DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

RESORT FUNDING, L.L.C.,	)	1 CA-CV 11-0069
	)	
Plaintiff/Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
CANYONVIEW DEVELOPMENT, L.P.,	)	Rule 28, Arizona Rules
	)	of Civil Appellate
Defendant/Appellant.	)	Procedure)
	)	
DALE GOODMAN,	)	
	)	
Receiver/Appellee,	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-012608

The Honorable Larry Grant, Judge

AFFIRMED

Quarles & Brady, LLP — Phoenix
By C. Bradley Vynalek
And Lori Winkelman
And
Venable, LLP — Baltimore, Maryland
By Brent W. Procida
Attorneys for Plaintiff/Appellee Resort Funding, LLC

Jackson White, PC — Mesa
By J. Grant Walker
And Kelly G. Black
Attorneys for Defendant/Appellant Canyonview Development, LP

Kelhoffer Manolio & Firestone, PLC Scottsdale
By Veronica L. Manolio
Attorneys for Receiver/Appellee Dale Goodman

O R O Z C O, Judge

¶1 Appellant Canyonview Development, L.P. (Canyonview) appeals: (1) the order dismissing Canyonview's counterclaims against Appellee Resort Funding, L.L.C. (Resort Funding); (2) the trial court's failure to rule on and/or its denial of Canyonview's partial motion for summary judgment; (3) the dismissal of Canyonview's crossclaims against Appellee Receiver Dale Goodman (Receiver); (4) an order exonerating the bond of the Receiver; (5) an order terminating the receivership and releasing the Receiver from the action; and (6) a protective order barring Canyonview from conducting discovery. For the reasons set forth herein, we affirm.

PROCEDURAL AND FACTUAL HISTORY

¶2 Canyonview was the owner and operator of a timeshare resort (Resort Property). In addition to operating the Resort Property, Canyonview's business operations involved a sales and marketing center (Marketing Center), which sold timeshare interests in the Resort Property and serviced the installment contracts of existing timeshare owners (Installment Contracts).

¶3 In 2005, Resort Funding made a secured loan (Loan) to Canyonview for the development of the Resort Property, secured by

a first priority security interest in all of Canyonview's real and personal property (Collateral). The Loan was also secured by a deed of trust recorded against the Resort Property.

¶4 By early 2008, Canyonview was in default of its obligations under the Loan and approached Resort Funding for additional financing. When the parties were unable to reach an agreement regarding a loan modification or the extension of an additional loan, Resort Funding filed a complaint with the superior court seeking the appointment of a receiver to manage the Resort Property. The court appointed the Receiver on a temporary basis in May 2008 and made the receivership permanent in October 2008. Pursuant to the deed of trust, the Resort Property was sold at a trustee's sale in December 2008.[1] In February 2009, the Receiver filed a Motion for Order Approving Receiver's Final Accounting, Discharging Receiver and Exonerating Receiver's Bond.

¶5 In March 2009, Canyonview objected to the final accountings of the Receiver, the discharge of the Receiver and the exoneration of the bond. Canyonview also filed counterclaims against Resort Funding and crossclaims against the Receiver. The

[1] The highest bid at the trustee's sale came from a fully-owned subsidiary of Resort Funding. The subsidiary immediately sold the Resort Property to a third-party purchaser, ARD Phoenix, LLC, on the same day as the trustee sale. ARD Phoenix purchased the property from the subsidiary for approximately $8.4 million more than the subsidiary's bid at the sale.

trial court summarily dismissed the crossclaims against the Receiver. In May 2009, prior to the hearing on Canyonview's objections to the discharge of the Receiver, Canyonview filed a hearing memorandum and petition to surcharge the Receiver. The petition alleged that the Receiver had mismanaged the Resort Property by failing to maintain the Marketing Center, collect payment on existing Installment Contracts, and promote additional sales of timeshare contracts.[2]

¶6 Over the course of several months, hearings were held on Canyonview's objections to discharging the Receiver. After taking the matter under advisement, the trial court found Canyonview's objections to the discharge of the receiver were without merit. The court also terminated the receivership, released the Receiver from the litigation and exonerated the Receiver's bond. In the minute entry terminating the receivership, the court found that the Receiver had not mismanaged the property and that he was not responsible for maintaining the operations in the Marketing Center. However, the court did not rule on or address the petition to surcharge. Canyonview appealed the order exonerating the Receiver's bond and the minute entry terminating the receivership. This court, citing *Cushman v. Nat'l Surety Corp. of New York*, 4 Ariz. App.

[2] The claims in the petition for surcharge were substantively the same as Canyonview's crossclaims against the Receiver.

24, 28, 417 P.2d 537, 541 (1966), dismissed the appeal because an order exonerating a receiver's bond is not an appealable order.[3]

¶7 Meanwhile, Canyonview filed amended counterclaims against Resort Funding, alleging that: (1) Resort Funding breached its contract with Canyonview by failing to make additional loans and fraudulently misrepresented and failed to disclose an appraisal of the Resort Property (the Appraisal) that was favorable to Canyonview; (2) Resort Funding breached its duty to negotiate in good faith by inducing Canyonview to rely to its detriment on representations that Resort Funding would make additional loans when Resort Funding never intended to make additional loans; (3) Canyonview was entitled to declaratory judgment that certain assets purportedly sold at the trustee's sale were not part of the Collateral and were not included in the recorded Notice of Trustee's Sale and Disposition of Personal Property; (4) Canyonview was entitled to declaratory judgment that the trustee's sale was void because the trustee allowed an entity other than the beneficiary of the deed of trust to submit a credit bid; (5) Canyonview was entitled to declaratory judgment that its debt to Resort Funding, pursuant to the Loan, had been satisfied; (6) Resort Funding and/or the Receiver should be

[3] *Cushman* deals only with an order exonerating the bond. It does not address whether an order terminating a receivership may be appealed.

required to submit an accounting for the proceeds of certain assets that Resort Funding and/or the Receiver illegally obtained and negligently or fraudulently sold because those assets belonged to Canyonview and were not part of the Collateral; and (7) Resort Funding and/or the Receiver were liable to Canyonview for damages Canyonview sustained through the closure of the Marketing Center and the depreciation of certain assets during the receivership. After Canyonview filed the amended counterclaims, the court granted Resort Funding's motion for a protective order preventing Canyonview from conducting any discovery in the action.

¶8 In June 2009, Resort Funding filed a motion to dismiss. In August, Canyonview filed a motion for partial summary judgment, claiming that: (1) the trustee's sale was void; (2) Canyonview had a claim to any excess proceeds of the trustee's sale over and above the amount of the debt owed to Resort Funding;[4] (3) because the trustee's sale was void, the subsequent sale of the collateral for a higher price than the bid price at the trustee's sale should be the measure of the fair market value of the property to determine whether there were any excess

[4] Canyonview did not make this argument in its amended counterclaims.

proceeds from the sale;[5] and (4) Canyonview was entitled to a fair market value determination of whether its debt to Resort Funding had been satisfied.

¶9 In September 2010, following a hearing on Resort Funding's motion to dismiss, the court granted the motion and dismissed Canyonview's counterclaims without elaboration. The court did not rule on Canyonview's motion for partial summary judgment.

¶10 Canyonview filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S) section 12-2101.A.1, 3 (Supp. 2011).[6]

DISCUSSION

Canyonview's Claims Against the Receiver

¶11 In its crossclaim and petition to surcharge the Receiver, Canyonview alleged that the Receiver mismanaged the receivership estate by failing to perform the marketing and administrative functions of the timeshare business operations. Arguing that the Receiver had a duty to carry on these marketing and administrative functions pursuant to the order appointing the Receiver, Canyonview contends the trial court erred by dismissing

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[5] Canyonview did not make this argument in its amended counterclaims.

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

the crossclaim, exonerating the Receiver's bond, and terminating the receivership and releasing the Receiver from the action.

¶12 At the outset, we again recognize that we do not have jurisdiction to review the order exonerating the Receiver's bond because it is not an appealable order. *Cushman*, 4 Ariz. App. at 28, 417 P.2d at 541. Furthermore, although Arizona has yet to address the issue, the general legal rule is that an order terminating a receivership is also not an appealable order.[7] *See generally* E. H. Schopler, Annotation, *Appealability of Order Discharging, or Vacating Appointment of, or Refusing to Discharge, or Vacate Appointment of, Receiver,* 72 A.L.R.2d 1075.II.A § 4 (1960); *see also* A.R.S. § 12-2101.A.5.b (providing for appellate review of orders appointing a receiver but not for orders terminating a receivership). However, to the extent the trial court dismissed Canyonview's claims against the Receiver in its April 24, 2009 order and January 20, 2010 minute entry, we find we have jurisdiction to review the dismissal of those claims pursuant to A.R.S. § 12-2101.A.1 and A.3.

¶13 A court may appoint a receiver, pursuant to Arizona Rule of Civil Procedure 66 and A.R.S. § 12-1241 (2003), as an

[7] Canyonview cites A.R.S. § 12-2101.A.5.b for the proposition that this court has jurisdiction to review the trial court's order terminating the receivership and dismissal of its claims against the Receiver. However, that section deals solely with appealing the appointment of a receiver and does not provide us with jurisdiction to review other types of receivership orders.

equitable remedy to protect property subject to pending litigation. *First Phoenix Realty Invs. v. Superior Court*, 173 Ariz. 265, 266, 841 P.2d 1390, 1391 (App. 1992). A receiver is a ministerial officer who derives his authority from the court, *Sawyer v. Ellis*, 37 Ariz. 443, 448, 295 P. 322, 324 (1931), and acts under the appointing court's authority for the benefit of all interested parties. *Midway Lumber, Inc. v. Redman*, 4 Ariz. App. 471, 472, 421 P.2d 904, 905 (1967).

¶14 A receiver acts in a fiduciary capacity and has the duty to exercise reasonable care in the management of the receivership estate. *Midway Lumber*, 4 Ariz. App. at 472, 421 P.2d at 905. We assume for purposes of this appeal, without deciding the legal issue, that a cause of action may lie against a receiver for breach of a fiduciary duty.[8] Accordingly, we will

[8] Based on our review of case law from other jurisdictions, the general rule appears to be that a receiver may be sued in an official or individual capacity for mismanagement or malfeasance during the receivership. *See* 65 Am. Jur. 2d *Receivers* §§ 282, 285, 290, 295-300 (2012) (individually surveying cases from federal and state courts and noting courts have recognized a cause of action against a receiver for breach of fiduciary duty); 20 A.L.R.3d 967 (1968) (same); *see also Erb v. Morasch*, 177 U.S. 584 (1900); *Federal Sav. & Loan Ins. Corp. v. PSL Realty Co.*, 630 F.2d 515 (7th Cir. 1980); *In re Sundance Corp.*, 149 B.R. 641 (Bankr. E.D. Wash. 1993); *Campbell v. Hargraves*, 26 S.W.2d 876 (Ark. 1930); *Aviation Brake Sys., Ltd. v. Voorhis*, 183 Cal. Rptr. 766 (Cal. App. 1982); *Four Strong Winds, Inc. v. Lyngholm*, 826 P.2d 414 (Colo. App. 1992); *State ex rel. Pope v. Germania Bank of St. Paul*, 118 N.W. 683 (Minn. 1908); *Citibank, N.A. v. T. T. P. Realty Corp.*, 417 N.Y.S.2d 691 (N.Y. App. Div. 1979); *INF Enter., Inc. v. Donnellon*, 729 N.E.2d 1221 (Ohio App. 1999); *Morris v. Pierce*, 110 P.2d 294 (Okla. 1940); *Covington v.*

assume Canyonview could properly bring claims against the Receiver in the receivership action in compliance with the Arizona Rules of Civil Procedure. *See* Ariz. R. Civ. P. 66(d) (stating that an action brought against a receiver shall be governed by the Arizona Rules of Civil Procedure). We now address the substance of those claims.

¶15 Generally stated, Canyonview claims the Receiver failed to fully perform all of his duties and obligations as ordered by the trial court. The scope of a receiver's authority is determined by the order of the court appointing him. *See* Restatement (Second) of Conflict of Laws §§ 370 cmt. a, 414 cmt. c (1971);[9] *see also S.E.C. v. Lincoln Thrift Ass'n*, 557 F.2d 1274, 1280 (9th Cir. 1977) (recognizing that the appointing court "is in the best position to clarify the scope of its own order"). Accordingly, we review a receivership order for an abuse of discretion, *Gravel Res. of Ariz. v. Hills*, 217 Ariz. 33, 37, ¶ 12, 170 P.3d 282, 286 (App. 2007) and will affirm the court's interpretation of its order if any reasonable view of the facts and law might support it. *City of Phoenix v. Geyler*, 144 Ariz.

Hawes-La Anna Co., 91 A. 514 (Pa. 1914); *Vander Vorste v. Nw. Nat'l Bank*, 138 N.W.2d 411 (S.D. 1965).

[9] Absent a statute or controlling authority to the contrary, we generally follow the Restatement. *Espinoza v. Schulenburg*, 212 Ariz. 215, 217, ¶ 9, 129 P.3d 937, 939 (2006).

323, 330, 697 P.2d 1073, 1080 (1985); *Cauble v. Osselaer*, 150 Ariz. 256, 258, 722 P.2d 983, 985 (App. 1986).

¶16 In this case, the original receivership order directed the Receiver to manage property described as Canyon View Condominiums. In part, the order directed the Receiver to "operate, repair, restore, manage, maintain, list, market, sell, convey or transfer the Property" and to "demand, collect and receive all Rents and Profits derived from the Property." Canyonview argues this language obligated the Receiver to maintain the marketing and contract servicing operations of the timeshare and the Receiver mismanaged the Resort Property by failing to: (1) maintain the Marketing Center; (2) collect payment on existing timeshare installment contracts; and (3) promote additional sales of timeshare contracts and maintain the marketing component of the timeshare business operations.

¶17 In support of its claims, Canyonview points to the transcript and minute entry from a June 13, 2008 hearing, during which the court (then Judge Peter B. Swann) clarified the Receiver's duties and powers. At that hearing, Judge Swann directed the Receiver to "maintain as an on-going concern not only the physical resort property but the sales component of the

business and the component of the business that maintains the time share contracts and services those contracts."[10]

¶18 However, after a series of hearings on Canyonview's objections to the discharge of the Receiver, the court (but a different trial judge, Judge Grant[11]) found that pursuant to the language of the original order, the Receiver was only obligated to maintain the physical Resort Property described as Canyon View Condominiums. The physical Resort Property was controlled by a wholly-owned subsidiary of Canyonview named Canyon View Condominiums, and Canyon View Condominiums did not perform any sales, marketing or servicing functions, which were performed by a separate wholly-owned subsidiary of Canyonview named Canyonview GP, LLC, South Mountain Marketing. Judge Grant found that at the June 13, 2008 hearing, Canyonview failed to distinguish between the separate subsidiaries, which resulted in confusion about the scope of the receivership estate and the Receiver's duties. Judge Grant also noted that the Receiver was ordered to maintain the sales component only at the Receiver's discretion. Accordingly, Judge Grant found that the original receivership order was never modified and was therefore controlling. Pursuant to that order, the Receiver was responsible solely for the

[10] It also appears that at the time of the June 13 hearing, the Marketing Center had already closed because Canyonview defaulted on its lease of the premises.

[11] Judge Grant took over the matter from Judge Swann.

management of the Resort Property, described as Canyon View Condominiums, and was never under any obligation to maintain the sales components of separate entities associated with the timeshare business.

¶19 Because the record supports the trial court's findings on the scope of the Receiver's duties and the receivership estate, we cannot say the court abused its discretion in finding that the Receiver did not mismanage the receivership estate or otherwise fail to perform his duties as receiver.

¶20 To the extent Canyonview appeals the court's dismissal of its claims against the Receiver in the April 24, 2009 order and January 20, 2010 minute entry, we review the dismissal under the standard for summary judgment because the trial court heard evidence extrinsic to the pleadings in this case. *See Frey v. Stoneman*, 150 Ariz. 106, 108-09, 722 P.2d 274, 276-77 (1986) (consideration of evidence extrinsic to the pleadings converts a motion to dismiss to a motion for summary judgment); *Dube v. Likins*, 216 Ariz. 406, 417 n.2, ¶ 34, 167 P.3d 93, 104 n.2 (App. 2007) ("[R]eliance on evidence extrinsic to the pleadings requires the court to treat the motion to dismiss as a motion for summary judgment.").

¶21 We review the grant of summary judgment de novo to determine whether any genuine issues of material fact exist and whether the trial court correctly applied the law. *Kiley v.*

Jennings, Strouss & Salmon, 187 Ariz. 136, 139, 927 P.2d 796, 799 (App. 1996); *In re Estate of Johnson*, 168 Ariz. 108, 109, 811 P.2d 360, 361 (App. 1991). 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 evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). We view the evidence and reasonable inferences in the light most favorable to the non-moving party. *Desert Mountain Props. Ltd. P'ship v. Liberty Mut. Fire Ins. Co.*, 225 Ariz. 194, 214, ¶ 87, 236 P.3d 421, 441 (App. 2010).

¶22 Because we defer to the trial court's findings as to the scope of the receivership estate and find the court did not abuse its discretion in finding that the Receiver did not mismanage the receivership estate or otherwise fail to perform his duties as receiver, we find no reasonable basis for Canyonview's claims against the Receiver. We therefore conclude, based on our independent review of the record, that the court did not err as a matter of law in granting summary judgment in favor of the Receiver.

Canyonview's Claims Against Resort Funding

¶23 Canyonview contends the trial court erred by dismissing its counterclaims against Resort Funding. Although the court

dismissed the claims in response to Resort Funding's motion to dismiss for failure to state a claim under Arizona Rule of Civil Procedure 12(b)(6), the court did not specify whether it relied on evidence outside the pleadings to make its ruling. *See Moretto v. Samaritan Health Sys.*, 190 Ariz. 343, 346, 947 P.2d 917, 920 (App. 1997) (stating that a motion to dismiss tests the formal sufficiency of a claim based on the face of the pleadings but where external evidence establishes a bar to relief, the proper pleading is a motion for summary judgment under Rule 56); *see also* Ariz. R. Civ. P. 12(b)(6), 56. Because the trial court heard evidence extrinsic to the pleadings in this case, we will again review the dismissal under the standard for summary judgment. *See Frey*, 150 Ariz. at 108-09, 722 P.2d at 276-77; *Dube*, 216 Ariz. at 417 n.2, ¶ 34, 167 P.3d at 104 n.2.

¶24 In its amended counterclaim against Resort Funding, Canyonview asserted seven causes of action. We separately review each count under the standard for summary judgment to determine whether the trial court properly dismissed the counterclaim.

BREACH OF CONTRACT AND FRAUD

¶25 In count one, Canyonview claimed Resort Funding committed to provide additional financing to Canyonview if (1) Canyonview hired an experienced timeshare marketing director and (2) the Resort Property continued to appraise for an amount sufficient to justify additional financing. Canyonview asserted

it satisfied the first condition by hiring an experienced marketing director and that Resort Funding obtained an appraisal (Appraisal) of the Resort Property at a value sufficient to satisfy the second condition. Canyonview claimed that Resort Funding failed to disclose the Appraisal and instead represented to Canyonview that the Resort Property had been appraised for an amount insufficient to satisfy the second condition. As a result, according to Canyonview, Resort Funding refused to extend additional financing although both conditions were actually satisfied and Resort Funding was contractually obligated to make additional loans.

¶26 Based on these alleged facts, Canyonview made two claims. First, Canyonview claimed Resort Funding breached the contract to make an additional loan if the two conditions were met. Second, Canyonview claimed that Resort Funding fraudulently misrepresented or concealed the value of the Appraisal and that Resort Funding had a duty to disclose the Appraisal and breached that duty.

A. Breach of Contract

¶27 Canyonview claims Resort Funding orally agreed to advance additional financing and that Resort Funding breached this oral contract by misrepresenting the value of the Appraisal and failing to make the loans when the two conditions were satisfied. Resort Funding responds that Canyonview's claim fails

because: (1) the claims are barred by the statute of frauds[12] and (2) Canyonview signed a contract (Pre-Negotiation Letter) in which Canyonview acknowledged that: the parties had not previously entered into a contract for additional financing; Canyonview was not entitled to rely on any representations made during the negotiations; either party could terminate the negotiations at any time; and no agreement between the parties would have any effect unless it was in writing.

¶28 Regarding the statute of frauds, Canyonview claims the oral contract was an agreement to modify the existing loan agreement and that a modification of a written agreement does not need to be in writing to satisfy the statute of frauds. *See Ariz. Feeds v. A & R Argo, Inc.*, 136 Ariz. 420, 423, 666 P.2d 520, 523 (App. 1983) ("[T]here can be a modification of a written agreement without further writing."); *Coronado Co. v. Jacome's Dep't Store, Inc.*, 129 Ariz. 137, 139, 629 P.2d 553, 555 (App. 1981) ("A written contract may be modified by subsequent oral changes that are supported by consideration.").

[12] Specifically, Resort Funding points to A.R.S. § 44-101(9) (2003), which requires that contracts to provide financing must be in writing, and A.R.S. § 33-701(B) (2007), which requires that mortgages be in writing. Citing *Trollope v. Koerner*, 106 Ariz. 10, 470 P.2d 91 (1970), Resort Funding also argues that "[a]n agreement to reduce a contract within the statute of frauds to writing is itself an agreement which must be in writing."

¶29 Regarding the Pre-Negotiation Letter, Canyonview claims the parties entered into the oral contract before the letter was signed, thereby making the letter irrelevant to the oral contract.[13] Canyonview also claims Resort Funding fraudulently induced Canyonview to sign the Pre-Negotiation Letter by misrepresenting the value of the Appraisal, and thus, the letter is unenforceable.

¶30 The interpretation of contracts is ordinarily a question of law to be determined independent of the trial court findings. *T.D. Dennis Builder, Inc. v. Goff*, 101 Ariz. 211, 213, 418 P.2d 367, 369 (1966). Even viewing the evidence in the light most favorable to Canyonview, the non-moving party below, we agree with Resort Funding that Canyonview's breach of contract claim is barred by the statute of frauds. *See* A.R.S. § 44-101.9.

¶31 Pursuant to § 44-101.9, a breach of contract claim may not be brought on "a contract, promise, undertaking or commitment to loan money or to grant or extend credit, or a contract, promise, undertaking or commitment to extend, renew or modify a loan or other extension of credit," unless the contract is in writing. Accordingly, even if the oral contract was an agreement

[13] According to Canyonview, the parties entered into the oral agreement in January 2008 and the Appraisal was also obtained in January 2008. However, the Pre-Negotiation Letter was not signed until February 29, 2008.

to modify the existing loan agreement, Canyonview's claim would nevertheless be barred by the statute of frauds.

¶32 Canyonview cites *Arizona Feeds* and *Coronado Co.* to argue that an oral agreement can properly modify a written contract that falls within the statute of frauds. Those cases, however, stand for the more limited proposition that an oral agreement can modify a prior written contract that does not fall within the statute of frauds. *See Ariz. Feeds*, 136 Ariz. at 423, 666 P.2d at 523 (agreement concerning the quality of cattle feed); *Coronado Co.*, 129 Ariz. at 139, 629 P.2d at 555 (agreement to lease certain premises within a specific time period). They do not, however, discuss whether an oral agreement is sufficient to modify a written agreement that is required to be in writing by the statute of frauds. Given the specific statutory directive in § 44-101.9, we find those cases to be inapplicable and find that the statute of frauds applies in this case.

¶33 To overcome the statute of frauds, Canyonview alleges that Resort Funding fraudulently induced Canyonview to change its position to its detriment based on Resort Funding's misrepresentation regarding the value of the Appraisal. Arizona courts will excuse the writing requirement of the statute of frauds in order to prevent fraud. *See Owens v. M.E. Schepp Ltd. P'ship*, 218 Ariz. 222, 225-26, ¶¶ 14-16, 182 P.3d 664, 667-68 (2008).

¶34 However, for a party to be estopped from asserting the statute of frauds as a defense, the party asserting fraud must show that acts of part performance or reliance cannot be explained in the absence of the contract. *Id.* at 226, ¶ 16, 182 P.3d at 668. In addition, "the evidence necessary to invoke the doctrine of equitable estoppel is measured by the detriment sustained by the party invoking it in acting upon the oral agreement or altering his position and not merely the benefits he would have received under the oral agreement." *Gray v. Kohlhase*, 18 Ariz. App. 368, 371, 502 P.2d 169, 172 (1972).

¶35 Here, Canyonview claims it relied to its detriment on Resort Funding's misrepresentation in two ways. First, Canyonview claims it would not have signed the Pre-Negotiation Letter and instead would have asserted its rights under the existing contract for additional financing if Resort Funding had not misrepresented the value of the Appraisal. Second, Canyonview claims that based on Resort Funding's representation that Resort Funding would advance additional financing if the conditions were met, Canyonview remained in business and incurred additional debts in an attempt to reach positive cash flow.

¶36 Viewing the evidence in the light most favorable to Canyonview, we determine that no reasonable juror could find that Canyonview justifiably relied to its detriment on Resort Funding's misrepresentation. Canyonview claims it would not have

signed the Pre-Negotiation Letter and would have asserted its rights under the oral contract if not for the misrepresentation. However, this argument fails to explain how Canyonview was harmed by the misrepresentation. Even if Resort Funding had disclosed the actual Appraisal, or Canyonview had not signed the Pre-Negotiation Letter, Canyonview would have been in no better position to assert its rights under the oral contract because the oral contract remained unenforceable under the statute of frauds.

¶37 In addition, Canyonview could not have reasonably relied on the false appraisal value when it continued business operations. Canyonview argues it stayed in business and incurred additional debts because it relied on Resort Funding's representation that Resort Funding would extend additional financing if the loan conditions were met. However, that reliance was not justified because Canyonview could not have expected any additional financing to be extended based on the lower appraisal value. In other words, Canyonview was not aware of the higher appraisal value, so it could not have reasonably expected that the loan conditions were met. Thus, Canyonview would have no reason to believe it could remain in business based on the oral contract or the false appraisal because it could not reasonably expect that additional financing would be forthcoming.

¶38 Furthermore, Canyonview must show that "any alleged act of part performance [is] consistent only with the existence of a

contract and inconsistent with other explanations such as ongoing negotiations, or an existing relationship between the parties[.]" *Owens*, 218 Ariz. at 227, ¶ 18, 182 P.3d at 669 (internal citations omitted). Both the signing of the Pre-Negotiation Letter and the continuance of business operations are consistent with the parties' ongoing negotiations and Canyonview's attempt to reach positive cash flow. Thus, Canyonview cannot meet the evidentiary requirement that its acts be explained only by the existence of the contract.

¶39 Finally, the equitable doctrines of part performance and reliance are not available to overcome the statute of frauds when a party seeks legal relief, such as monetary damages. *William Henry Brophy Coll. v. Tovar*, 127 Ariz. 191, 195, 619 P.2d 19, 23 (App. 1980). Because Canyonview sought only monetary damages for Resort Funding's alleged breach, Canyonview cannot rely on the equitable remedies of part performance or reliance to make the oral contract enforceable. *See Lininger v. Sonenblick*, 23 Ariz. App. 266, 269, 532 P.2d 538, 541 (1975) (recognizing that "an action for damages cannot be maintained on the ground of fraud in refusing to perform the contract, even though the defendant at the time of the making of the oral contract may have had no intention of performing it." (internal quotation marks omitted)).

¶40 Accordingly, as a matter of law, the statute of frauds barred Canyonview's breach of contract claim and the trial court did not err in granting summary judgment in favor of Resort Funding as to this claim.

B. Fraudulent Misrepresentation, Non-Disclosure or Concealment

¶41 Arizona recognizes tort-based causes of action for fraudulent misrepresentation, non-disclosure and concealment. *See Wells Fargo Bank v. Ariz. Laborers Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 496-98, ¶¶ 88-98, 38 P.3d 12, 34-36 (2002). In *Wells Fargo*, the Arizona Supreme Court described the three causes of action:

> [1] Liability for fraudulent misrepresentation occurs under § 525 of the Restatement (Second) of Torts and lies against "[o]ne who fraudulently makes a misrepresentation of fact . . . for the purpose of inducing another to act or to refrain from action. . . ."
>
> [2] In contrast, liability for nondisclosure occurs under § 551 of the Restatement (Second) of Torts and lies against "[o]ne who fails to disclose to another a fact . . . if, but only if, he is under a duty to the other . . . to disclose the matter in question."
>
> [3] Liability for fraudulent concealment occurs under § 550 of the Restatement (Second) of Torts and lies against a "party to a transaction who by *concealment or other action intentionally* prevents the other from acquiring material information." (Emphasis added.) As discussed, duty has no relevance in a tort requiring an intentional act. Concealment necessarily involves an element

> of non-disclosure, but it is the intentional act of preventing another from learning a material fact that is significant, and this act is always the equivalent of a misrepresentation. Restatement (Second) of Contracts § 160 ("Action intended or known to be likely to prevent another from learning a fact is equivalent to an assertion that the fact does not exist.").

201 Ariz. at 496 n.22, ¶ 88, 38 P.3d at 34 n.22 (citing Restatement (Second) of Torts §§ 525, 550, 551 (1977)).

¶42 Fraudulent non-disclosure requires that the defendant be under a duty to disclose the information. *See Dunahay v. Struzik*, 96 Ariz. 246, 248, 393 P.2d 930, 932 (1964) ("While fraud may be committed by the failure to speak, a duty to speak must be imposed."); *see also Haisch v. Allstate Ins. Co.*, 197 Ariz. 606, 610, ¶ 14, 5 P.3d 940, 944 (App. 2000). In contrast, fraudulent misrepresentation and fraudulent concealment do not impose such a duty requirement because they involve intentional torts. *Wells Fargo*, 201 Ariz. at 496 n.22, ¶ 88, 38 P.3d at 34 n.22.

i. Fraudulent misrepresentation

¶43 A defendant will be liable for fraudulent misrepresentation if he makes a material representation that he knows is false, he makes the statement with the intent that it be acted upon by the listener, the listener is ignorant of the statement's falsity, the listener justifiably relies on the statement's truth, and there is a consequent and proximate

injury. *Dillon v. Zeneca Corp.*, 202 Ariz. 167, 172, ¶ 13, 42 P.3d 598, 603 (App. 2002); *see* Restatement (Second) of Torts §§ 526, 531, 537, 538.

¶44 In this case, Canyonview alleged that Resort Funding knowingly misrepresented that the Resort Property had been appraised at a value insufficient to meet the first condition, which was material to their contract. Canyonview claims Resort Funding intended to induce Canyonview's reliance on the false appraisal value because if the value had been higher, Canyonview would have sought performance under the contract for additional financing. Finally, Canyonview also claims it was unaware of the actual Appraisal value and that it was proximately injured because its business operations failed as a result of the inability to obtain additional financing.

¶45 Based on these alleged facts, we find that a reasonable juror could find that: (1) Resort Funding knowingly made a false representation; (2) the misrepresentation was material to the contract; (3) Resort Funding intended to induce Canyonview's reliance; (4) Canyonview was ignorant of the actual Appraisal value; and (5) Canyonview was consequently and proximately injured. Accordingly, the only remaining issue is whether Canyonview justifiably relied on Resort Funding's misrepresentation.

¶46 As previously discussed, Canyonview claims it relied on the misrepresentation by signing the Pre-Negotiation Letter and by remaining in business and incurring additional debts. However, as we found regarding Canyonview's breach of contract claim, Canyonview could not reasonably have relied on the misrepresentation in those ways. Because the oral contract was unenforceable, Canyonview was not harmed by the Pre-Negotiation Letter and could not have any reasonable expectation to obtain additional funding. Accordingly, we find that no reasonable juror could find that Canyonview reasonably relied on Resort Funding's misrepresentation and the trial court did not err in granting summary judgment as to this claim.

ii. Fraudulent concealment and non-disclosure

¶47 According to the Restatement, fraudulent concealment may occur when

> the defendant successfully prevents the plaintiff from making an investigation that he would otherwise have made, and which, if made, would have disclosed the facts; or when the defendant frustrates an investigation. . . . Even a false denial of knowledge or information by one party to a transaction, who is in possession of the facts, may subject him to liability as fully as if he had expressly misstated the facts, if its effect upon the plaintiff is to lead him to believe that the facts do not exist or cannot be discovered.

Restatement (Second) of Torts § 550 cmt. b.

¶48 In addition, a party that "fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction" is liable for the non-disclosure, but only if "he is under a duty to the other to exercise reasonable care to disclose the matter in question." Restatement (Second) of Torts § 551(1).

¶49 Here, Canyonview has not alleged that a fiduciary relationship existed between itself and Resort Funding or that Resort Funding had a duty to disclose the Appraisal;[14] and there is no evidence in the record that Resort Funding agreed to obtain and disclose the Appraisal. We also note that Canyonview was free to obtain its own appraisal. Although we do not condone Resort Funding's conduct, we do not agree that Resort Funding

[14] In fact, the parties were engaged in negotiations at arm's length, which do not typically involve a relationship of trust and confidence. *See Urias v. PCS Health Sys., Inc.*, 211 Ariz. 81, 87, ¶ 32, 118 P.3d 29, 35 (App. 2005) ("A commercial contract creates a fiduciary relationship only when one party agrees to serve in a fiduciary capacity."); *see also In re Koreag*, 961 F.2d 341, 353 (2d Cir. 1992) ("Purely commercial transactions do not give rise to a fiduciary relationship."). As we noted in *Urias*, if Canyonview intended to create a fiduciary relationship with Resort Funding, it could have negotiated for a specific contractual obligation to that effect, but none of the contracts at issue contain any such language. Indeed, the loan agreement specifically contemplates that "[t]he relationship between [Canyonview] and [Resort Funding] is solely that of debtor and creditor, and [Resort Funding] has no fiduciary or other special relationship with [Canyonview], and no term or provision of any of the Loan Documents shall be construed so as to deem the relationship between [Canyonview] and [Resort Funding] to be other than that of debtor and creditor."

prevented Canyonview from obtaining its own appraisal or otherwise discovering the value of the Resort Property. *See* Restatement (Second) of Torts §§ 550 cmt. b (a cause of action for fraudulent concealment will lie when the defendant successfully prevents the plaintiff from acquiring information or making an investigation), 551(1) (a cause of action for non-disclosure will lie when the defendant successfully induces the plaintiff to act or refrain from acting).

¶50 In addition, under both the Restatement and Arizona law, the causes of action for fraudulent concealment and non-disclosure are transactionally based. *See Wells Fargo*, 201 Ariz. at 496 n.22, ¶ 88, 38 P.3d at 34 n.22 (noting that the defendant must be a party to a *transaction*); Restatement (Second) of Torts §§ 550 cmt. b (noting that the defendant must prevent the plaintiff from acquiring information relating to a *transaction*), 551(1) (noting that the defendant must induce the plaintiff to act or refrain from acting in a business *transaction*). Here, because the oral contract was unenforceable, the parties were in ongoing negotiations and had not entered into a contractual relationship. Accordingly, Canyonview cannot claim Resort Funding concealed or failed to disclose any information relating to any transaction. At most, Resort Funding concealed or failed to disclose information relating to ongoing negotiations. While injudicious, Resort Funding's conduct does not give rise to a

claim for fraudulent concealment or non-disclosure.[15] The court did not err in granting summary judgment in favor of Resort Funding on this claim.

BREACH OF THE DUTY TO NEGOTIATE IN GOOD FAITH

¶51 In count two, Canyonview asserted that Resort Funding failed to negotiate in good faith when the parties were negotiating for additional financing. Specifically, Canyonview claims: (1) Resort Funding induced Canyonview to rely to Canyonview's detriment on representations that Resort Funding would make additional loans when Resort Funding never intended to make additional loans, and (2) Resort Funding failed to disclose the Appraisal.

¶52 However, Canyonview cites no authority that a party has a duty to negotiate in good faith. While Arizona law recognizes an implied covenant of good faith and fair dealing in the performance of every contract, *Wells Fargo*, 201 Ariz. at 490, ¶ 59, 38 P.3d at 28, we are unable to find any authority to support Canyonview's assertion that there is a corresponding duty to negotiate in good faith as well. Canyonview has a duty to support its claim with citation to authority, *see* ARCAP 13(a)6; merely mentioning its argument in the opening brief is insufficient. *See State v. Moody*, 208 Ariz. 424, 452 n.9, ¶ 101,

[15] See the following discussion relating to breach of the duty to negotiate in good faith.

94 P.3d 1119, 1147 n.9 (2004). The court did not err in granting summary judgment as to count two.

DECLARATORY JUDGMENT THAT ASSETS SOLD AT THE TRUSTEE'S SALE WERE NOT PART OF THE COLLATERAL

¶53 In count three, Canyonview claimed that a certain group of existing Installment Contracts were never a part of the Collateral given to Resort Funding to secure the Loan.[16] Canyonview also claimed that the Installment Contracts were not specifically described in the notice of trustee's sale, and therefore, the transfer of those contracts was not a commercially reasonable sale under A.R.S. § 47-9610.B (2005). Canyonview sought declaratory judgment that the Installment Contracts were not part of the Collateral, could not have been legally sold at the trustee's sale and were not sold in a commercially reasonable manner at the trustee's sale. Finally, Canyonview sought a court order requiring Resort Funding to return the Installment Contracts or to pay their fair market value to Canyonview.

¶54 Canyonview's claims are not supported by the record. In the deed of trust, Canyonview gave Resort Funding a security interest in "all contracts for the sale of intervals," as well as "[e]ach and every right of Trustor to the payment of money relating to the Property, including but not limited to, all

[16] As part of its business operations, Canyonview sold timeshare installment contracts to individuals that gave the individuals ownership interests in the timeshare.

present and future debt instruments, chattel paper, accounts, loans and obligations receivable . . . .” There is no language in the deed that indicates any contracts were excluded from the description of the Collateral. Additionally, the notice of trustee’s sale contains a description of the Collateral to be sold that is identical to the language used in the deed of trust. Thus, given the expansive and inclusive language used in both the deed of trust and notice of trustee’s sale, we find that the Installment Contracts were included in the Collateral and properly sold at the trustee’s sale.

¶55 Furthermore, by seeking a court order for the return of the Installment Contracts or a judgment for their fair market value, Canyonview is improperly seeking affirmative or coercive relief through a declaratory action. *See* A.R.S. § 12-1831 (2003); *Canyon del Rio Investors, L.L.C. v. City of Flagstaff*, 227 Ariz. 336, 341, ¶ 18, 258 P.3d 154, 159 (App. 2011) (A declaratory action “allows adjudication of rights before the occurrence of a breach or injury necessary to sustain a coercive action (one seeking damages or injunctive relief)”); *Maricopa Realty & Trust Co. v. VRD Farms, Inc.*, 10 Ariz. App. 524, 527, 460 P.2d 195, 198 (1969). The court did not err in granting summary judgment in favor of Resort Funding as to count three.

DECLARATORY JUDGMENT THAT THE TRUSTEE'S SALE WAS VOID

¶56 In count four, Canyonview sought declaratory relief that the trustee's sale was void under A.R.S. § 33-810.A (2007) because the trustee allowed an entity other than the beneficiary of the deed of trust to submit a credit bid at the sale. Section 33-810.A provides that "[o]nly the beneficiary may make a credit bid in lieu of cash at sale." In this case, Resort Funding assigned its credit bid rights to its subsidiary, 4647 East Francisco Drive, LLC (4647 East Francisco), and the subsidiary purchased the Collateral at the trustee's sale by submitting a credit bid. Canyonview argues Resort Funding was not entitled to assign its rights to make a credit bid under A.R.S. § 33-810.A and, as a result, the trustee's sale was void.

¶57 Without addressing whether Resort Funding could validly assign its credit bid rights to 4647 East Francisco, we conclude Canyonview's claim in count four is an improper attack on the validity of the trustee's sale. Pursuant to A.R.S. § 33-811.B (2007), a trustee's deed "shall constitute conclusive evidence," in favor of an actual purchaser without notice, of compliance with the statutory requirements relating to the exercise of the power of sale and the sale of the trust property. Thus, the statute creates an irrebuttable presumption that a bonafide beneficiary of the trust deed — one who purchases for value and without actual notice of any alleged defect in the trustee's sale

—– holds good title to the trust property. *Main I Ltd. P'ship v. Venture Capital Constr. & Dev. Corp.*, 154 Ariz. 256, 260, 741 P.2d 1234, 1238 (App. 1987) ("[W]here the statute states that the trustee's deed constitutes 'conclusive evidence' of compliance with the requirements of the deed of trust statutes, this evidence cannot be rebutted.").

¶58 Furthermore, pursuant to § 33-811.C, all interested parties "shall waive all defenses and objections to the [trustee's] sale not raised in an action that results in the issuance of court order granting relief . . . on the last business day before the scheduled date of the sale." *See BT Capital, LLC v. TD Serv. Co. of Ariz.*, 229 Ariz. 299, 301, ¶ 10, 275 P.3d 598, 600 (2012) (under A.R.S. § 33–811, "a person who has defenses or objections to a properly noticed trustee's sale has one avenue for challenging the sale: filing for injunctive relief").

¶59 Here, the trustee's deed was recorded on the day of the trustee's sale. After 4647 East Francisco purchased the Collateral at the sale, it subsequently sold the Collateral to ARD Phoenix for value. Canyonview has not alleged any facts that ARD Phoenix had actual knowledge that the requirements of the deed of trust statutes had not been met.[17] Accordingly, ARD

[17] In its reply brief, Canyonview claims ARD Phoenix did have actual knowledge that the requirements of the deed of trust

Phoenix was a purchaser for value without actual knowledge and qualifies for protection under § 33-811. The deed therefore constitutes conclusive evidence of compliance with the statutory requirements relating to a trustee's sale, and Canyonview may not retroactively challenge ARD Phoenix's good title to the Collateral. *See* A.R.S. § 33-811.B-C; *BT Capital*, 229 Ariz. at 301, ¶ 10, 275 P.3d at 600; *Main I Ltd. P'ship*, 154 Ariz. at 260, 741 P.2d at 1238.

¶60 In addition, the deed of trust in the case states, "The recitals in [the trustee's deed] of any matters or facts shall be conclusive proof of the truthfulness thereof." The trustee's deed states, "The Trustee has fulfilled the conditions specified in the Deed of Trust, and has complied with the laws of the State of Arizona authorizing this conveyance, including compliance with all requirements of law regarding . . . the Trustee's Sale and

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statutes had not been met because evidence of the failure appears on the face of the trustee's deed itself. However, that argument assumes that ARD Phoenix was aware that 4647 East Francisco was not entitled to be assigned the named beneficiary's rights to a credit bid. We do not agree that such knowledge should be imputed to ARD Phoenix. Furthermore, Canyonview seeks to impute constructive knowledge of the identity of the named beneficiary to ARD Phoenix. Such knowledge is insufficient, however, because ARD Phoenix must have actual knowledge that the statutory requirements were not met, and § 33-811.B expressly states that knowledge of the trustee shall not be imputed to the beneficiary. Accordingly, Canyonview has not presented any evidence that ARD Phoenix had actual knowledge that the requirements of the deed of trust statutes had not been met.

all proceedings leading thereto." These documents are binding and enforceable. *See Norwest Bank Ariz. v. Superior Court*, 192 Ariz. 240, 247, ¶ 29, 963 P.2d 319, 326 (App. 1998).

¶61 Moreover, by seeking to void the trustee's sale, Canyonview is improperly seeking affirmative or coercive relief through a declaratory action. *See* A.R.S. § 12-1831; *Canyon del Rio Investors, L.L.C.*, 227 Ariz. at 341, ¶ 18, 258 P.3d at 159; *Maricopa Realty & Trust Co.*, 10 Ariz. App. at 527, 460 P.2d at 198. The court did not err in granting summary judgment in favor of Resort Funding on this claim.

DECLARATORY JUDGMENT THAT THE LOAN HAD BEEN SATISFIED

¶62 In count five, Canyonview sought declaratory judgment that "as of the date of the Trustee's sale[,] [Canyonview's] debt to Resort Funding was satisfied and that Resort Funding was obligated to pay to Canyonview any surplus from the sale to ARD Phoenix over and above the debt." Canyonview claims declaratory judgment should have been entered because Canyonview was entitled to a "Fair Market Value hearing," pursuant to A.R.S. § 33-814.A (Supp. 2011),[18] to determine the fair market value of the Collateral sold at the trustee's sale. Canyonview argues such a

[18] A.R.S. § 33-814.A provides in relevant part: "A written application for determination of the fair market value of the real property may be filed by a judgment debtor with the court in the action for a deficiency judgment or in any other action on the contract which has been maintained."

hearing would show the fair market value of the Collateral exceeded the debt and that it was entitled to judgment in the amount of the surplus.

¶63 Canyonview's reliance on § 33-814.A is misplaced, however, because that section specifically provides that a *judgment debtor* may file an application for a determination of the fair market value of real property. Canyonview is not a judgment debtor in this action. *See* Black's Law Dictionary (9th ed. 2009) (defining "judgment debtor" as "[a] person against whom a money judgment has been entered but not yet satisfied"). Resort Funding instituted an extra-judicial trustee's sale against the Collateral but did not obtain a judgment against Canyonview. *See* A.R.S. § 33-807 (2007); *Patton v. First Fed. Sav & Loan Ass'n*, 118 Ariz. 473, 477, 578 P.2d 152, 156 (1978) (recognizing that a deed of trust allows a trustee to institute a foreclosure sale out of court with no necessity of judicial action). Thus, § 33-814.A is inapplicable in this case.

¶64 In addition, Canyonview did not file an application for a fair market value hearing. Instead, Canyonview sought declaratory relief that the debt had been satisfied and that it should be awarded the surplus if the Collateral sold at the trustee's sale had a fair market value over and above the amount of the debt. In effect, Canyonview sought an advisory opinion concerning the outcome of a hearing to which it was not entitled

and a monetary judgment based on that advisory opinion. Courts will not issue advisory opinions, *Iman v. S. Pac. Co.*, 7 Ariz. App. 16, 20-21, 435 P.2d 851, 855-56 (1968), and, as previously mentioned, a declaratory action is not the proper cause of action for seeking monetary relief. A.R.S. § 12-1831; *Canyon del Rio Investors, L.L.C.*, 227 Ariz. at 341, ¶ 18, 258 P.3d at 159; *Maricopa Realty & Trust Co.*, 10 Ariz. App. at 527, 460 P.2d at 198. The court did not err in granting summary judgment on count five.

AN ACCOUNTING FOR THE PROCEEDS OF CERTAIN ASSETS

¶65 In count six, Canyonview sought an accounting for the proceeds Resort Funding received during the receivership from the payment on existing Installment Contracts. Canyonview claims the Receiver and Resort Funding should have accounted for these proceeds. Canyonview also appears to assert, as it did in count three, that the Installment Contracts were not part of the Collateral. According to Canyonview, either Resort Funding illegally acquired the Installment Contracts or the Installment Contracts were negligently or fraudulently sold at the trustee's sale.

¶66 With respect to the accounting, the Receiver did file monthly accounting reports with the court documenting his management of the receivership estate. As we discussed in greater detail in our discussion of Canyonview's claims against

the Receiver, the Receiver had no obligation to manage or service the Installment Contracts because they were never part of the receivership estate. Accordingly, an accounting of proceeds from the payment on the Installment Contracts was never a duty of the Receiver.

¶67 Similarly, Canyonview has not cited any authority that Resort Funding had a duty to submit an accounting of proceeds from the payment on the Installment Contracts during the receivership. Because Canyonview failed to support its argument with any evidence in the record or legal authority, we do not address this claim. *See* ARCAP 13(a)6; *Moody*, 208 Ariz. at 452 n.9, ¶ 101, 94 P.3d at 1147 n.9.

¶68 As for Canyonview's claim that the Installment Contracts were not part of the Collateral, we disagree for the reasons set forth in our discussion of count three. Furthermore, an accounting cause of action is not the proper method for seeking monetary relief or damages, as Canyonview appears to do here. The trial court did not err in granting summary judgment in favor of Resort Funding as to count six.

DAMAGES CAUSED BY CLOSING THE MARKETING CENTER[19]

¶69 The substance of Canyonview's claim is that Resort Funding is liable for any losses incurred through the alleged mismanagement of the Collateral during the receivership. Specifically, Canyonview sought damages from the closing of the Marketing Center and the failure of the Receiver to maintain the sales, marketing, and administrative operations of the timeshare business during the receivership. However, Canyonview cites no evidence or authority that Resort Funding had any contractual obligation to maintain the Marketing Center or the sales and marketing operations. Indeed, Canyonview agreed in the original loan agreement that it was Canyonview's duty to maintain the Resort Property and agreed in the deed of trust that Resort Funding "shall not be obligated to perform or discharge, any obligation, duty or liability under any Lease." Furthermore, in the original order appointing the Receiver, the trial court specifically stated that Resort Funding was not obligated to pay the costs and expenses of the management and operation of the receivership estate.

¶70 Without asserting some other recognized cause of action or legal duty for which Resort Funding may be liable, Canyonview

[19] In count seven, Canyonview asserted "damages" as a cause of action. A request for damages is not a cause of action for which relief may be granted absent some other recognized cause of action or legal duty.

cannot show it is entitled to the damages sought in count seven. The trial court did not err in granting summary judgment on this claim.

Canyonview's Motion for Partial Summary Judgment

¶71 Canyonview claims the trial court erred in failing to rule on and/or in denying its motion for partial summary judgment. Although the court did not expressly rule on Canyonview's motion, we treat the court's dismissal of Canyonview's counterclaims as an implicit denial of the motion. In most circumstances, the denial of a motion for summary judgment is not subject to review on appeal from a final judgment. *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, 316, ¶ 7, 965 P.2d 47, 50 (App. 1998). One exception to this rule is where we vacate the trial court's judgment on appeal, determine that there are no actual material disputes and find that the appellant is entitled to summary judgment as a matter of law. *Id.* In this case, we have not determined that Canyonview was entitled to summary judgment as a matter of law. Therefore, we find no error.

The Protective Order

¶72 Lastly, we address Canyonview's claim that the trial court erred by issuing a protective order barring Canyonview from conducting discovery. The Arizona Rules of Civil Procedure grant trial courts broad discretion to issue protective orders. *See*

Ariz. R. Civ. P. 26(c)(1) ("[T]he court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]"); *City of Casa Grande v. Ariz. Water Co.*, 199 Ariz. 547, 555, ¶ 26, 20 P.3d 590, 598 (App. 2001). We treat a court's decisions regarding discovery issues with deference and will not disturb its rulings absent an abuse of the court's discretion. *Id*. Because we affirm the court's dismissal of Canyonview's claims, we cannot say the court abused its discretion in issuing the protective order.

Attorney Fees and Costs

¶73 All parties request attorney fees and costs on appeal. In our discretion we decline all requests for fees. As the prevailing parties on appeal, Resort Funding and the Receiver are entitled to their costs, contingent upon compliance with ARCAP 21.

CONCLUSION

¶74 For the reasons set forth above, we affirm the trial court's dismissal of the claims.

/S/
_____
PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
_____
PHILIP HALL, Judge

/S/
_____
JOHN C. GEMMILL, Judge