968.

1. Judicial Notice

¶128 Appellants appear to contend that the superior court erred by taking judicial notice of prior pleadings and judgments, and by basing its application of claim preclusion and issue preclusion on the judicially noticed facts. We disagree. The court was properly able to take judicial notice of prior legal actions involving similar parties and issues. *Regan v. First Nat'l Bank*, 55 Ariz. 320, 327, 101 P.2d 214, 217 (1940); Ariz. R. Evid. 201. Here, the court expressly took judicial notice of "the rulings of this Court (and the subsequent appellate review) in prior cases involving the parties herein, the public records attached to the Appendix to the motions [to dismiss], and the documents referred to in the pleadings."

2. Barred Claims

¶129 The complaint's allegations against GT arise out of Clemency's representation of Comerica while he was at GT, and the alleged concealment and destruction of client documents. In the *Quarles & Brady* litigation, the same evidence regarding Clemency's representation led to a final judgment on the merits against Appellants and their entities, with which they were in privity. In the *Porter* litigation, the issue whether GT had concealed or destroyed client documents was decided adversely to Appellants and their entities after full and fair litigation.

¶130 To the extent the 2008 complaint alleged that GT had engaged in misconduct amounting to racketeering and securities fraud, those allegations arose from the same transactional nucleus of facts as the federal securities and antitrust law claims for which the District Court and Ninth Circuit determined that Appellants and their privies had failed to state a claim. Additionally, the federal courts held that to the extent state-law contract, fraud, and tort claims were asserted in the federal court litigation, they were precluded by previous proceedings.

¶131 The superior court correctly determined that claim preclusion and issue preclusion applied.

3. Ariz. R. Civ. P. 60(c)

¶132 Appellants contend that prior judgments could not bar the 2008 complaint because the complaint was an independent

action by which Appellants sought relief from those judgments. Appellants contend that they were entitled to relief pursuant to Ariz. R. Civ. P. 60(c) because the judgments were obtained by fraud upon the court, and because the judgments were released by the Settlement Agreement.

¶133 Ariz. R. Civ. P. 60(c) permits a party to bring an independent action to set aside a judgment for fraud upon the court. The rule further provides that a party may move to have a judgment set aside by reason of its release. Here, however, Appellants' complaint failed to articulate any fraud upon the court that was previously undiscoverable such that it could not have been litigated in the former proceedings.⁹ With regard to the release, the court correctly observed that the plain language of the Settlement Agreement released only the "Comerica Released Parties" from judgments against them, and did not similarly release Appellants. We therefore discern no error in the superior court's refusal to grant Rule 60(c) relief.

C. Claim for Relief Pursuant to 42 U.S.C. § 1983

1. State Action

¶134 The trial court correctly held that Appellants' claim for relief pursuant to 42 U.S.C. § 1983 failed as a matter of law for lack of state action. See *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835-36 (9th Cir. 1999). A private

⁹ Nor have Appellants provided an explanation on appeal.

party's conduct may qualify as state action if one of four tests is satisfied: "(1) public function, (2) joint action, (3) governmental compulsion or coercion, [or] (4) governmental nexus." *Id.* (citations omitted). GT is a private law firm. Appellants alleged that GT attorneys nonetheless engaged in state action because they acted as "officers of the court" and induced judicial and law enforcement officials to commit fraud. An allegation that a private party coerced the government is not sufficient to allege state action.

2. Legal Malpractice

¶135 The court also considered whether the § 1983 claim alleged a cognizable claim of legal malpractice, and correctly concluded that the complaint alleged insufficient facts to state a claim. Moreover, GT correctly notes on appeal that any legal malpractice claim against GT is precluded as a matter of law. In the federal court litigation, the Ninth Circuit held: "[A]s opposing counsel for Comerica, the law firm Greenberg Traurig and its attorneys cannot be liable to Appellants for malpractice based on counsel's litigation conduct."

Attorney's Fees on Appeal

¶136 Without citation to authority, Appellants request attorney's fees on appeal. Because Appellants are not the prevailing party, they are not entitled to fees.

Conclusion

¶137 The superior court properly dismissed Appellants' complaint against GT. We affirm the judgment in favor of GT, and award it its costs on appeal.

/s/

PETER B. SWANN, Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Presiding Judge

/s/

DONN KESSLER, Judge