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Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 04/26/2012  
RUTH A. WILLINGHAM,  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

MARY HAYDEN, an unmarried woman, ) 1 CA-CV 11-0424  
)  
Plaintiff/Appellant, ) DEPARTMENT E  
)  
v. ) **MEMORANDUM DECISION**  
)  
STEVEN PITTENDRIGH, an unmarried ) (Not for Publication -  
man, ) (Rule 28, Arizona Rules of  
) Civil Appellate Procedure)  
Defendant/Appellee. )  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CV2008-024245

The Honorable Jeanne M. Garcia

**AFFIRMED IN PART; REVERSED IN PART AND REMANDED**

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H A L L, Judge

¶1 Plaintiff/Appellant Mary Hayden (Wife) appeals the granting of Defendant/Appellee Steven Pittendrigh's (Husband) motion to dismiss under Arizona Rules of Civil Procedure (Rule) 12(b). For the reasons that follow, we affirm the dismissal of all of Wife's claims against Husband except for the breach of contract claim. With respect to the latter, we find that the trial court erred in holding that Wife failed to state a claim for breach of contract, and we remand for proceedings consistent with this decision.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

¶2 In 2005, Husband and Wife entered into a property settlement agreement dividing all of their marital assets including their interest in InPulse Response Group, Inc. (IRG). Prior to the execution of the settlement agreement, Pittendrigh's expert valued IRG at \$4.7 million and Wife's share at \$790,000. Wife hired her own expert to provide a "limited appraisal" of IRG. Wife's contract with her expert explained that a limited appraisal relied upon the accuracy and reliability of information provided by Husband and IRG, and that it could not be relied upon to "disclose errors, irregularities or illegal acts, including fraud or defalcations that may exist." Wife's expert valued IRG at \$4 million to \$8 million.

¶13 Based upon this information, the parties entered into the settlement agreement. Husband was awarded IRG as his sole and separate property and in exchange he was required to pay Wife \$1 million over a three year period beginning on December 31, 2005 and ending on December 31, 2008 (equalization payments). The settlement agreement was incorporated into the consent decree dissolving their marriage but expressly stated that the settlement agreement was not merged into the consent decree.

¶14 Ten months after the consent decree was entered, on October 5, 2006, Husband sold IRG for \$58 million, \$44.5 million in cash and \$13.5 million in debt repayment. Although the settlement agreement made all outstanding payments due and payable upon the sale of IRG, Husband did not inform Wife of the sale or pay her the remaining \$700,000 that he owed on the date of the sale. Wife learned of the sale the following May 2007 and contacted her former divorce attorney the same day. Wife decided to take no action until after she had collected all payments owed under the settlement agreement to avoid having these funds tied up in litigation. Husband continued making the payments on the dates set forth in the settlement agreement as if he had not sold IRG. He made the last payment on December 31, 2008. In January, Husband paid the 5% penalty required

under the settlement agreement in the event any payment was not made on time.

¶15 Wife waited until seventeen months after learning of the sale to file this lawsuit. Wife also waited twenty-two months after learning of the sale to file a Rule 60(c) Motion to Set Aside the Judgment in the divorce action. Wife petitioned the court to stay this lawsuit pending a decision on her Rule 60(c) motion to set aside, which the court granted. The court in the divorce action denied Wife's Rule 60(c) motion, holding that it was unreasonable for Wife to have waited twenty-two months after learning of the sale to file her motion to set aside.

¶16 The trial court in this action granted Husband's motion to dismiss holding it was an impermissible collateral attack on the judgment entered in the divorce action, and alternatively, that Wife had ratified the settlement agreement. The trial court also dismissed Wife's breach of contract claim for interest. The trial court held that Wife had failed to state a claim for breach of contract because she was only entitled to the 5% penalty that Husband already paid, not prejudgment interest. After the court entered a final judgment, Wife timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(A) (Supp. 2011).

## DISCUSSION

### Standard of Review

¶17 We review de novo a trial court's grant of a motion to dismiss for failure to state a claim. *N. Peak Constr., LLC v. Architecture Plus, Ltd.*, 227 Ariz. 165, 167, ¶ 13, 254 P.3d 404, 406 (App. 2011).

### Collateral Attack

¶18 Wife argues that the trial court erred in dismissing her claims against Husband on the grounds that such claims were an impermissible collateral attack on the judgment rendered in the divorce action.

¶19 Our initial inquiry is whether the settlement agreement was merged into the consent decree. If it was, there existed no agreement upon which Wife could maintain a separate action for damages. If no merger occurred, then the agreement continued to exist and could form the basis for Wife's lawsuit. See *Marshick v. Marshick*, 25 Ariz.App. 588, 591, 545 P.2d 436, 439 (1976) (holding that, because there was no merger, the property settlement agreement survived the decree and the appellee was entitled to bring an action for breach of the post-nuptial property settlement agreement); *Young v. Burkholder*, 142 Ariz. 415, 418, 690 P.2d 134, 137 (App. 1984).

¶10 The settlement agreement and consent decree both expressly provide that the settlement agreement is not merged into the consent decree. That is not the end of our analysis, however, because both *Young* and *Marshick* involved a lawsuit to enforce an agreement - not modify, revoke or otherwise attack it, as Wife does here.

¶11 Thus, we must next determine whether the claim made by Wife is a collateral attack on the judgment rendered by the divorce court.

A collateral attack upon a judgment is an effort to obtain another and independent judgment which will destroy the effect of the former judgment. [citation omitted]. The rule is laid down in Arizona that, 'where an action has for its primary purpose the obtaining of independent relief, and the vacating or setting aside of a judgment is merely incidental thereto, such action is not a direct, but a collateral, attack upon the judgment.'

*Cox v. Mackenzie*, 70 Ariz. 308, 312, 219 P.2d 1048, 1051 (1950).

¶12 Achieving a fair and equitable division of property is one of the primary objectives in a dissolution proceeding. In her First Amended Complaint, Wife sought a declaration that the "Property Settlement Agreement was fraudulently induced and was therefore void as a matter of law." She also sought "an award of her share of the Marital Community's interest (sic) InPulse Response Group, Inc." Clearly, Wife's fraud claims against

Husband are a collateral attack on the judgment entered in the divorce action.

¶13 The appropriate procedure for setting aside a judgment is by filing a motion to set aside under Rule 60(c).<sup>1</sup> A party can bring such a motion whether the fraud alleged is intrinsic or extrinsic, but it must be brought within six months of entry of the judgment. See Rule 60(c)(3). In addition to filing this lawsuit, Wife also filed a Rule 60(c) motion to set aside the judgment in the family court action. However, her motion, which was filed more than six months after the entry of the judgment relied on Rule 60(c)(6) ("any other reason justifying relief from the operation of the judgment") as grounds for setting the judgment aside. Such a motion must be brought within a reasonable time. Rule 60(c)(6). Finding that Wife unreasonably delayed filing the motion until twenty-two months after discovering the sale, the family court in the divorce action denied Wife's motion.

¶14 Nonetheless, as Wife notes, Rule 60(c) expressly provides that: "This rule does not limit the power of a court

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<sup>1</sup> A divorce action is governed by the Arizona Rules of Family Law Procedure (Family Law Rules), and Wife's motion should have been brought under Family Law Rule 85(C). Because the parties and the trial court referred to Wife's motion as arising under Rule 60(c), and the analysis is the same under either Rule, we likewise refer to Rule 60(c) throughout our decision.

to entertain an independent action to relieve a party from a judgment, order or proceeding . . . or to set aside a judgment from fraud upon the court." Rule 60(c). An independent action collaterally attacking a judgment for fraud, however, is only permitted when the fraud is extrinsic. *Roberson v. Teel*, 20 Ariz.App. 439, 448-49, 513 P.2d 977, 986-87 (1973); *Dockery v. Cent. Ariz. Light & Power Co.*, 45 Ariz. 434, 450-51, 45 P.2d 656, 662-63 (1935).

¶15 Extrinsic fraud, which would justify equitable relief against a judgment or decree, means some "intentional act or conduct by which the prevailing party has prevented the unsuccessful party from having a fair submission of the controversy." *Bates v. Bates*, 1 Ariz.App. 165, 168, 400 P.2d 593, 596 (1965) (citing *United States v. Throckmorton*, 98 U.S. 61 (1878)). "Extrinsic fraud may also consist of deception practiced by the successful party in purposely keeping his opponent in ignorance." *Bates*, 1 Ariz.App. at 168, 400 P.2d at 596. The *Bates* court quotes extensively from *Dockery* to explain the difference between extrinsic and intrinsic fraud and why they should be treated differently:

Not every fraud is sufficient to move a court of equity to grant relief from a judgment, but in order to set aside a judgment alleged to have been obtained by fraud, it must appear that fraud was practiced in the very act of obtaining it. The acts for which a



court of equity may, on account of fraud, set aside or annul a judgment at law between the same parties have relation only to fraud which is extrinsic or collateral to the matter tried by the first court, and not to fraud in the matter on which the judgment was rendered. Relief is granted for extrinsic fraud on the theory that by fraud or deception practiced on the unsuccessful party, he has been prevented from fully exhibiting and trying his case, by reason of which there never has been a real contest before the court of the subject matter of the suit. The reason of the rule refusing relief in other cases of fraud seems to be based upon the idea that there must be an end to litigation, and therefore an issue which has been tried and passed upon by the first court should not be retried in an action to enjoin the judgment; otherwise, litigation would be interminable.

1 Ariz.App. at 169-170, 400 P.2d at 597-98. In other words, if Husband had concealed an asset from Wife, this would be extrinsic fraud because it deprived Wife of the opportunity to litigate in the family court action issues related to her fair share of a marital asset. Here, the fraud Wife complains of is intrinsic.

¶16 This case is similar to *Gavrilis v. Gavrilis*, 116 P.3d 1272 (Colo. App. 2005). In *Gavrilis*, the parties entered a separation agreement that was incorporated into the consent decree. 116 P.3d at 1272. After the divorce was final, wife discovered information that led her to believe that husband had misrepresented his income and the value of marital assets. *Id.* at 1273. Instead of filing a Rule 60 motion to re-open the judgment in the dissolution action, wife filed a separate action

for damages alleging breach of the settlement agreement and various tort claims. *Id.* Pointedly, the court held:

In this case, husband had disclosed to wife, in the dissolution proceeding, the existence of all assets and, on an attachment to the financial affidavit, all of his income received as of the time he filed the financial affidavit. At issue here is whether husband misrepresented the value of the parties' assets . . . [or] his income . . . Because these matters could have been discovered with reasonable diligence and litigated within the dissolution proceeding or the applicable six-month period thereafter for seeking relief from judgment, wife is barred from pursuing the present damages action against husband.

*Id.* at 1275.

¶17 The same is true here. Wife was fully aware that IRG was an asset subject to valuation and distribution during the family court action. In fact, it appears from the record that IRG's valuation may have been the primary source of contention during the divorce proceedings. Wife chose to retain an expert to provide a "limited appraisal" of IRG and rely on information provided by Husband. The alleged fraud of which Wife now complains could have been fully litigated in the family court action, but she chose not to do so. Her recourse when she suspected fraud was to immediately file a Rule 60(c)(3) or (6) motion to set aside. As stated previously, Rule 60(c) permits the setting aside of a judgment for intrinsic fraud as well as extrinsic fraud. However, Wife chose not to file the motion and

waited almost two years until Husband had made all of the payments required under the settlement agreement. Her decision to wait resulted in a finding in the family court action that she had delayed an unreasonable length of time and was foreclosed from relief under Rule 60(c).<sup>2</sup> Because the alleged fraud she complains of is intrinsic, she is barred from collaterally attacking the family court's judgment in this separate action. Furthermore, as we explain below, even if, we were to consider Wife's fraud claim to be extrinsic, and thus permissible, we would nonetheless affirm the trial court because Wife ratified the agreement by accepting the payments.

### **Ratification**

¶18 The trial court dismissed Wife's claims against Husband on the alternative basis that Wife had ratified the contract by accepting its benefits after discovering Husband sold the business for \$54 million.<sup>3</sup> For that reason, she was

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<sup>2</sup> At oral argument, Wife raised a "consequential damages" claim that, but for Husband's failure to accelerate full payment at the time he sold IRG, Wife would have had the financial means to timely file this lawsuit. Because this issue was not properly raised in the appellate briefing, we decline to address it. See *Mitchell v. Gamble*, 207 Ariz. 364, 369-70, ¶ 16, 86 P.3d 944, 949-50 (App. 2004) (explaining that arguments raised for the first time at oral argument are untimely and waived).

<sup>3</sup> Husband maintains that there are legitimate reasons for the dramatic increase in IRG's value in the intervening ten months that have nothing to do with fraud. Nonetheless, for ease of

precluded from rescinding the settlement agreement. Wife argues that this was error because she did not seek rescission of the settlement agreement, she sought damages for fraud.

¶19 Wife acknowledges that there is no question that ratification took place here, the only question is the legal effect of her ratification. We review issues of law de novo. *Burnette v. Bender*, 184 Ariz. 301, 304, 908 P.2d 1086, 1089 (App. 1995).

¶20 When one is fraudulently induced to enter into a contract, one may either rescind the contract or affirm it and sue for damages, but one cannot do both. *Jennings v. Lee*, 105 Ariz. 167, 171, 461 P.2d 161, 165 (1969). Wife claims she elected to pursue a damage claim, even though her First Amended Complaint seeks both damages and rescission.

¶21 Although Wife does not use the word rescission, ¶ 84 of the First Amended Complaint provides: "Mary, therefore, seeks an order declaring the contract void *ab initio* . . ." In her prayer for relief she asks the court to declare that the settlement agreement is "void as a matter of law." Black's Law Dictionary defines "rescission of contract" to mean: "To

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reference only, we will refer to the fact that Wife's share of IRG was valued at \$1 million and IRG sold for \$58 million ten months later as indicative of fraud.

declare a contract void in its inception and to put an end to it as though it never were." Black's Law Dictionary (6th ed. 1991). The trial court's ruling was correct to the extent Wife's complaint sought to rescind the settlement agreement.

¶122 Notwithstanding the foregoing, assuming arguendo that Wife seeks only money damages for the fraud as she argues on appeal, she is nonetheless precluded under the doctrine of ratification from collecting those damages because she affirmed the contract by continuing to accept the benefit of her contractual bargain after discovering the fraud.

¶123 Wife points to *Miller v. Arizona Bank*, 45 Ariz. 297, 43 P.2d 518 (1935), as authority for the proposition that she may affirm the contract and collect money damages.<sup>4</sup> However, Wife misses the point. Unlike Wife, the plaintiffs in *Miller* did not accept the benefits of the contract after discovering the fraud. *Id.* at 312, 43 P.2d at 514 ("As soon as they discovered enough of the facts to warrant the filing of an action, . . . each plaintiff elected to and did disaffirm and rescind the contract of purchase of stock[.]"). Thus, *Miller* simply stands for the basic proposition that Wife had two

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<sup>4</sup> Wife argues that the trial court committed error on the ratification issue because it relied on *Page Investment Co. v. Staley*, 105 Ariz. 562, 468 P.2d 589 (1970), which is a rescission case, and therefore, Wife contends, distinguishable. Yet, *Miller* is also a rescission case.

remedies available to her after she discovered the alleged fraud, rescission or affirmation and a suit for damages. None of the cases cited by Wife hold that after one discovers the fraud, one may affirm the contract by accepting its remaining benefits and then sue for damages.

¶24 In fact, none of the cases cited address the situation we have here, in which the fraudulently induced contract was not fully performed at the time the fraud was discovered, and after discovering the fraud, the party continued to accept all of the benefits under the contract and then filed suit for damages. Under such circumstances, the party, here Wife, has ratified the contract, reaffirming all of its terms, and is then bound by those terms. See *All-Way Leasing, Inc. v. Kelly*, 182 Ariz. 213, 216, 895 P.2d 125, 128 (App. 1994) (one not bound by a contract may ratify the contract and thus become bound by its terms, by affirming the contract through words or deeds); *Mackey v. Philzona Petroleum Co.*, 93 Ariz. 87, 91, 378 P.2d 906, 908 (1963) (“[T]he power of avoidance for fraud or misrepresentation is lost if the injured party after having acquired knowledge, actual or constructive, of the fraud, manifests to the other party an intention to affirm or exercises domination of things, restoration of which is a condition of his power of

avoidance." ).<sup>5</sup> Therefore, having accepted the benefits of the contract after discovering the alleged fraud, Wife is bound by its terms and may not sue for damages.

### **Prejudgment Interest**

¶125 Wife sought to recover prejudgment interest from Husband due to his admitted breach of the settlement agreement. The trial court dismissed Wife's breach of contract claim for failure to state a claim.

¶126 To state a claim for breach of contract, Wife had only to allege a contract, its breach and resulting damages. In reviewing the dismissal of a complaint for failure to state a claim pursuant to Rule 12(b)(6), we accept as true the facts alleged in the complaint and will affirm the dismissal only if the plaintiff would not be entitled to relief under any interpretation of the facts susceptible of proof. *Fidelity Sec. Life Ins. Co. v. State*, 191 Ariz. 222, 224, ¶ 4, 954 P.3d 580, 582 (1998). That said, Husband admits to the contract and its breach. Thus, the only remaining issue is whether Wife is

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<sup>5</sup> The ratification defense has also been deemed a waiver and/or estoppel defense with similar result. *Carrel v. Lux*, 101 Ariz. 430, 443, 420 P.2d 564, 577 (1966) (explaining the general rule that plaintiffs' election to retain the benefits of the contract into which they were fraudulently induced after learning of the fraud constitutes waiver and an estoppel from recovery).

entitled to prejudgment interest as a measure of damages for Husband's admitted breach of the parties' agreement.<sup>6</sup>

¶127 The settlement agreement provides that "Wife relied upon each payment being timely made and has not required interest payment. In order to insure prompt payment, any payment not made on or before the date specified shall incur a 5% penalty." Husband maintains that this provision means that Wife is not entitled to interest; rather, she is entitled only to the 5% penalty he paid in accord with the agreement because the 5% penalty is "in lieu of" interest. We agree that the penalty was an agreement between the parties to encourage Husband to pay the equalization payments in a timely fashion and that Wife was entitled to no interest up until the date that the debt for equalization payments matured.

¶128 According to the settlement agreement, however, Husband's \$800,000 debt to Wife matured on December 31, 2008, when the final \$600,000 equalization payment was due. Alternatively, the agreement provided that the remainder of the unpaid equalization debt was payable immediately upon the sale of IRG. Although the agreement was silent as to whether Wife

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<sup>6</sup> Wife did not allege damages in the body of her First Amended Complaint (and fails to do so in her proposed Second Amended Complaint). She does, however, include in her prayer for relief "interest at the legal rate on all sums not paid but owing from the date of breach until actually paid."



was entitled to interest at maturity if not paid, Arizona law is clear on this issue.

¶129 When a contract provides for a loan to be repaid without interest there is no obligation to pay interest until the debt becomes due. After the debt becomes due and payable, it bears interest at the legal rate. *Palmcroft Dev. Co. v. City of Phoenix*, 46 Ariz. 400, 401, 51 P.2d 921, 921 (1935). If the debt is liquidated, then it bears interest from the date it should have been paid. *Id.*

¶130 The legal rate is fixed by statute at ten percent per annum, "unless a different rate is contracted for in writing, in which event any rate of interest may be agreed to." A.R.S. § 44-1201(A) (2003). Husband argues that the rate of interest agreed to by the parties in this case is zero. We agree that the parties contemplated the payment of zero percent interest up until the date the debt matured. However, the law is well established that a provision for payment of a sum of money without interest applies only to the payment of interest to maturity. After maturity, the debt bears interest at the statutory rate. *Imperial Litho/Graphics v. M.J. Enterprises*, 152 Ariz. 68, 74, 730 P.2d 245, 251 (App. 1986) ("If a definite sum of money is lent to be repaid without interest at the end of a specified time, on failure to pay at that time the lender can

recover judgment for the amount of money so lent, with interest at the legal rate after maturity.”) (quoting 5 *Corbin on Contracts* § 1046 (1964)).

¶31 Such a rule makes sense because prejudgment interest on a liquidated damage claim is a matter of right. See *Fleming v. Pima County*, 141 Ariz. 149, 155, 685 P.2d 1301, 1307 (1974). “Where a party retains and makes use of money belonging to another, equity requires that interest be paid on the money so retained and used.” *Malecky v. Malecky*, 148 Ariz. 121, 122, 713 P.2d 322, 323 (App. 1985).

¶32 The trial court’s dismissal of Wife’s claim for prejudgment interest denied Wife compensation for the loss of the use of the money Husband wrongfully withheld from her. This compensation was an element of her damages against Husband for his admitted breach. See *In re U.S. Currency in Amount of \$26,980.00*, 199 Ariz. 291, 299, ¶ 27, 18 P.3d 85, 93 (App. 2000) (“Prejudgment interest is compensation for the loss of the use of the money and is an element of damages”); see also *Lee Dev. Co. v. Papp*, 166 Ariz. 471, 478, 803 P.2d 464, 471 (App. 1990) (prejudgment interest is akin to “compensation for use by defendant of money to which the plaintiff is entitled”).

¶33 Once the debt matured with the sale of the business, and Husband breached the contract by failing to pay Wife the

