DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CARL G. HOFFMAN and MARY K. HOFFMAN, as Trustees under Trust Agreement dated March 8, 1984; and HOFFMAN FAMILY LIMITED LIABILITY PARTNERSHIP; WOOD-MCCASLIN, INC., an Arizona corporation; FIRST AMERICAN TITLE COMPANY, a California corporation, Appellees, v. ZIPPRICH GROUP. LLC; and WILLIAM CLEVERLY, Appellants.	Court of Appeals Division One No. 1 CA-CV 12-0072 A 1 CA-SA 12-0247 1 CA-SA 12-0280 (Consolidated) Maricopa County Superior Court No. CV2005-005003 CV2009-040211 CV2010-019594 (Consolidated) Department E **MEMORANDUM DECISION**
CARL G. HOFFMAN and MARY K. HOFFMAN, as Trustees under Trust Agreement dated March 8, 1984; HOFFMAN FAMILY LIMITED LIABILITY PARTNERSHIP, Petitioners, v. THE HONORABLE ALFRED FENZEL, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge,	

WOOD McCASLIN, INC., an Arizona corporation,

Real Party in Interest.

CARL G. HOFFMAN and MARY K. HOFFMAN, as Trustees under Trust Agreement dated March 8, 1984; and HOFFMAN FAMILY LIMITED LIABILITY PARTNERSHIP,

Petitioners,

v.

THE HONORABLE ALFRED FENZEL, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,

Respondent Judge,

THE ZIPPRICH GROUP, LLC and WILLIAM CLEVERLY,

Real Parties in Interest.

Appeal from the Superior Court in Maricopa County

Cause Nos. CV 2005-005003; CV 2009-040211; CV 2010-019594

The Honorable Paul A. Katz, Judge (Retired)
The Honorable J. Kenneth Mangum, Judge (Retired)
The Honorable Alfred M. Fenzel, Judge

JUDGMENT AFFIRMED; JURISDICTION ACCEPTED; RELIEF DENIED

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H A L L, Judge

¶1 In 1 CA-CV 12-0072 A, the Zipprich Group, LLC and William Cleverly (collectively, Zipprich) appeal from the superior court's judgment holding that certain monies (the closing funds) deposited with First American Title Insurance Company (First American) by Wood-McCaslin, Inc. (Wood-McCaslin) are not subject to garnishment. We also address two special actions filed by Carl and Mary Hoffman (the Hoffmans) that have been consolidated with Zipprich's appeal.[1] As explained below, we affirm the judgment on direct appeal and deny the Hoffmans' requests for relief in 1 CA-SA 12-0247 and 1 CA-SA 12-0280.

FACTS AND PROCEDURAL BACKGROUND[2]

¶2 This case involves the purchase of approximately 240 acres of undeveloped land near Casa Grande. On October 7, 2004, Apex, Wood-McCaslin's predecessor-in-interest (referred to as

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[1] Although Zipprich is not a party in 1 CA-SA 12-0247, we have permitted it to intervene in that matter for the limited purpose of opposing the petition for special action.

[2] "We view the facts in the light most favorable to sustaining the trial court's judgment." *Southwest Soil Remediation, Inc. v. City of Tucson*, 201 Ariz. 438, 440, ¶ 2, 36 P.3d 1208, 1210 (App. 2001).

Wood-McCaslin herein), executed two contracts to purchase two parcels of real property from the Hoffmans for a total purchase price of $6,718,000. Pursuant to the terms of the purchase contracts, the Hoffmans agreed to finance a portion of the purchase price, $5,038,500, secured by notes and deeds of trust in favor of the Hoffmans. The purchase contracts required Wood-McCaslin to make a series of scheduled earnest money deposits totaling $130,000 during the escrow period. In addition, Wood-McCaslin agreed to pay the balance, $1,549,500, "with additional cash to close escrow." As set forth in the purchase contracts, the parties were scheduled to close escrow on April 29, 2005.

¶3 During the escrow period, the area where the two subject parcels are located experienced a dramatic increase in land value. On March 22, 2005, the Hoffmans filed a complaint in superior court seeking declaratory relief (CV2005-005003). The Hoffmans alleged that Wood-McCaslin failed to make an earnest money deposit for each purchase contract ($50,000 and $15,000, respectively) as scheduled on February 22, 2005. The Hoffmans asserted that Wood-McCaslin's payment of the earnest money a day late was a material breach authorizing the Hoffmans to unilaterally terminate the purchase contracts.

¶4 On April 25, 2005, Wood-McCaslin counterclaimed for specific performance. Three days later, Wood-McCaslin deposited

the "additional cash to close escrow" required under the purchase contracts, $1,549,243.30, with First American.

¶5 The next day, on April 29, 2005, Zipprich and Wood-McCaslin entered a Letter of Agreement, pursuant to which Zipprich loaned Wood-McCaslin, and its principals, Philip and Stacie Polich (the Poliches), $1,120,000 through two promissory notes. The Zipprich/Wood-McCaslin Agreement provided that the proceeds of the loans were to be "used solely to pay those amounts payable by [Wood-McCaslin]" under the Hoffman/Wood-McCaslin purchase contracts. Pursuant to the terms of the promissory notes, the loans were to be repaid the "earliest of (i) the ninetieth (90th) day following the date of this note, [or] (ii) the return to [Wood-McCaslin] of the Closing Funds." Wood-McCaslin never repaid the loans.

¶6 On January 22, 2007, the superior court entered judgment in favor of Wood-McCaslin, ordering the Hoffmans to specifically perform and convey the properties to Wood-McCaslin.

¶7 During the lengthy period between Wood-McCaslin's filing of its counterclaim in April 2005 and the superior court's January 2007 judgment ordering specific performance in Wood-McCaslin's favor, the area where the two subject parcels are situated experienced a tremendous decrease in land value. On December 26, 2007, Wood-McCaslin moved for relief from the specific performance judgment pursuant to Rule 60(c) of the

Arizona Rules of Civil Procedure, claiming that the Hoffmans had failed to inform them that the properties were subject to certain easements. The superior court denied the motion. Wood-McCaslin appealed the superior court's denial of its Rule 60(c) motion and, on July 2, 2009, this court affirmed.

¶8 Wood-McCaslin then petitioned for review of this court's decision to the supreme court. On December 30, 2009, while the petition for review was pending, Zipprich filed a complaint against Wood-McCaslin alleging breach of contract (CV 2009-040211) for Wood-McCaslin's failure to repay the April 29, 2005 promissory notes. In February 2010, Zipprich and Wood-McCaslin entered a settlement and tolling agreement in which Wood-McCaslin admitted to defaulting on its loan and Zipprich agreed not to attempt to recover its monies from any source other than the closing funds. On March 31, 2010, the superior court entered a stipulated judgment awarding Zipprich $2,045,000 plus interest against Wood-McCaslin, subject to the terms of the parties' settlement and tolling agreement.

¶9 On April 7, 2010, the supreme court denied Wood-McCaslin's petition for review. On April 27, 2010, this court issued its mandate affirming the superior court's judgment.

¶10 On April 29, 2010, Zipprich served a writ of garnishment on First American. In its answer, First American acknowledged that it was holding the closing funds, plus

interest, but stated that it would not release the closing funds without a court order because the Hoffmans and Wood-McCaslin had made conflicting claims to the monies. First American also notified the Hoffmans, who moved to intervene in the Zipprich/Wood-McCaslin litigation and quash the writ of garnishment.

¶11 In June 2010, the Hoffmans filed a proposed judgment on mandate in the superior court, directing specific performance of the real estate contracts and including an award of attorneys' fees and costs. On June 7, 2010, Zipprich moved to intervene in this case and filed an objection to the proposed form of judgment, contending it was the party entitled to the escrow funds. Zipprich also moved for summary judgment in the garnishment action. On October 28, 2010, the superior court issued a minute entry granting First American's motion to consolidate CV2005-005003 (Hoffmans/Wood-McCaslin breach of contract/specific performance litigation), CV2009-040211 (Zipprich/Wood-McCaslin breach of contract litigation), and CV2010-019594 (the garnishment action) under CV2005-005003.

¶12 On April 8, 2011, the superior court denied Zipprich's motion for summary judgment on its garnishment claim. In June 2011, the superior court granted First American's motion to interplead the closing funds due to continuing doubt over the competing claims to the funds. Pursuant to the court's order,

First American deposited the closing funds with the clerk of the court.

¶13 On October 12, 2011, the superior court entered a judgment on mandate ordering the parties to close by December 31, 2011. On November 14, 2011, Zipprich filed a notice of appeal, seeking review of the October 12, 2011 judgment on mandate.

¶14 On December 19, 2011, the superior court entered a signed judgment dismissing Zipprich's garnishment claim, ruling that the closing funds deposited with First American were not nonexempt monies because they were subject to a previous order to close escrow. Specifically, the superior court stated in relevant part:

> [A]t the time the writ of garnishment was served on First American Title Insurance Company the "closing funds" subject to the garnishment were not "non-exempt monies" of judgment debtor Wood-McCaslin, Inc., because those funds were then, and are now, subject to an order to close escrow.

¶15 On December 22, 2011, Zipprich timely appealed from the superior court's judgment dismissing the garnishment action. The appeal was assigned Cause No. 1-CA-CV 12-0072 in this court.

¶16 On December 30, 2011, Wood-McCaslin filed for bankruptcy protection and escrow did not close on December 31, 2011 as ordered by the superior court. The Hoffmans objected

and moved to dismiss, and, on March 15, 2012, the bankruptcy court dismissed the bankruptcy petition.

¶17 In April 2012, the Hoffmans filed an application for appointment of a receiver to complete the sale of the property, transfer title, and distribute the escrow funds. In their application, the Hoffmans expressed concerns about the delay in closing and their continuing obligation to pay taxes on the subject properties, notwithstanding the superior court's order to close escrow by the end of December 2011.

¶18 On April 11, 2012, Zipprich moved for a stay of all proceedings in the superior court pending the resolution of its appeals. The Hoffmans opposed the stay request and, in the alternative, argued that the superior court should require Zipprich to post a supersedeas bond.

¶19 On May 23, 2012, a motions panel of this court denied Zipprich's motion to consolidate its appeals and dismissed Zipprich's appeal of the superior court's October 12, 2011 judgment on mandate for lack of jurisdiction, explaining that any challenge involving a judgment entered following an appeal and issuance of the mandate must take the form of a special action. In July 2012, the superior court denied the Hoffmans' motion to sever the previously consolidated cases, denied the Hoffmans' request for a receiver, and granted Zipprich's emergency motion for stay pending appeal. The Hoffmans moved

for reconsideration and requested an expedited hearing on their request for a supersedeas bond. On October 31, 2012, the Hoffmans filed a special action (SA 12-0247) seeking relief from the superior court's entry of stay and denial of its request for a receiver. On November 28, 2012, this court accepted jurisdiction over the special action, granted Zipprich's motion to intervene, consolidated the matter with CV-12-0072, and accelerated the appeal on its own motion.

¶20 On November 16, 2012, the superior court denied the Hoffmans' request for a supersedeas bond. The Hoffmans filed a motion for reconsideration, which was eventually denied. The Hoffmans then filed a special action (I CA-SA 12-0280) seeking relief from the superior court's denial of their request for a superseadeas bond. The Hoffmans' request that the special action be consolidated with 1 CA-CV 12-0072 was granted by this court. We have jurisdiction over Zipprich's direct appeal pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(A)(1) (Supp. 2012). We have previously accepted jurisdiction over 1 CA-SA 12-0247 and we now accept jurisdiction over 1 CA-SA 12-0280 pursuant to Arizona Rule of Procedure for Special Actions 1(a).

ISSUES

¶21 In its appeal, Zipprich raises a single issue: (1) Did the superior court err by finding that the closing funds are not

subject to garnishment? In their consolidated special actions, the Hoffmans raise two issues: (1) Did the superior court err by granting entry of stay pending Zipprich's appeal and failing to execute the judgment on mandate? (2) Did the superior court err by denying the Hoffmans' request that Zipprich post a superseadeas bond? We address each issue in turn.

DISCUSSION

I. Status of the Closing Funds

¶22 Zipprich contends that the superior court erred by finding that the closing funds are not subject to garnishment. Specifically, Zipprich asserts that, notwithstanding the January 2007 specific performance judgment, Wood-McCaslin maintained legal title to the closing funds and therefore the monies were subject to garnishment as of the date Zipprich filed its writ of garnishment.

¶23 In reviewing a superior court's dismissal of a writ of garnishment, we view all evidence in the light most favorable to sustaining the judgment and will uphold the court's factual findings "if they are justified by any reasonable construction of the evidence." *Figueroa v. Acropolis*, 192 Ariz. 563, 564, 968 P.2d 1048, 1049 (App. 1997). We review, however, the superior court's legal conclusions de novo. *Id*. at 565, 968 P.2d at 1050.

¶24 "Garnishment is a creature of statute and is governed by the terms of the statute." *Weir v. Galbraith*, 92 Ariz. 279, 286, 376 P.2d 396, 400 (1962). As set forth in A.R.S. § 12-1584(B), if a party timely objects to a writ of garnishment, the superior court shall hold a hearing to receive evidence and argument. After holding such a hearing, the court shall:

> determine whether the writ is valid against the judgment debtor, what amount is presently due and owing on the underlying judgment and what amount of ***nonexempt monies***, ***if any***, the garnishee was holding for or owed to the judgment debtor ***at the time the writ was served***, and the court shall enter judgment on the writ against the garnishee for that amount or enter an order discharging the garnishee if no nonexempt monies are determined owing.

Id. (emphasis added). As defined in A.R.S. § 12-1570(7), "[n]onexempt monies or property means monies or property which are not restricted by law from judicial process." A.R.S. § 12-1570(7).

¶25 Our goal in interpreting a statute is to find and give effect to the intent of the legislature. *Mail Boxes, Etc. U.S.A. v. Indus. Comm'n*, 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995). We look first to the language of the statute, and if the language is clear and unambiguous, we must give effect to that language and do not use other rules of statutory construction. *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.,* 177 Ariz. 526, 529, 869 P.2d 500, 503 (1994); *Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991).

The interpretation of a statute presents a question of law, which we review de novo. *Schwarz v. City of Glendale*, 190 Ariz. 508, 510, 950 P.2d 167, 169 (App. 1997).

¶26 Citing A.R.S. § 12-1570(2), which defines "exempt monies or property" as "monies or property that, pursuant to a state or federal law, is not subject to judicial process," Zipprich contends that monies are subject to garnishment unless specifically protected by statute. Accordingly, Zipprich asserts that the superior court's specific performance judgment could not place the closing funds beyond the reach of garnishment. Zipprich raises this claim for the first time in its reply brief, and the issue is therefore waived. *See Varsity Gold, Inc. v. Porzio*, 202 Ariz. 355, 357, ¶ 9, 45 P.3d 352, 354 (App. 2002) (explaining that arguments raised for the first time in a reply brief deprive the other party of the opportunity to respond and are therefore deemed waived).

¶27 Nonetheless, even assuming that the qualifying phrase "state or federal," as used in A.R.S. § 12-1570(2), limits "exempted" monies to those protected by statute, no corresponding qualifying language is included in A.R.S. § 12-1570(7). Rather, A.R.S. § 12-1570(7) defines "nonexempt monies" as those "not restricted by law from judicial process" and A.R.S. § 12-1584 provides that only "nonexempt monies" are subject to garnishment. If the legislature had intended to

qualify "nonexempt monies" with such a limitation, it could have done so expressly, and did not. *See State v. Jennings*, 150 Ariz. 90, 93, 722 P.2d 258, 261 (1986) ("If the legislature had intended to have [certain] language," found in one statute but not in a related statute, "apply to both [statutes], it could have simply placed it in both sections"); *see also Braden Trust v. County of Yuma*, 205 Ariz. 272, 278, ¶ 29, 69 P.3d 510, 516 (App. 2003) ("It is not in the court's power to change legislative enactments; our duty is to interpret the law and apply it as written."). Absent such qualifying language in A.R.S. § 12-1570(7), we ascribe the plain and ordinary meaning of the term "law." Law is defined as "[a] rule established by authority," Webster's II New College Dictionary 622 (1995), and "[t]he judicial and administrative process; legal action and proceedings," Black's Law Dictionary 363 (1996). *See W. Corr. Group., Inc. v. Tierney*, 208 Ariz. 583, 587, ¶ 17, 96 P.3d 1070, 1074 (App. 2004) (citing *State v. Wise*, 137 Ariz. 468, 470 n.3, 671 P.2d 909, 911 n.3 (1983) (in determining the plain meaning of a term in a statute, courts refer to established and widely used dictionaries). Thus, the plain and ordinary meaning of "law" is sufficiently broad to encompass court orders and judgments, such as at issue here.

¶28 The parties do not dispute that Zipprich holds a valid judgment against Wood-McCaslin in the amount of $2,045,000 plus

interest. Therefore, the narrow issue before us is whether the closing monies were "nonexempt" at the time Zipprich filed its writ of garnishment. More specifically, we must determine whether the superior court's January 2007 specific performance judgment rendered the closing funds "not nonexempt," that is, not subject to judicial process.

¶29 In entering judgment in favor of Wood-McCaslin on its specific performance claim, the superior court found:

> [Wood-McCaslin], on April 29, 2005, **tendered to the [Hoffmans]** by and through escrow agent, First American Title Insurance Company, Wood-McCaslin's **complete and unconditional performance of its contractual duties** under [the purchase contracts].

Thus, the specific performance judgment provides that the closing funds are ***the*** "additional cash to close escrow" Wood-McCaslin was required to pay under the terms of the contracts, and the monies are therefore payable to the Hoffmans upon their tender of title to the subject properties. Contrary to Zipprich's argument that Wood-McCaslin was and is free to withdraw the closing funds at any time before the close of escrow, we conclude that any reasonable construction of the effect of the court's order forecloses this possibility.

¶30 Relying on case law from Arizona and other jurisdictions holding that a depositor of funds in escrow with a title company generally retains legal title to those funds until the close of escrow, Zipprich asserts that Wood-McCaslin

controlled the disposition of those funds when the writ of garnishment was served on First American. Therefore, according to Zipprich, the funds were subject to garnishment. We are not persuaded.

¶31 Although Wood-McCaslin retained legal title to the escrow funds, the Hoffmans obtained equitable ownership, *see Jarvis v. Chanslor & Lyon Co.*, 20 Ariz. 134, 136, 177 P. 27, 28 (1919) (explaining that when a deed is placed in escrow, the grantor holds the legal title and the grantee the equitable title), essentially creating a trust relationship with the Hoffmans as the beneficiaries. *See In re NTA, LLC*, 380 F.3d 523, 530 (1st Cir. 2004) (explaining that when property is placed into escrow, a trust is created: "The beneficiary of the trust holds an 'equitable interest' in the property, consisting of the right to obtain legal title to the property pursuant to the terms of the contractual agreements between the parties." (applying Illinois law)). And a beneficial interest in a person other than the debtor is not garnishable. 6 Am. Jur. 2d *Attachment and Garnishment* § 154 (2012); *see also Webster v. USLIFE Title Co.*, 123 Ariz. 130, 132-34, 598 P.2d 108, 110-12 (App. 1979) (holding that funds deposited in escrow by a purchaser from which a broker's commission was to be paid were not subject to garnishment).

¶32 Even if we were to assume that Wood-McCaslin retained control of the closing funds when they were placed in escrow and that they therefore could have been garnished,[3] it voluntarily relinquished any right to control the funds when it later sought and obtained the specific performance judgment. That judgment did not order Wood-McCaslin to pay the "additional cash to close escrow"; rather, it found that Wood-McCaslin had already done so. Accordingly, the court did not order Wood-McCaslin to tender performance, but ordered the Hoffmans to tender title. The specific performance judgment indisputably placed the closing funds beyond the reach of Wood-McCaslin, and thereby

[3] Although Zipprich repeatedly claims in its appellate briefing that Wood-McCaslin instructed First American to void all closing documents and return the closing funds to Wood-McCaslin if escrow did not close by May 6, 2005, this claim is, at best, a mischaracterization of the record. In a letter dated April 29, 2005, counsel for Wood-McCaslin informed First American that it was "to call" counsel "for further instructions" if escrow did not close by May 6, 2005. The letter also stated that such "further instructions . . . ***may include*** . . . an instruction that you mark as 'void' all Closing Documents executed by Buyer and the return to Buyer all of Buyer's Funds." (Emphasis added.) Zipprich has not cited, and our review of the record has not revealed, any evidence that Wood-McCaslin actually instructed First American to return the funds before the superior court entered its January 2007 specific performance judgment. Indeed, the record reflects that Wood-McCaslin first requested that First American return the funds in September 2007, approximately eight months after the specific performance judgment was entered. We also note that Wood-McCaslin never sought a court order to compel First American to return the funds before the specific performance judgment was entered. Therefore, Zipprich's suggestion that First American engaged in wrongdoing by failing to return the funds in 2005, and that this alleged wrongdoing provides an additional basis for Zipprich's entitlement to the closing funds, is devoid of merit.

beyond the reach of Zipprich's derivative rights as garnishor. *Mid-State Elec. Supply Co. v. Ariz. Title Ins. & Trust Co.*, 105 Ariz. 321, 323-24, 464 P.2d 604, 606-07 (1970) ("The rights of the garnishor-creditor to the assets in the hands of the garnishee are no greater than the rights of the defendant-debtor to those assets."). Therefore, the superior court did not err by finding the closing funds are "not non-exempt" monies and dismissing Zipprich's writ of garnishment.[4]

II. Failure to Execute Judgment on Mandate and Denial of Request for Appointment of Receiver

¶33 In the first of their consolidated special actions (1 CA-SA 12-0247), the Hoffmans argue the superior court had no discretion to fail to execute the judgment on mandate.[5] They further contend that the court erred by denying their request for appointment of a receiver to complete the sale of the property.

¶34 The Hoffmans have cited no authority, and indeed acknowledge "there is no case law," that addresses the precise issue presented here, namely, whether a superior court may enter

[4] Based on our resolution of this issue, we need not reach the Hoffmans' alternative claim that "Zipprich is a privy of Wood-McCaslin and it has no greater right to the closing funds than Wood-McCaslin."

[5] Even though our decision resolves the sole issue on appeal, we nonetheless address the propriety of the superior court's stay order because of the potential for further legal proceedings before the issuance of the mandate on appeal.

a stay and postpone execution of a judgment on mandate when a third-party garnishor has a potentially viable claim to the monies at issue in the underlying judgment. Although a superior court is bound by a decision and mandate of an appellate court and may not review or alter the appellate court's determination, *see Tovrea v. Superior Court*, 101 Ariz. 295, 297, 419 P.2d 79, 81 (1966), we conclude the issue presented to the superior court by Zipprich's request for a stay of the judgment on mandate while it pursued an appeal in the garnishment judgment was distinct from the issues finally determined under the mandate issued by this court. The superior court therefore did not exceed its authority when it entertained Zipprich's request for stay on appeal.

¶35 Our determination that the superior court did not improperly fail to execute our mandate when it granted the stay renders moot the Hoffmans' assertion that the court erred by not appointing a receiver. *Cf*. 38 C.J.S. Garnishment § 251 (2012) ("A garnishment is a ground for a stay of execution on another judgment against the garnishee pending resolution of the garnishment proceeding, if there are conflicting claims to the funds.").

III. Denial of Request for Supersedeas Bond

¶36 In their second consolidated special action (1 CA-SA 12-0280), the Hoffmans contend the superior court erred by

staying the garnishment judgment without first ordering Zipprich to post a supersedeas bond and denying the Hoffmans' request for a hearing on the matter.

¶37 We review a superior court's denial of a request for a supersedeas bond for an abuse of discretion. *See Salt River Sand and Rock Co. v. Dunevant*, 222 Ariz. 102, 107 n.5, ¶ 12, 213 P.3d 251, 256 n.5 (App. 2009). The Hoffmans rely on the version of Arizona Rule of Civil Appellate Procedure 7(a) in effect before January 1, 2012, which provided, in relevant part:

> (1) [W]henever an appellant entitled thereto desires a stay on appeal, he may obtain a stay by filing a supersedeas bond in the superior court in accordance with these rules. . . . The amount of the bond may be determined upon stipulation or upon motion. A hearing on such motion shall be held forthwith. The court may make any further order, other than or in addition to the bond, appropriate to preserve the status quo or the effectiveness of the judgment. The stay is effective when the supersedeas bond, as stipulated or as ordered by the court, is filed, and all other conditions imposed by the court have been complied with.
>
> (2) The bond shall be conditioned for the satisfaction in full of the judgment remaining unsatisfied, together with costs, interest, and any damages reasonably anticipated to flow from the granting of the stay including damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed[.] . . . In determining the amount of the bond, the court shall consider, among other things, whether there is other security for the judgment, or whether there is property in controversy which is in the custody of the sheriff or the court.

¶38 Thus, under the former rule, the court generally required a judgment debtor to post a supersedeas bond in the

amount of the unsatisfied judgment, plus costs, interest, and any attendant damages. *Salt River Sand and Rock*, 222 Ariz. at 107 n.5, ¶ 12, 213 P.3d at 256 n.5. Relying on the "delay" provision in former Rule 7(a)(2), the Hoffmans argue the superior court should have required Zipprich to post a bond to cover (1) the loss of interest on the closing funds since the entry of stay – monies the Hoffmans could otherwise receive on the closing funds were they not held in a non-interest bearing account with the clerk of the court, and (2) the reasonable damages and reasonably anticipated damages the Hoffmans have or will incur since the entry of the stay, namely, the taxes the Hoffmans have been required to pay to maintain good title to the subject properties. We need not decide, however, whether the superior court abused its discretion under the previous version of Rule 7(a) because the Rule had been superseded when Zipprich filed its April 2012 motion to stay the proceedings.

¶39 The current version of Rule 7(a)(2) provides, in relevant part:

> *Amount of the Bond*. The amount of the bond shall be set as the lesser of the following:
>
> (A) The total amount of damages awarded, excluding punitive damages;
>
> (B) Fifty per cent of the appellant's net worth;
>
> (C) Twenty-five million dollars.

Thus, subsection (a)(2) no longer expressly provides that a bond shall include "any damages reasonably anticipated to flow from . . . [the] delay."

¶40 We note that, under the current version of the Rule, as well as the former version, subsection (a)(1) grants a court discretion to "make any further order, other than or in addition to the bond, appropriate to preserve the status quo or the effectiveness of the judgment." The Hoffmans did not frame their supersedeas bond argument to the superior court under the "status quo" provision, however, and we therefore need not determine whether the superior court would have abused its discretion had it been requested but declined to require Zipprich to post a supersedeas bond under 7(a)(1). *See Winters v. Ariz. Bd. of Educ.*, 207 Ariz. 173, 177, ¶ 13, 83 P.3d 1114, 1118 (App. 2004) ("When a challenge is not raised with specificity and addressed in the [superior] court, we generally do not consider it on appeal."). Therefore, we cannot say that the superior court abused its discretion by denying the Hoffmans' request for a supersedeas bond.

IV. Attorneys' Fees

¶41 The Hoffmans request an award of their attorneys' fees incurred on appeal and in the special actions. For the appeal in 1 CA-CV 12-0072, the Hoffmans cite A.R.S. § 12-341.01 (2003) as the basis for their fee award; for 1 CA-SA 12-0247, the

Hoffmans cite A.R.S. §§ 12-341.01, -348(A)(4), and -349(A)(3) (2003) as the basis for their fee award; and for 1 CA-SA 12-0280, the Hoffmans cite A.R.S. §§ 12-348(A)(4) and -349(A) as the basis for their fee award.

¶42 "In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorneys fees." A.R.S. § 12-341.01. Here, the "pivotal question" is whether the claims at issue in this litigation "arise out of an express or implied contract." *See Chaurasia v. General Motors Corp.*, 212 Ariz. 18, 26, ¶ 24, 126 P.3d 165, 173 (App. 2006). "Attorneys' fees are not recoverable [] if [a] contract serves only as a factual predicate for the action and not its essential basis." *Id*. at 26, ¶ 25, 126 P.3d at 173. "We must examine the nature of the action and the surrounding circumstances to determine whether the claim is one 'arising out of a contract.'" *Id*. "The contract must have some causal connection with the claim to justify an award of attorneys' fees." *Id*.

¶43 We conclude this litigation did not arise out of a contract. Lurking in the background are two contracts, the Hoffmans' purchase agreement with Wood-McCaslin and Zipprich's loan agreement with Wood-McCaslin. Zipprich's garnishment claim to the closing monies certainly did not arise out of the Hoffmans/Wood-McCaslin purchase agreement. Although not as

readily apparent, we likewise conclude that Zipprich's garnishment claim to the closing monies did not arise out of the Zipprich/Wood-McCaslin agreement for purposes of A.R.S. § 12-341.01. Zipprich obtained a default judgment against Wood-McCaslin based on Wood-McCaslin's failure to repay the loan monies under the terms of the Zipprich/Wood-McCaslin agreement. Thus, Zipprich would not have obtained a judgment against Wood-McCaslin but for the Zipprich/Wood-McCaslin agreement and Wood-McCaslin's breach of that agreement. Zipprich's garnishment claim to the closing monies is predicated upon its default judgment, however, not the Zipprich/Wood-McCaslin agreement. Therefore, we conclude that this indirect connection to a contract is insufficient to support an award of attorneys' fees pursuant to A.R.S. § 12-341.01 in 1 CA-CV 12-0072 and 1 CA-SA 12-0247.

¶44 We now turn to the other statutory bases the Hoffmans cite to support an award of attorneys' fees in the special actions. Section 12-348(A)(4), which entitles a party who prevails in a special action challenging "an action by this state . . . against a party" to attorneys' fees, is inapplicable here. Finally, Zipprich did not engage in any conduct in successfully litigating these special actions that would subject it to fees pursuant to A.R.S. § 12-349(A). Therefore, we deny the Hoffmans' request for attorneys' fees.

CONCLUSION

¶45 For the foregoing reasons, we affirm the superior court's dismissal of Zipprich's writ of garnishment. We also affirm the superior court's entry of stay pending appeal and its denial of the Hoffmans' request for a supersedeas bond. We award the Hoffmans their taxable costs on appeal upon their compliance with Arizona Rule of Civil Appellate Procedure 21.

_/s/_____
PHILIP HALL, Judge

CONCURRING:

_/s/_____
MARGARET H. DOWNIE, Presiding Judge

_/s/_____
MAURICE PORTLEY, Judge