IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

PNC BANK, N.A., A NATIONAL BANKING ASSOCIATION,
Plaintiff/Appellant/Cross-Appellee,

v.

LESLIE A. STROMENGER FKA LESLIE A. MADRIL
NKA ALANNAH TAYLOR ARIEL AND MATTHEW J. STROMENGER,
Defendants/Appellees/Cross-Appellants.

No. 2 CA-CV 2015-0135
Filed August 22, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20127052
The Honorable D. Douglas Metcalf, Judge

AFFIRMED

COUNSEL

Gurstel Chargo PA, Scottsdale
By Wendy M. Gillott and Brian Williamson
Counsel for Plaintiff/Appellant/Cross-Appellee

Alannah Taylor Ariel, Las Vegas, Nevada
In Propria Persona

Matthew J. Stromenger, Tucson
In Propria Persona

MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Miller concurred.

H O W A R D, Presiding Judge:

¶1 PNC Bank appeals from the trial court's order granting summary judgment, dismissing its claims for breach of contract, account stated, and unjust enrichment against Alannah T. Ariel and Matthew Stromenger (collectively, "appellees").[1] It claims the court erred in applying Pennsylvania's statute of limitations, pursuant to a choice-of-law provision in the parties' contract. Ariel cross-appeals from the court's denial of her motion to amend her counterclaim and answer and the court's order vacating entry of default.[2] Because the contract's choice-of-law provision was valid and effective, and because the court did not abuse its discretion in denying Ariel's motion to amend or vacating the entry of default, we affirm the judgment of the trial court.

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[1]Ariel and Stromenger initially filed a joint answer to PNC Bank's complaint. The trial court, however, struck Ariel from that answer and, thereafter and on appeal, she and Stromenger have represented themselves individually.

[2]The trial court denied Ariel's motion for default judgment. Its order effectively amounted to one vacating the entry of default. *Master Fin. Inc. v. Woodburn*, 208 Ariz. 70, ¶¶ 4-5, 90 P.3d 1236, 1237-38 (App. 2004). We will refer to this order as such in this decision.

Factual and Procedural Background

¶2 "On appeal from a grant of summary judgment, we view all facts and reasonable inferences therefrom in the light most favorable to the party against whom judgment was entered." *Villa De Jardines Ass'n v. Flagstar Bank, FSB*, 227 Ariz. 91, ¶ 2, 253 P.3d 288, 291 (App. 2011), *quoting Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 2, 965 P.2d 47, 49 (App. 1998). In September 2007, appellees contracted to receive a student loan from PNC Bank. Those funds were disbursed, but by November 2008,[3] appellees were in default.

¶3 In November 2012, PNC Bank sued appellees for breach of a promissory note, account stated, and unjust enrichment. Appellees answered and counterclaimed for malicious prosecution, abuse of process, breach of fiduciary duty, defamation, intentional infliction of emotional distress, and false light. PNC Bank moved to dismiss these claims, and the trial court dismissed all counterclaims "except for . . . abuse of process as to Matthew Stromenger." It also struck Ariel from the answer and counterclaim. In January 2014, Ariel filed an answer and counterclaim similar to that filed originally.

¶4 PNC Bank did not reply to Ariel's answer and counterclaim, so she filed an "application for entry of default" and thereafter moved for entry of default judgment "for a sum certain." *See* Ariz. R. Civ. P. 55(b)(1). The trial court ultimately denied the motion for default judgment, effectively vacating the entry of default, reasoning that

> [b]ecause the Court only ordered [Ariel] to file an answer and because [the court] had previously dismissed . . . Stromenger's counterclaim that raised substantially the same issues as [Ariel's] . . . it was reasonable for [PNC Bank] to believe that it did not

[3]The record is unclear on the exact date of default, but as mentioned below, PNC Bank admitted that it filed this action more than four years after the default occurred.

> need to reply to [Ariel's] counterclaim as that counterclaim was not properly before the Court.

¶5 Stromenger eventually filed a motion to dismiss the action against appellees on the ground that Pennsylvania's applicable four-year statute of limitations had run. *See* 42 Pa. Const. Stat. § 5525. Ariel joined this motion. The court construed the motion as one for summary judgment. During oral argument on the motion, PNC Bank conceded that the date of default was more than four years before it filed suit. While the motion for summary judgment was pending, Ariel filed a motion to amend her answer/counterclaim to add a defense of lack of standing and to expand her counterclaim.

¶6 The trial court granted summary judgment to appellees on the statute of limitations ground, and to PNC Bank on the remaining abuse of process counterclaim, but denied Ariel's motion to amend her answer/counterclaim. In deciding to grant appellees' motion for summary judgment, the court determined that, although Arizona's six-year limitation period, A.R.S. § 12-548, would apply if the at-issue contract had been executed in Arizona, it did not apply because the promissory note in this case had been "executed in Pennsylvania because the parties included language in the promissory note to say it was formed in Pennsylvania." The court denied Ariel's motion to amend her counterclaim on the grounds that it came "too late in the life of this lawsuit" noting that it had continued the original trial date to allow appellees to argue the statute of limitations issue. These appeals followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A), 12-2101(A)(1), and 12-2102(A).[4]

[4] *See Wyckoff v. Mogollon Health Alliance*, 232 Ariz. 588, ¶ 4, 307 P.3d 1015, 1017 (App. 2013) ("[B]ecause we have jurisdiction to consider the trial court's grant of summary judgment under § 12-2101(A)(1), we likewise have jurisdiction to consider all issues related to this judgment that were not separately appealable.").

Choice-of-Law Provision

¶7 PNC Bank argues that the trial court erred by finding that this contract was executed in Pennsylvania and not subject to § 12-548. We review choice-of-law questions de novo. *Swanson v. Image Bank, Inc.*, 206 Ariz. 264, ¶ 6, 77 P.3d 439, 441 (2003). We also review "questions of statutory interpretation and questions of law regarding statute of limitations defenses" de novo. *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶ 5, 181 P.3d 219, 225 (App. 2008). And we review the interpretation of a contract de novo. *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, ¶ 9, 218 P.3d 1045, 1050 (App. 2009). We may affirm the trial court "if it is correct for any reason." *Forszt v. Rodriguez*, 212 Ariz. 263, ¶ 9, 130 P.3d 538, 540 (App. 2006).

¶8 "Arizona courts apply the [Restatement (Second) of Conflict of Laws (1971)] to determine the applicable law in a contract action." *Swanson*, 206 Ariz. 264, ¶ 6, 77 P.3d at 441. "If a contract includes a specific choice-of-law provision, we must determine whether that choice is 'valid and effective' under Restatement § 187." *Id.*, *quoting Cardon v. Cotton Lane Holdings, Inc.*, 173 Ariz. 203, 208, 841 P.2d 198, 203 (1992). Restatement § 187(1) provides: "The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue." *See Swanson*, 206 Ariz. 264, ¶ 10, 77 P.3d at 442 ("[t]he 'particular issue' [in a § 187(1) analysis] is whether parties may contractually waive [a] statutory right or claim" under Arizona law), *quoting Swanson v. Image Bank, Inc.*, 202 Ariz. 226, ¶ 25, 43 P.3d 174, 182 (App. 2002), *vacated in part on other grounds*, 206 Ariz. 264, ¶¶ 10-11, 77 P.3d at 442-43.

¶9 The at-issue contract provision comes from the promissory note that PNC Bank provided to appellees. It reads:

> I[, the Borrower,] understand that you[, the Lender,] are located in Pennsylvania and that this Credit Agreement will be entered into in the same state. Consequently, the provisions of this Credit Agreement will be

> governed by federal law and the laws of the Commonwealth of Pennsylvania, *without regard to conflict of law rules.* (Emphasis added.)

Section 5525(a)(7), Pa. Cons. Stat., provides a four-year statute of limitations for actions on a contract for a "negotiable or nonnegotiable bond, note or similar instrument in writing." But § 12-548 provides a six-year statute of limitations for actions for debt based on a written contract "executed" in Arizona. Thus, if parties may explicitly contract to shorten the statute of limitations applied under Arizona law, this choice-of-law provision is "valid and effective." *Swanson*, 206 Ariz. 264, ¶ 6, 77 P.3d at 441, *quoting Cardon*, 173 Ariz. at 208, 841 P.2d at 203; *see also* Restatement § 187(1).

¶10 Subject to some limitations, parties may generally shorten the statute of limitations by express contractual provision. *Angus Med. Co. v. Digital Equip. Corp.*, 173 Ariz. 159, 166-68, 840 P.2d 1024, 1031-33 (App. 1992) (suggesting provision shortening statute of limitations was potentially enforceable and not unconscionable); *see also Swanson*, 206 Ariz. 264, ¶ 12, 77 P.3d at 443 ("Generally speaking, however, parties do have the power to determine the terms of their contractual engagements."); *Nangle v. Farmers Ins. Co. of Ariz.*, 205 Ariz. 517, ¶ 17, 73 P.3d 1252, 1255 (App. 2003) (reduction in limitation period allowed contractually); *Zuckerman v. Transamerica Ins. Co.*, 133 Ariz. 139, n.5, 650 P.2d 441, 445 n.5 (1982) (same). And PNC Bank has not cited any Arizona case holding to the contrary. Thus § 187(1) applies, and the choice-of-law provision is "valid and effective." *Swanson*, 206 Ariz. 264, ¶ 6, 77 P.3d at 441, *quoting Cardon*, 173 Ariz. at 208, 841 P.2d at 203.

¶11 Turning to the facts at hand, the at-issue contract contains a valid and effective choice-of-law provision, which manifests the intent of the parties to have Pennsylvania law govern any disputes, regardless of choice-of-law rules. Thus, the four-year period set forth in § 5525(a)(7), Pa. Cons. Stat., applies. The parties, by choosing to apply Pennsylvania law, essentially chose to contract for a shorter statute of limitations—a contractual provision we must give effect. *See Zuckerman,* 133 Ariz. at 143 n.5, 650 P.2d at 445 n.5; *Desarrollo Immobiliario y Negocios Industriales De Alta Tecnologia De*

Hermosillo, S.A. De C.V. v. Kader Holdings Co., 229 Ariz. 367, ¶ 24, 276 P.3d 1, 8 (App. 2012); *Angus Med.*, 173 Ariz. at 166-68, 840 P.2d at 1031-33. Thus, the trial court correctly applied Pennsylvania's statute of limitations.

¶12 But PNC Bank contends that Restatement § 6 requires us to apply § 12-548 notwithstanding the contract's choice-of-law provision. Section 6 dictates that a court should "follow a statutory directive of its own state on choice of law." Section 12-548(A) provides for a six-year statute of limitations for contracts "executed" in Arizona and § 12-548(B) provides that, "[i]f there is a conflict between another jurisdiction and this state relating to the statute of limitations for a debt action [under] this section, this section applies." PNC Bank reasons that because a court must follow a statutory directive of its own state, and § 12-548(B) amounts to a statutory directive, this court should ignore the choice-of-law provision in PNC Bank's own contract. But appellees counter that this reasoning does not apply because § 12-548 only applies to contracts "executed" in Arizona and that this contract provides that it is "entered into and executed" in Pennsylvania.

¶13 Both parties intentionally contracted, "without regard to conflict of law rules," to use Pennsylvania law that applies a shorter statute of limitations in cases such as this. "A general principle of contract law is that when parties bind themselves by a lawful contract the terms of which are clear and unambiguous, a court must give effect to the contract as written." *Desarrollo Immobiliario*, 229 Ariz. 367, ¶ 24, 276 P.3d at 8, *quoting Grubb & Ellis Mgmt. Servs., Inc. v. 407417 B.C., L.L.C.*, 213 Ariz. 83, ¶ 12, 138 P.3d 1210, 1213 (App. 2006). And when interpreting a contract, the objective is "to determine and make effective the Intention of the Contracting Parties." *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 157 n.5, 854 P.2d 1134, 1143 n.5 (1993), *quoting* 6 John E. Murray, Jr. & Timothy Murray, *Corbin on Contracts Interim Edition* § 572B, at 68 (Supp. 1992).

¶14 By including the choice-of-law provision, the parties evinced their intention that the contract be governed by Pennsylvania law. Thus, in interpreting the phrase "entered into in [Pennsylvania]," we must attempt to give effect to the parties' intent

that Pennsylvania law would apply. *Desarrollo Immobiliario*, 229 Ariz. 367, ¶ 24, 276 P.3d at 8; *Potter v. U.S. Specialty Ins. Co.*, 209 Ariz. 122, ¶ 7, 98 P.3d 557, 559 (App. 2004) ("As with any question of contract interpretation, our goal is to effectuate the parties' intent, giving effect to the contract in its entirety."), *quoting Tenet Healthsystem TGH, Inc. v. Silver*, 203 Ariz. 217, ¶ 7, 52 P.3d 786, 788 (App. 2002). We thus interpret "entered into" to mean "executed" for the purposes of § 12-548(A), thereby effectuating the parties' contractual intent to apply Pennsylvania law.

¶15 PNC Bank argues that "entered into" does not mean "executed," and cites to the dictionary definitions of the terms. It urges us to construe "entered into" to mean that "steps had been taken 'to form a part of or a component of' a binding contract." *See Enter*, Webster's New World Dictionary (5th ed. 2010).

¶16 Although dictionary definitions may assist in determining the parties' intent, here their intent is clear without resorting to such. Using dictionary definitions to defeat the parties' intent would violate this principle. *See Potter*, 209 Ariz. 122, ¶¶ 6-7, 98 P.3d at 559 (parties' intent controls over "warring dictionary definitions" when interpreting contractual provisions).

¶17 Moreover, our interpretation does not contradict but is supported by the dictionary definitions. To "enter" into an agreement means "[t]o become a party to" and "execute" means either "to perform or complete (a contract or duty)" or to "make (a legal document) valid by signing; to bring (a legal document) into its final, legally enforceable form." *Enter*, *Execute*, Black's Law Dictionary (10th ed. 2014). "Party" is defined as "[s]omeone who takes part in a transaction." *Party*, Black's Law Dictionary (10th ed. 2014). Thus, the plain language of the contract expresses the intention of PNC Bank and appellees to become parties to the contract in Pennsylvania, thereby bringing the contract into its final, legally enforceable form, in Pennsylvania.

¶18 *Steward v. Atlantic National Bank of Boston*, 27 F.2d 224 (1928), on which PNC Bank relies, does not support its position that this contract was executed in Arizona. The contract involved in that

case did not have a choice-of-law provision and the court was not attempting to fulfill the parties' intent.

¶19 Here, § 12-548 does not apply to this contract because it was not "executed" in Arizona. Furthermore, Arizona has not expressed a "materially greater interest in the application of its own statute of limitation," as PNC Bank argues, for the same reason. Therefore, Restatement § 6 does not mandate that § 12-548(A) apply.

Cross-Appeal

Motion for Default Judgment

¶20 Ariel separately appeals from the trial court's order vacating the entry of default. She argues that because PNC Bank did not file a reply to her counterclaims and "did not file an answer in opposition to the application" for entry of default or her motion for default judgment, PNC Bank defaulted and subsequently consented to the application for entry of default and motion for default judgment, relying on Rule 7.1(a), Ariz. R. Civ. P. "The trial court has broad discretion in deciding whether to vacate a[n entry of default], and this court will not disturb the trial court's ruling absent a clear abuse of discretion." *BYS Inc. v. Smoudi*, 228 Ariz. 573, ¶ 14, 269 P.3d 1197, 1201 (App. 2012).

¶21 Rule 12(a)(2), Ariz. R. Civ. P., requires the plaintiff to file a reply to a counterclaim within twenty days after service. Rule 55(a), Ariz. R. Civ. P., provides that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these Rules, the clerk shall enter that party's default" after ten days' notice. Once the clerk enters a default, a plaintiff may, "for a sum certain," move the court to enter a default judgment. Ariz. R. Civ. P. 55(b). Otherwise, a hearing is required. *Id.*

¶22 But Rule 7.1, on which Ariel relies, does not apply to the entry of default under Rule 55(a). And, as to the motion for judgment, Rule 7.1 "is not mandatory, and the failure to respond does not in and of itself authorize a judgment against the nonmoving party." *Zimmerman v. Shakman*, 204 Ariz. 231, ¶ 21,

62 P.3d 976, 982 (App. 2003); *see* Ariz. R. Civ. P. 7.1(b) ("non-compliance [with Rule 7.1] *may* be deemed a consent to the denial or granting of the motion, and the court *may* dispose of the motion summarily") (emphasis added). PNC Bank therefore did not consent to the entry of the default judgment and the trial court did not abuse its discretion in considering PNC Bank's response to the motion for default judgment.

¶23 Ariel next appears to argue that the trial court erred by vacating the entry of default because "no valid reason was ever provided to the court" to justify vacating the entry of default. But, "[f]or good cause shown the court may set aside an entry of default." Ariz. R. Civ. P. 55(c). "The test of good cause is the same for an entry of judgment or default." *Harper v. Canyon Land Dev., LLC*, 219 Ariz. 535, ¶ 9, 200 P.3d 1032, 1036 (App. 2008), *quoting Webb v. Erickson*, 134 Ariz. 182, 185-86, 655 P.2d 6, 9-10 (1982). A court may vacate an entry of default if a party can "show that it sought relief from the judgment promptly, that the failure to timely answer the complaint was excusable under [Rule 55(c)] and that it had a meritorious defense to the action." *BYS Inc.*, 228 Ariz. 573, ¶ 14, 269 P.3d at 1201.

¶24 In vacating the entry of default, the trial court stated PNC Bank could have concluded it did not need to file a reply to the counterclaim because Ariel had only been granted permission to file an answer, and the counterclaim raised issues that had previously been dismissed. It therefore could have concluded the counterclaim was not properly before the court. Further, the court determined any confusion was due to Ariel's actions and she should not benefit from such confusion.

¶25 The trial court did not abuse its discretion in vacating the entry of default on a finding of good cause. Ariz. R. Civ. P. 55(c); *see BYS Inc.*, 228 Ariz. 573, ¶ 14, 269 P.3d at 1201. PNC Bank was present and active throughout the litigation, the case had been in arbitration for part of the relevant time, the court found that PNC Bank reasonably ignored the counterclaims, and it had a meritorious defense to the counterclaims because the court "had previously dismissed Mr. Stromenger's counterclaim that raised substantially the same issues." *See BYS Inc.*, 228 Ariz. 573, ¶ 14,

269 P.3d at 1201. We also note that "[t]he law favors resolution on the merits, and therefore if the trial court has doubt about whether to vacate a default judgment, it should rule in favor of the moving party." *Daou v. Harris*, 139 Ariz. 353, 359, 678 P.2d 934, 940 (1984).

Motion to Amend

¶26 Ariel argues the trial court erred by not allowing her to amend her answer and counterclaim to add new claims. A court should grant motions to amend the pleadings "unless the court finds undue delay in the request, bad faith, undue prejudice, or futility in the amendment." *Tumacacori Mission Land Dev., Ltd. v. Union Pac. R.R. Co.*, 231 Ariz. 517, ¶ 4, 297 P.3d 923, 925 (App. 2013), *quoting MacCollum v. Perkinson*, 185 Ariz. 179, 185, 913 P.2d 1097, 1103 (App. 1996). "We review a trial court's denial of a motion to amend a complaint for an abuse of discretion." *Id*.

¶27 In denying Ariel's motion to amend, the trial court noted it had not "granted her leave to file a new counterclaim," but had only "ordered her to file an answer that she signed." The court specifically found undue delay, noting that Ariel's motion to amend was filed "[o]n the Friday before the Monday oral argument on the motions for summary judgment." The court further noted that the matter was originally set for trial in December 2014, but that date was vacated solely to accommodate Ariel and Stromenger's motion for summary judgment. The court did not extend the trial date to allow "additional claims, additional discovery, and then additional dispositive motions." Thus, the court did not abuse its discretion in denying leave to amend.

¶28 Ariel argues, however, that because her pleading was stricken, she did not require leave to amend in order to file her second answer and counterclaim. She also appears to argue that PNC Bank consented to the amendment, citing Rule 15(a)(1)(B), Ariz. R. Civ. P., which allows a first amendment as a matter of course by "written consent of the adverse party."[5] But she did not

[5]Ariel argues that PNC Bank's counsel gave such consent on January 13, 2014. But Rule 15(a)(1)(B) requires written consent, and

raise these arguments to the trial court; she has therefore waived them on appeal. *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 503, 733 P.2d 1073, 1086 (1987) (failure to raise argument below waives argument on appeal).

¶29 Finally, she argues that the new claims she attempted to add had arisen "since the commencement of the original complaint" but "prior to the filing" of her answer and counterclaims. To the extent she meant that these claims accrued after the filing of her answer, Ariel has failed to identify which claims matured or otherwise explain how they did so after her initial answer was filed. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal). Furthermore, Ariel raised this claim for the first time in her motion for reconsideration, therefore it is waived. *Ramsey v. Yavapai Family Advocacy Ctr.*, 225 Ariz. 132, ¶ 18, 235 P.3d 285, 290 (App. 2010) (arguments raised for first time in motion for reconsideration waived).

Attorney Fees

¶30 Both parties to the appeal request fees pursuant to A.R.S. § 12-341.01. Appellees were the successful party on PNC Bank's appeal. But pro se litigants are not entitled to attorney fees, even if they are attorneys. *Munger Chadwick, P.L.C. v. Farwest Dev. and Constr. of the Sw., LLC*, 235 Ariz. 125, ¶ 5, 329 P.3d 229, 231 (App. 2014). Thus, appellees are not entitled to fees.

¶31 As to Ariel's cross appeal, PNC Bank was the successful party. But many of the claims raised by Ariel and Stromenger in their counterclaims arose out of tort and cannot therefore sustain a request for attorney fees under § 12-341.01. To the extent that PNC Bank intended to request fees for any contract claims in the counterclaim, or the tort claims by asserting those tort claims "ar[ose] out of a contract," we exercise our discretion to deny the

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such consent is not apparent in the record. Further, that date was before Ariel filed her first answer and counterclaim.

request for fees. A.R.S. § 12-341.01(A) ("[T]he court may award . . . fees.").

Disposition

¶32 Based on the foregoing, the judgment of the trial court is affirmed.