

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. Civ. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



DIVISION ONE  
FILED: 05/10/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

REX EUGENE FRANK, a single man, ) 1 CA-CV 11-0511  
)  
Plaintiff/Appellant, ) DEPARTMENT A  
)

v. )

**MEMORANDUM DECISION**

DARRIN MAURER, a single man, ) (Not for Publication -  
) Rule 28, Arizona Rules  
Defendant/Appellee. ) Of Civil Appellate  
) Procedure)  
)

---

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-052864

The Honorable Brian R. Hauser, Judge (Retired)

**AFFIRMED**

---

Law Offices of Roger D. Smith  
By Roger D. Smith  
Attorneys for Plaintiff/Appellant

Scottsdale

Singer Pistiner, P.C.  
By Jason Pistiner and Robert S. Singer  
Attorneys for Defendant/Appellee

Phoenix

---

**K E S S L E R**, Judge

¶1 Plaintiff/Appellant Rex Eugene Frank ("Frank") appeals the superior court's grant of summary judgment in favor of Defendant/Appellee Darrin Maurer ("Maurer") and Michelle

Williams ("Williams").<sup>1</sup> Frank claims there were genuine issues of material fact that precluded summary judgment. For the following reasons, we affirm.

#### **FACTUAL AND PROCEDURAL HISTORY**

¶12 In July 2010, Frank filed a complaint against Maurer and Williams alleging breach of an oral contract. According to the complaint, in March 2006, Frank was investigating Maurer's and Williams's finances because he was hired to do so by people not parties to this litigation. According to the complaint, Maurer and Williams allegedly contacted Frank and offered to pay him a "considerable amount of money" if he ceased the investigation. Frank also alleged in his complaint that Maurer and Williams discussed several business arrangements including a partnership with Frank. Frank alleged that on August 15, 2006, an agreement was reached wherein Maurer and Williams agreed to pay Frank a "specific sum of money" to cease the investigation. Frank was supposed to be paid by July 15, 2007. Frank alleged that he "fulfilled all of his duties under the agreement" because he "ceased his investigation," but he was never paid.

---

<sup>1</sup> Defendant's last name is spelled "Maurer." We therefore amend the caption and order the use of this caption for all further proceedings on appeal.

**I. Maurer's motion to dismiss.**

¶3 Maurer filed a motion to dismiss based on *res judicata* arguing Frank filed a similar complaint in 2007, alleging an agreement to form a partnership with him in March 2006.<sup>2</sup> The superior court denied the motion stating that "though dismissed, [the previous case] was not reduced to final judgment."

---

<sup>2</sup> In 2007 Frank filed a complaint that stated in relevant part:

In March of 2006, Darrin Maurer contacted Rex Frank to ask that he stop the investigation of him and Michelle Williams. He stated that if Mr. Frank ceased the investigation, they would be willing to form a partnership with Mr. Frank. . . . Rex Frank agreed to a partnership with Darrin Maurer and Michelle Williams . . . . Both defendants agreed to the terms. Rex Frank believed that [Maurer and Williams] had hidden assets in excess of \$2,000,000.00. Under their agreement, Rex Frank was entitled to 1/3 of these assets.

In the earlier litigation, Maurer and Williams filed counterclaims alleging among other things emotional distress, abuse of process, harassment, and theft by extortion. They also filed a motion to dismiss Frank's complaint. In April 2008, the superior court dismissed Frank's complaint in an unsigned minute entry: "The complaint fails to set forth the necessary elements of contract or breach. Further, the complaint that reflects the agreement does not comply with the statute of frauds . . . [and therefore] fails to state a claim pursuant to [Arizona Rules of Civil Procedure] 12(b)." In June 2009, the court entered a final signed order that "dismiss[ed] the case without prejudice for lack of prosecution."

**II. The motions for summary judgment.**

¶4 Maurer then filed a motion for summary judgment, attaching as part of the motion, Frank's complaint, motion for reconsideration, initial disclosure statement, and responses to interrogatories in the previous litigation. In his motion, Maurer argued he was entitled to a judgment as a matter of law based on: (1) illegality; (2) the statute of frauds; (3) failure to establish the necessary elements of a contract; and (4) the statute of limitations. Maurer also filed an affidavit denying the existence of the alleged contract and stating that he never entered into any type of contract with Frank.

¶5 Because we affirm based on the statute of frauds, we discuss only the arguments of the parties on that issue. Maurer argued that the statute of frauds, Arizona Revised Statutes ("A.R.S.") section 44-101(5) (2003), prohibited Frank's claim because the alleged agreement to pay money could not be performed within one year. Maurer claimed that Frank was inventing the current allegations because Frank never disclosed the July 15, 2007 payment date in the prior litigation. Maurer also argued that in the earlier complaint Frank filed statements under oath that the agreement to pay money was formed in March 2006, not August 2006 as he now alleged.

¶6 Frank opposed the motion arguing that there were fact issues in dispute and that Maurer had not met the burden of

proof for summary judgment. On the statute of frauds issue, Frank argued that because the contract to pay money was entered into on August 15, 2006 and breached on July 15, 2007, the statute of frauds was inapplicable. Frank argued the previous lawsuit involved a different agreement that did not include a responsibility to pay money by July 15, 2007, and thus, he did not need to disclose this date. He maintained that Maurer's "primary argument is that [Frank] took a different position in a prior lawsuit and that [Frank] is bound by those positions in this case." Frank explained:

As stated in Exhibit 1 ([Frank's] affidavit in opposition to Maurer's motion for summary judgment),<sup>3</sup> the parties entered the Investigation Contract where [Frank] agreed to terminate an investigation and

---

<sup>3</sup> Frank's affidavit states:

10. I first entered an oral agreement with Maurer and his partner (on August 15, 2006) wherein they agreed to pay me a sum of money by July 15, 2007, if I stopped investigating their financial situation (hereinafter referred to as 'Investigation Contract.')

11. After the parties entered the Investigation Contract, Maurer and his partner also informed me that they liked my determination and competence in investigating them. They said I would be a valuable asset in their business dealings. They offered to enter a partnership with me whereby I would receive one-third of their present assets and future profits. Therefore, after the Investigation Contract was entered, the parties entered a contract to form a partnership (hereinafter referred to as 'Partnership Contract.')

Maurer agreed to pay an amount certain to [Frank]. *Subsequently*, the parties entered another agreement whereby they agreed to form a partnership regarding the profits from various business deals.

[Frank] previously sued Maurer for the partnership profits. . . . The prior lawsuit did not involve the Investigation Contract. Moreover, the prior lawsuit was dismissed without prejudice.

. . . .

. . . [Frank's] positions in the prior lawsuit concerned the partnership claim while the current lawsuit concerns Maurer's promise to pay money to [Frank] in order to induce him to stop his investigation.

While [Frank] could have raised the Investigation Contract in the prior lawsuit, he did not do so.

(Emphasis added).

¶17 Williams filed a separate motion for summary judgment, attaching Frank's prior complaint alleging breach of a partnership agreement and his answers to interrogatories in that matter. Her motion was similar to Maurer's in that she denied entering into any kind of contract with Frank, and argued the contract lacked requisite elements including mutuality and specificity of terms. She also argued that Frank's current complaint conflicted with his allegations in the previous lawsuit. Frank moved to strike Williams's motion for a failure to attach a separate statement of facts and because she did not file an answer to the complaint.

**III. Entry of summary judgment and Frank's motion for new trial.**

¶8 The superior court held oral argument on the motions for summary judgment and Frank's motion to strike Williams's motion. Frank did not appear at the argument. The court denied Frank's motion to strike Williams's motion and granted summary judgment for Maurer and Williams.

¶9 Frank moved for new trial arguing that Maurer and Williams failed to establish the facts were undisputed and that Williams's motion was deficient. He argued that because Maurer's affidavit stated that Maurer did not enter a contract with Frank, it created a fact dispute. Frank argued that he did not take an inconsistent position in the previous lawsuit because the current action involved a different oral agreement and only a jury could decide if his statements were inconsistent.

¶10 On June 2, 2011, the superior court held oral argument on the motion for new trial and denied the motion in a minute entry. On June 17, 2011, the court entered a final signed judgment granting the motions for summary judgment. The court stated it considered all of the pleadings filed in the case and found: (1) that the facts in the complaint are "not supported by even a scintilla of evidence and are contradictory to previously sworn statements by [Frank]"; (2) assuming the truth of the

facts alleged, Frank "failed to set forth the necessary elements for the formation of a contract, specifically specification of terms and consideration"; and (3) the "contract would be null and void pursuant to illegality as [Frank] would have engaged in extortion and bribery." Thus, the court granted summary judgment "for every single reason set forth in the Motion for Summary Judgment and Reply." The court also awarded Maurer attorneys' fees and costs.

¶11 Frank timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) (2003), -2101(A)(1) (Supp. 2011).

#### ISSUE ON APPEAL

¶12 Frank argues that there were disputed fact issues precluding summary judgment including Maurer's and Williams's denials of the existence of a contract.<sup>4</sup> Frank essentially reasserts his arguments in response to Maurer's motion for summary judgment. As to the statute of frauds issue, Frank argues the contract is not prohibited by the statute of frauds because the contract to pay money was allegedly entered into on August 15, 2006 with payment due by July 15, 2007; thus, it could be performed in less than one year and Maurer did not

---

<sup>4</sup> Williams has not appeared in this appeal. In the exercise of our discretion, we do not consider her absence to be a confession of error. *Evertsen v. Indus. Comm'n*, 117 Ariz. 378, 383, 573 P.2d 69, 74 (App. 1977), approved and adopted by the supreme court, 117 Ariz. 342, 572 P.2d 804 (1977).



present evidence proving the allegations were false.<sup>5</sup> Frank also asserts that Maurer's "arguments for summary judgment were based in large part on the erroneous theory that the prior case was binding" and that his prior case was dismissed without prejudice or the entry of a final judgment, thus, *res judicata* does not bar his claim.

¶13 The undisputed material facts in this case establish that the oral contract in this case falls within the statute of frauds. Accordingly, we affirm the grant of summary judgment.

#### DISCUSSION

##### I. Standard of review and standard for summary judgment.

¶14 Under Rule 56(c) of the Arizona Rules of Civil Procedure, summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Summary judgment "should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of the evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim." *Orme*

---

<sup>5</sup> Frank also argues: (1) the three-year statute of limitations pursuant to A.R.S. § 12-543 (2003) does not bar his claim because the alleged breach of contract occurred July 15, 2007 and he filed suit on July 12, 2010; (2) the elements establishing the existence of a contract and breach were properly alleged; and (3) because Frank disclosed his investigatory findings to the bankruptcy court before the contract was allegedly entered into he did not extort Maurer.

*Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). A "scintilla" of evidence, or evidence that creates the "slightest doubt," is insufficient to withstand summary judgment. *Id.*

¶15 We review *de novo* whether summary judgment is warranted, including whether genuine issues of material fact exist and whether the superior court properly applied the law. *Dreamland Villa Cmty. Club, Inc., v. Raimey*, 224 Ariz. 42, 46, ¶ 16, 226 P.3d 411, 415 (App. 2010). We view the facts and all reasonable inferences in the light most favorable to the appellant. *Ruelas v. Staff Builders Pers. Servs., Inc.*, 199 Ariz. 344, 345, ¶ 2, 18 P.3d 138, 139 (App. 2001). We will affirm the superior court if its determination "is correct for any reason, even if that reason was not considered" by the court. *Hill v. Safford Unified Sch. Dist.*, 191 Ariz. 110, 112, 952 P.2d 754, 756 (App. 1997); accord *Gary Outdoor Adver. Co. v. Sun Lodge, Inc.*, 133 Ariz. 240, 242, 650 P.2d 1222, 1224 (1982) (stating "trial court will be affirmed when it reaches the correct conclusion even if it does so for an incorrect reason").

**II. Frank's complaint is barred by the statute of frauds.**

¶16 The crux of the statute of frauds issue is whether the agreement to pay money alleged in this case was to be performed within one year of its formation because the statute of frauds prohibits the enforcement of an oral "agreement which is not to

be performed within one year from the making thereof." A.R.S. § 44-101; compare *Exec. Towers v. Leonard*, 7 Ariz. App. 331, 332-33, 439 P.2d 303, 304-05 (1968) (determining that where agreement for lease of an apartment was for longer than one year, it was required to be in writing and oral agreement could not be enforced), with *Neyens v. Donato*, 67 Ariz. 1, 5-6, 188 P.2d 588, 591-92 (1948) (determining agreement to render services was limited to six months to a year, and thus, not barred by statute of frauds).

¶17 In his first action against Maurer and Williams, Frank contended that the partnership agreement was entered into in March 2006. See *supra* ¶ 3. In the current litigation, he states that the agreement to pay money was the *first* agreement the parties entered into but contradicts his earlier statement by saying that the agreement to pay money was entered into in August 2006. Because Frank is precluded from changing his prior sworn statements about the date of the alleged partnership agreement to avoid summary judgment, the trial court did not err in granting summary judgment. See *Wright v. Hills*, 161 Ariz. 583, 587-88, 780 P.2d 416, 420-21 (App. 1989) (overruled on other grounds as stated in *James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Prot.*, 177 Ariz. 316, 319, 868 P.2d 328, 332 (App. 1993)).

**A. Frank's prior verified statements are admissible evidence against him in the current litigation.**

¶18 Frank seems to argue that because *res judicata* does not apply to his current claim, his verified statements in the previous litigation should not be considered. We disagree. In the previous matter, Frank filed a verified complaint, an initial disclosure statement, and answers to interrogatories that all state he signed the statements "being first duly sworn, upon his oath." The sworn complaint and disclosures are admissible evidence against Frank. See *Ryan v. San Francisco Peaks Trucking Co.*, 228 Ariz. 42, 46, ¶¶ 15-17, 262 P.3d 863, 867-68 (App. 2011) (determining in a tort case that disclosure statements prepared by plaintiff's attorney were admissible as evidentiary admissions); *Henry ex rel. Estate of Wilson v. HealthPartners of S. Ariz.*, 203 Ariz. 393, 396, ¶ 9, 55 P.3d 87, 90 (App. 2002) (determining in a tort case that plaintiff's factual allegations in her complaint were evidentiary admissions); see also Ariz. R. Evid. 801(d)(2) ("The statement is offered against an opposing party and . . . (B) is one the party manifested that it adopted or believed to be true; [or] (C) was made by a person whom the party authorized to make a statement on the subject . . . ."). Thus, Frank's factual allegations can be considered for summary judgment purposes irrespective of the applicability of *res judicata*.

- B. Frank's claim that the money contract was entered in August 2006 directly contradicts his previous sworn statement that the partnership contract was entered in March 2006.

¶19 Frank maintains that the parties entered two oral contracts—first, the agreement to pay him money and then later, a partnership agreement. To avoid summary judgment dealing with the alleged money contract, Frank states in his affidavit in this case that the money contract was entered into in August 2006, *but prior to the partnership contract*. Frank states:

*I first entered an oral agreement with Maurer and his partner (on August 15, 2006) wherein they agreed to pay me a sum of money by July 15, 2007, if I stopped investigating their financial situation (hereinafter referred to as 'Investigation Contract.'). . . . After the parties entered the Investigation Contract, Maurer and his partner . . . offered to enter a partnership with me whereby I would receive one-third of their present assets and future profits. Therefore, after the Investigation Contract was entered, the parties entered a contract to form a partnership . . . .*

(Emphases added.)

¶20 Frank's affidavit in this case directly conflicts with his sworn statements in the prior litigation that the partnership contract was entered into in March 2006. Because his statement that the partnership contract was entered in March 2006 is binding upon him for summary judgment purposes, his admission in this case that the partnership contract occurred after the money contract bars the money contract under the

statute of frauds. See *Wright*, 161 Ariz. at 587-88, 780 P.2d at 420-21 (disregarding affidavit in opposition for summary judgment that directly contradicted prior deposition testimony).

¶21 In Frank's initial disclosure statement in the prior litigation he stated the factual basis for his claim:

In *March of 2006*, Mr. Maurer called Mr. Frank and asked why Mr. Frank was investigating him. . . . Mr. Maurer asked what it would take to end the investigation and Mr. Frank asked what did Mr. Maurer have in mind. *Mr. Maurer then offered a partnership to Mr. Frank . . . .* Mr. Maurer said he would offer him a partnership in nothing, since he did not have anything. Mr. Frank answered the (sic) he believed Mr. Maurer has some \$2,000,000 in hidden assets and that what [Mr. Frank] would want was a third of those assets, with a third for Mr. Maurer and a third for Michelle Williams. Mr. Frank states that Mr. Maurer agreed to a partnership to a third of nothing and Mr. Frank told Mr. Maurer that if he attempted to move assets . . . he would sue to collect his third . . . . *Mr. Frank states that he also spoke briefly with Michelle Williams, who was with Mr. Maurer during the call, to confirm the partnership and her understanding of the partnership.*

(Emphases added.)

¶22 This sworn statement establishes that in March 2006, an agreement was reached wherein Frank would cease his investigation in exchange for a partnership interest. When that is combined with Frank's statement in his current affidavit that the partnership contract was entered into *after* the money contract, it means that the money contract occurred before March

2006, and as he admits here, the payment date was July 2007, more than one year after the entry of the contract.

¶123 Frank denies that these statements are inconsistent and contends that the parties only entered negotiations in March, but did not enter the partnership contract until August. This explanation is not supported by the record. As Frank stated in the prior litigation: (1) "In March of 2006, Mr. Maurer called Mr. Frank"; (2) the parties "agreed to a partnership"; and (3) Frank "also spoke briefly with Michelle Williams, who was with Mr. Maurer *during the call, to confirm the partnership.*" (Emphasis added.)

¶124 This direct contradiction is not merely a discrepancy that would affect Frank's credibility at trial. It is inherently contradictory such that no reasonable fact-finder could resolve the issue in Frank's favor. Thus, we disregard Frank's affidavit insofar as it is irreconcilable with his earlier sworn statement. See *Wright*, 161 Ariz. at 587-88, 780 P.2d at 420-21 (disregarding affidavit in opposition to summary judgment that directly contradicted prior deposition testimony where there was no evidence the affiant was confused or lacked access to material facts).

**C. Oral contracts and the statute of frauds.**

¶125 The facts establish that the money contract predated the partnership contract and the partnership contract was

entered in March 2006. The money contract had a payment date more than one year after March 2006.<sup>6</sup> Accordingly, the oral contract "is not to be performed within one year from the making" and is unenforceable under A.R.S. § 44-101(5).

#### **ATTORNEYS' FEES AND COSTS ON APPEAL**

¶26 Maurer requests an award of costs and attorneys' fees on appeal pursuant to A.R.S. § 12-341.01(A) (2003) which provides: "In any contested action arising out of a contract . . . the court may award the successful party reasonable attorney fees." A party is entitled to attorneys' fees pursuant to A.R.S. § 12-341.01(A) "if the court finds that the contract on which the action is based does not exist." *Berthot v. Sec. Pac. Bank of Ariz.*, 170 Ariz. 318, 324, 823 P.2d 1326, 1332 (App. 1992). Here, we assume for the purposes of the statute of frauds that the contract existed, but it was not enforceable. Accordingly, the claim arises out of contract for purposes of the attorneys' fee statute. In the exercise of our discretion we award Maurer his attorneys' fees and costs on appeal upon his

---

<sup>6</sup> Even if we assume that the money contract was entered in August 2006, as Frank claims, his claim still fails. Under that analysis, the money contract would not be supported by consideration because Frank had already agreed to "cease his investigation" in consideration for the March 2006 partnership contract. See *Leone v. Precision Plumbing & Heating of S. Ariz., Inc.*, 121 Ariz. 514, 515, 591 P.2d 1002, 1003 (App. 1979) ("A promise lacks consideration if the promisee is under a pre-existing duty to counter-perform.").



timely compliance with Rule 21 of the Arizona Rules of Civil Appellate Procedure.

**CONCLUSION**

¶27 There are no genuine issues of material fact precluding summary judgment. As a matter of law, Frank cannot prevail on the alleged oral contract. We affirm the superior court's judgment in favor of Maurer and Williams.

/S/  
\_\_\_\_\_  
DONN KESSLER, Judge

CONCURRING:

/S/  
\_\_\_\_\_  
ANN A. SCOTT TIMMER, Presiding Judge

/S/  
\_\_\_\_\_  
PATRICIA K. NORRIS, Judge