

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
FILED: 11/04/10
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

U.S. BANK NATIONAL ASSOCIATION) No. 1 CA-CV 10-0067
ND, a national banking) 1 CA-CV 10-0148
association,) (Consolidated)
Plaintiff/Appellee,)
) DEPARTMENT B
v.)
) **MEMORANDUM DECISION**
HORACE D. ALLEN and) (Not for Publication -
TOYA S. ALLEN,) Rule 28, Arizona Rules of
Defendants/Appellants.) Civil Appellate Procedure)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-001240

The Honorable Richard J. Trujillo, Judge
The Honorable Emmet J. Ronan, Judge

AFFIRMED

Hammerman & Hultgren, P.C. Phoenix
By Jon R. Hultgren and Jennifer R. Spiegel
Attorneys for Plaintiff/Appellee

Horace D. Allen Chandler
Toya S. Allen
Defendants/Appellants *In Propria Persona*

B R O W N, Judge

¶1 Horace and Toya Allen appeal the trial court's judgment in favor of U.S. Bank National Association ND ("U.S. Bank").¹ For the following reasons, we affirm.

BACKGROUND

¶2 U.S. Bank sued the Allens for breach of contract for outstanding debts totaling approximately \$44,000 on three credit card accounts. The Allens filed a *pro per* response and counterclaim to the complaint, denying the allegation that the marital community was responsible for the debt and asserting that U.S. Bank wrongfully refused settlement negotiations on the delinquent accounts.² As part of their counterclaim, the Allens sought damages in the amount of \$750,000.

¶3 U.S. Bank filed a motion to dismiss the Allens' counterclaim for failure to state a claim. On June 25, 2009, the trial court granted the motion and awarded U.S. Bank \$1250 in attorneys' fees pursuant to Arizona Revised Statutes ("A.R.S.") section 12-341.01 (2003)³.

¹ On the court's own motion, it is hereby ordered amending the caption for this appeal as reflected in this decision. The above referenced caption shall be used on all documents filed in this appeal.

² We note that Toya did not sign the response nor does the record reflect that she filed a joinder. Nonetheless, both U.S. Bank and the trial court treated her as a counterclaimant and thus we will do likewise.

³ We cite the current version of the applicable statutes when no revisions material to this decision have since occurred.

¶14 U.S. Bank subsequently moved for summary judgment on its breach of contract claim. The court ruled in favor of U.S. Bank on its claim against Horace Allen. Prior to entry of a formal order, U.S. Bank moved to voluntarily dismiss Toya Allen, explaining that "throughout the course of this litigation, [the Allens] have disclosed information pertaining to their marriage that Plaintiff was not privy to prior to suit" and that U.S. Bank "simply does not wish to pursue its claim against [Toya]." In response, Toya objected to the request for dismissal and filed several motions to compel relating to discovery she was seeking.

¶15 In November 2009, while the motion to dismiss Toya was still pending, the court entered judgment against Horace only, and awarded additional attorneys' fees to U.S. Bank.⁴ On December 10, 2009, Horace timely appealed from the judgment. Shortly thereafter, the court granted U.S. Bank's motion to dismiss Toya and she appealed from that order. The motions panel of this court consolidated Horace and Toya's appeals, which we now consider.

DISCUSSION

¶16 As an initial matter, this court has an independent duty to review its jurisdiction and to dismiss an appeal if

⁴ The judgment was entered pursuant to Arizona Rule of Civil Procedure 54(b).

jurisdiction is lacking. *Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304, 812 P.2d 1119, 1122 (App. 1991). We may only accept an appeal from a "party aggrieved by the judgment." See ARCAP 1. A party is aggrieved if the judgment "denies that party some personal or property right or imposes on that party some substantial burden or obligation." *Kerr v. Killian*, 197 Ariz. 213, 216, ¶ 10, 3 P.3d 1133, 1136 (App. 2000). The denial of the personal or property right "must flow *directly* from the judgment and not merely from applying the legal principle established in the judgment to another proceeding." *Id.* (emphasis added).

¶7 In this case, Toya has appealed from the court's order dismissing U.S. Bank's claims against her. As such, she is not an aggrieved party. She has not been denied any personal or property right nor did she suffer a substantial burden as a result of the dismissal. In fact, the dismissal of all claims was to her benefit. Thus, we have no jurisdiction to consider her appeal from the dismissal of U.S. Bank's claims against her.

¶8 We also lack jurisdiction to consider her attempted appeal from the dismissal of her counterclaim. Toya was required to file a notice of appeal within thirty days after the trial court entered the order granting the motion to dismiss the counterclaim. See ARCAP 9(a). However, only Horace appealed from the court's judgment which disposed of the counterclaim.

Additionally, even if we had jurisdiction over Toya's appeal, only Horace has submitted briefs in support of his appeal and thus we have no arguments to consider on behalf of Toya. See *Encinas v. Mangum*, 203 Ariz. 357, 358, ¶¶ 6-11, 54 P.3d 826, 827 (App. 2002) (holding that a non-attorney may not represent a *pro se* litigant and perform the traditional functions of a lawyer); *Haberkorn v. Sears, Roebuck & Co.*, 5 Ariz. App. 397, 399, 427 P.2d 378, 380 (1967) (holding that a husband, appearing *pro se*, could not sign a notice of appeal and designation of record on behalf of his wife to assert her appeal because doing so would constitute the unauthorized practice of law).

¶19 Turning to the appeal filed by Horace, he argues first that the trial court erred by granting U.S. Bank's motion to dismiss the counterclaim for failure to state a claim. We review a trial court's decision on a motion to dismiss for an abuse of discretion, but review issues of law *de novo*. *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 180, ¶ 16, 181 P.3d 219, 227 (App. 2008). When reviewing a trial court's dismissal of a complaint for failure to state a claim, we accept the facts alleged in the complaint as true and affirm the dismissal only if the non-moving party "would not be entitled to relief under any interpretation of the facts susceptible of proof." *Fid. Sec. Life Ins. Co. v. Ariz. Dep't of Ins.*, 191 Ariz. 222, 224, ¶ 4, 954 P.2d 580, 582 (1998). A pleading which

sets forth a claim for relief must contain a statement of the claim showing that the pleader is entitled to relief. Ariz. R. Civ. P. 8(a). Additionally, a party appearing without a lawyer is entitled to no more consideration than a party represented by counsel and is held to the same standards as an attorney. *Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, 287, ¶ 16, 17 P.3d 790, 793 (App. 2000).

¶10 Horace's counterclaim alleged that U.S. Bank committed fraud due to its unwillingness to authorize a payment plan despite a corporate motto of working with clients to find solutions to financial hardship. Under the Arizona Rules of Civil Procedure, fraud must be pled with particularity. Ariz. R. Civ. P. 9(b). Although specific language is not necessary, the pleading, considered as a whole, must be capable of being construed to plead all nine elements⁵ of fraud. *Hall v. Romero*, 141 Ariz. 120, 124, 685 P.2d 757, 761 (App. 1984). An allegation that a party's actions were "fraudulent" is insufficient. *Id.*

⁵ These nine elements are: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it be acted upon by the recipient in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the right to rely on it; (9) his consequent and proximate injury. *Echols v. Beauty Built Homes*, 132 Ariz. 498, 500, 647 P.2d 629, 631 (citing *Nielson v. Flashberg*, 101 Ariz. 335, 338-39, 419 P.2d 514, 517-18 (1966)).

¶11 Here, the counterclaim does not address any of the elements of fraud or contain allegations that could reasonably be construed as supporting the nine elements. Moreover, actionable fraud cannot be predicated on unfulfilled promises or statements concerning future events unless such statements were made with the present intent not to perform. *Id.* at 123, 685 P.2d at 760. Horace alleged that, both on its website and through customer service personnel, U.S. Bank offered to provide assistance to customers in meeting their financial obligations to the bank. However, Horace did not allege that these statements were made by U.S. Bank or its customer service personnel with the intent not to perform. Thus, the trial court did not abuse its discretion in dismissing Horace's counterclaim.

¶12 Horace next argues that the trial court improperly granted summary judgment against him on U.S. Bank's complaint for breach of contract. Summary judgment may be granted when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Ariz. R. Civ. P.* 56(c). We review a trial court's grant of summary judgment de novo. *Chalpin v. Snyder*, 220 Ariz. 413, 418, ¶ 17, 207 P.3d 666, 671 (App. 2008).

¶13 The crux of Horace's argument appears to be that he is not liable for the credit card deficiencies because U.S. Bank

refused to enter into settlement negotiations with him. He asserts that because other banking institutions offered to settle his debts for reduced amounts, U.S. Bank should be required to do the same. Even assuming that U.S. Bank failed to discuss settlement options or treat Horace in the same manner as other banks may treat their customers under similar circumstances, the facts were uncontroverted that Horace breached his contractual obligations by failing to pay the amounts owed on his credit cards.

¶14 On this record, no issues of material fact exist as to whether Horace failed to pay the amounts owing on his U.S. Bank credit cards. Therefore, we conclude that the trial court did not err in granting summary judgment.

¶15 Finally, Horace argues that the trial court erred in awarding attorneys' fees to U.S. Bank. We review a trial court's decision regarding an award of attorneys' fees for an abuse of discretion and will uphold the ruling if it is supported by any reasonable basis. See *Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 569, ¶ 9, 155 P.3d 1090, 1093 (App. 2007).

¶16 Horace asserts that the trial court erred because it failed to take into consideration that Toya prevailed when U.S.

Bank moved to dismiss her from the lawsuit.⁶ We disagree. First, as noted, the claims against Toya are not properly before us. Second, Toya was not represented by counsel in the trial court; therefore, she was not entitled to an award of attorneys' fees regardless of whether she was the prevailing party. See *Connor v. Cal-Az Props., Inc.*, 137 Ariz. 53, 56, 668 P.2d 896, 899 (App. 1983) (holding that party filing *pro per* cannot claim attorneys' fees due to the absence of the attorney-client relationship). Thus, the court did not err in failing to award fees to Toya.

¶17 U.S. Bank requests attorneys' fees on appeal pursuant to A.R.S. § 12-341.01. In the exercise of our discretion, we award an amount of reasonable attorneys' fees to U.S. Bank upon its compliance with Arizona Rule of Civil Appellate Procedure 21.

⁶ Horace also argues that the trial court failed to apply the proper statute regarding attorneys' fees on the motion to dismiss. Although he alleges that the court should have relied on A.R.S. § 25-324(A), that statute applies only to matters involving domestic relations. See A.R.S. § 25-324(A) (2010).

CONCLUSION

¶18 For the foregoing reasons, we affirm the judgment of the trial court in favor of U.S. Bank.

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

DIANE M. JOHNSEN, Presiding Judge

/s/

JOHN C. GEMMILL, Judge