DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: mjt

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

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| MARY and CHRISTOPHER COLLINS, husband and wife,<br><br>Plaintiffs/Appellants/ Cross-Appellees,<br><br>v.<br><br>TRI-RANCH PROPERTIES, LLC; CAPSTONE HOLDINGS, LLC,<br><br>Defendants/Appellees,<br><br>ELONICA SAVILLE; SCOTT SAVILLE,<br><br>Defendants/Appellees/ Cross-Appellants. | 1 CA-CV 12-0470<br><br>DEPARTMENT A<br><br>**MEMORANDUM DECISION**<br>(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure) |

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-080556

The Honorable John R. Ditsworth, Judge

**AFFIRMED IN PART; REMANDED IN PART; VACATED IN PART**

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**S A N D E R S**, Judge

**¶1** Mary and Christopher Collins (collectively, "Appellants") appeal the superior court's dismissal with prejudice of their complaint against Tri-Ranch Properties, LLC, Capstone Holdings, LLC, and Elonica and Scott Saville (collectively, "Appellees").[1] For the following reasons, we remand to the superior court to consider whether Appellants' fraud claim constitutes a permitted independent action alleging fraud upon the court pursuant to Arizona Rule of Civil Procedure ("Rule") 60(c). In light of this decision, we also vacate the court's award of attorney's fees and costs.

**FACTS AND PROCEDURAL BACKGROUND**

**¶2** Appellants leased a home in Peoria owned and operated by Appellees. On October 31, 2008, Appellants informed Appellees that they were terminating their lease prematurely and vacating the premises on November 8, 2008, claiming the property was uninhabitable. They provided a prorated rent check for November, which Appellees returned as "an unauthorized partial payment for Nov. rent." Appellees subsequently brought a forcible entry and detainer ("FED") action against Appellants in Lake Pleasant Justice Court ("justice court") and secured a judgment against

[1] Only Tri-Ranch and Capstone filed an answering brief with this court. For the sake of clarity, we refer to Tri-Ranch, Capstone and the Savilles as "Appellees," though note that our determination of arguments raised by Appellees refer only to those in Tri-Ranch and Capstone's answering brief.

Appellants for the entire November rent amount plus fees and costs, totaling $4,794.00 ("rent judgment"). A few days later on November 23, 2008, Appellees rented the home to new tenants.

**¶3** Appellees then commenced garnishment proceedings in the justice court to satisfy the rent judgment. At that time and during all future appearances in the justice court, however, Appellees failed to disclose that the home had been re-rented on November 23. Though the new renters' lease provided that they did not pay rent for the final seven days of November during which time they resided in the home, Appellees do not dispute that Appellants' wages were garnished to satisfy all of November's rent.

**¶4** Upon independently discovering that the home had been re-let during part of the same period Appellants were subject to the rent judgment, Appellants filed suit against Appellees. They alleged six counts: (1) fraud for knowingly and intentionally making misrepresentations or failing to disclose that the property was re-rented, (2) negligent misrepresentation in failing to exercise reasonable care "by providing [Appellants] with false, misleading, incorrect and incomplete material information," (3) failure to supervise their employees' negligent acts, (4) conversion of Appellants' property through wage garnishment, (5) breach of contract for failing to maintain the property in a habitable condition and not mitigating Appellants'

lease obligations when the property was re-rented, and (6) breach of the covenant of good faith and fair dealing. Appellants sought compensatory damages in an amount to be established at trial for all six counts.

**¶5** In lieu of an answer, Appellees filed a motion to dismiss pursuant to Rule 12(b)(6) arguing Arizona's economic loss rule barred Appellants' tort claims, the action was a collateral attack on the justice court judgment, the complaint failed to state facts sufficient to support the contract claims and the complaint failed to state a valid claim for damages.

**¶6** After oral argument on the motion, the superior court dismissed Appellants' complaint with prejudice. The court reasoned that the economic loss rule barred the tort claims and the action constituted a collateral attack on the rent judgment. Moreover, the court found Appellants failed to state sufficient facts to support the three contract claims and failed to state a valid claim for damages. Appellees then sought attorney's fees, costs and sanctions against Appellants. In response, Appellants' counsel noted for the first time that Appellants were indigent and obtained counsel through the Volunteer Lawyers Program of the Maricopa County Bar Association. The court awarded Appellees over $10,000 in fees and costs, but denied their request for sanctions.

**¶7** Appellants' timely appeal followed. The Savilles also timely cross-appealed the superior court's denial of the motion for sanctions. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21 (West 2013) and -2101(A) (West 2013).[2]

## DISCUSSION

### A. Standard of Review.

**¶8** "Dismissal of a complaint under Rule 12(b)(6) is reviewed de novo." *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7, 284 P.3d 863, 866 (2012). We will affirm if Appellants "would not be entitled to relief under any facts susceptible to proof in the statement of the claim." *T.P. Racing, L.L.L.P. v. Ariz. Dep't of Racing*, 223 Ariz. 257, 259, ¶ 8, 222 P.3d 280, 282 (App. 2009) (citation omitted). Additionally, we review an award of attorney's fees and costs for an abuse of discretion and will affirm the award if it was supported by any reasonable basis. *Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 569, ¶ 9, 155 P.3d 1090, 1093 (App. 2007). Finally, while we review the superior court's denial of Rule 11 sanctions for an abuse of discretion, *Roberts v. City of Phoenix*, 225 Ariz. 112, 123, ¶ 45, 235 P.3d 265, 276 (App. 2010), we review the denial of sanctions

[2] Absent material revisions after the relevant date, we cite a statute's current version.

requested under A.R.S. § 12-349 (West 2013) de novo, *Hormel v. Maricopa Cnty.*, 224 Ariz. 454, 461, ¶ 27, 232 P.3d 768, 775 (App. 2010).

**B. Appellants' Tort Claims.**

**¶9** The superior court dismissed Appellants' entire complaint with prejudice. Appellants, however, present no argument on appeal concerning the superior court's dismissal of their breach of contract claims. In their opening brief, Appellants challenge only the court's reasons for dismissing their tort claims. We therefore address only those arguments raised in Appellants' brief and consider any arguments regarding the court's dismissal of the contract claims waived. *See Phoenix Newspapers, Inc. v. Molera*, 200 Ariz. 457, 462, ¶ 26, 27 P.3d 814, 819 (App. 2001).

**1. Economic loss rule.**

**¶10** Appellants first argue the superior court erred by applying the economic loss rule to dismiss their tort claims. Appellees, on the other hand, maintain that the economic loss rule controls because, "[a]t its core, this case is a contract case that is governed by a lease agreement." We agree with Appellants that the court misapplied the economic loss rule in dismissing their tort claims.

**¶11** The economic loss rule is "a common law rule limiting a contracting party to contractual remedies for the recovery of

economic losses unaccompanied by physical injury to persons or other property." *Flagstaff Affordable Hous. Ltd. P'ship v. Design Alliance, Inc.* (*Flagstaff II*), 223 Ariz. 320, 323, ¶ 12, 223 P.3d 664, 667 (2010). When a contracting party suffers purely economic loss related to the subject of the contract, the party is limited wholly to its contractual remedies. *See id.* at 326, ¶ 28, 223 P.2d at 670. Here, however, Appellants' tort claims do not relate to the subject of their contract.

**¶12** Appellants repeatedly asserted in their complaint that they were harmed by Appellees' concealment during the garnishment proceedings that the home was re-rented on November 23, 2008. This alleged misconduct not only occurred after the contractual relationship between the parties ceased, but was also extraneous to any contractual relationship. *See id.* at 323, ¶ 14, 223 P.3d at 667 (court considers underlying policies of tort and contract law in the context of the facts and claim made to determine whether the economic loss rule applies). The factual context of Appellants' tort claims does not stem from any alleged breach of contract; rather, Appellants alleged that Appellees' conduct in the justice court, distinct from any duties under the lease, constituted fraud. Thus, because the alleged misrepresentations forming Appellants' tort claims were not linked to any contract claim, the court erred in applying the economic loss rule.

**2. Negligent misrepresentation and failure to supervise.**

**¶13** Though the superior court erred in applying the economic loss rule, because we review de novo, we nonetheless affirm the court's dismissal of Appellants' negligent misrepresentation and failure to supervise counts because the complaint failed to state claims upon which relief could be granted.

**¶14** Appellants' complaint alleged that Appellees committed negligent misrepresentation by providing false, misleading and incomplete material information – namely, failing to disclose that the home was re-rented. The complaint failed to allege, however, that Appellants relied to their detriment on the incorrect or incomplete information. *See Taeger v. Catholic Family & Cmty. Servs.*, 196 Ariz. 285, 294, ¶ 29, 995 P.2d 721, 730 (App. 1999) (to establish negligent misrepresentation, plaintiff must allege it relied on the incorrect information and that such reliance caused its damages); Ariz. R. Civ. P. 9(b) (claims of fraud or mistake must be pled with particularity).

**¶15** Appellants also alleged that Appellees failed to supervise their employees. We simply do not see how Appellants would be entitled to relief under any facts susceptible to proof in their statement of this claim. They alleged the Savilles were employees of the real estate companies, Tri-Ranch and Capstone, and that these companies were responsible under a theory of

respondeat superior for failing to supervise the employees' negligent actions. But nowhere did Appellants indicate what negligent actions by the employees caused them harm. If failing to disclose the re-rental of the home was negligent, that action was not taken by any employee. Rather, Tri-Ranch and Capstone as represented by counsel appeared at the FED and garnishment proceedings. Thus, the superior court properly dismissed Appellants' claims for negligent misrepresentation and failure to supervise because Appellants did not state claims upon which relief could be granted.

**3. Fraud.**

**¶16** Pursuant to the above discussion, only Appellants' fraud claim remains. Having disposed of the economic loss rule, we now turn to whether the court properly dismissed the fraud claim as a "collateral attack on the FED judgment obtained in" the justice court. Appellants argue the court erred, while Appellees contend the ruling was proper because Appellants "waived their right to appeal the Justice Court judgment and most certainly would be turned away in any attempt to have that judgment set aside or vacated." We hold the superior court erred in dismissing the fraud claim because, though it constituted a collateral attack, it may be considered a permissible one under Rule 60(c).

**¶17** Rule 60(c) provides that a party may file a motion for relief from a final judgment for reasons such as mistake or excusable neglect and discovery of new evidence. Rule 60(c) also states that its provisions

> do[] not limit the power of a court to entertain an *independent action* to relieve a party from a judgment . . . or to set aside a judgment for *fraud upon the court*. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules *or by an independent action*.

(Emphases added). In other words, a collateral attack of a judgment, i.e. an independent action, may be maintained pursuant to Rule 60(c) if the plaintiff alleges the judgment was obtained by fraud upon the court. *See Roberson v. Teel*, 20 Ariz. App. 439, 449, 513 P.2d 977, 987 (App. 1973) ("[E]xtrinsic fraud, that is, fraud which operates upon the manner in which the judgment was procured, is grounds for a collateral attack upon the judgment."). Appellants' fraud claim can be read as alleging just that. *See Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7, 189 P.3d 344 346 (2008) (we must indulge all reasonable inferences from the factual allegations of the complaint).

**¶18** The heart of Appellants' fraud claim was that Appellees allegedly knowingly and intentionally failed to disclose to the justice court and Appellants that the home had been re-rented on November 23 despite the FED judgment against Appellants for all

of November's rent. Appellees note that because the new renters did not pay November rent, Appellants cannot claim Appellees fraudulently "double-dipped" by obtaining rent via the FED judgment for that same month. Appellees claim that if the case is not "about double dipping, then one can only venture a guess as to why it would be relevant that [Appellees] did or did not inform [Appellants] that the Property had been re-rented."

**¶19** Appellees fail to realize the significance of their omission to the justice court. Because the new tenants resided in the property rent-free for the last seven days of November, Appellants should not have been subject to a rent judgment for all of November. *See Tempe Corporate Office Bldg. v. Ariz. Funding Servs., Inc.*, 167 Ariz. 394, 399, 807 P.2d 1130, 1135 (App. 1991) (landlord can recover unpaid rent due only prior to reletting the premises). The justice court did not have the opportunity to consider this argument, however, because as Appellants alleged in their complaint nearly ten times, Appellees "knowingly and intentionally failed to disclose" to the justice court and Appellants that the property had been re-rented. "When a party obtains a judgment by concealing material facts and suppressing the truth with the intent to mislead the court, this constitutes a fraud upon the court, and the court has the power to set aside the judgment at any time." *Cypress on Sunland*

*Homeowners Ass'n v. Orlandini*, 227 Ariz. 288, 299, ¶ 42, 257 P.3d 1168, 1179 (App. 2011).

**¶20** Additionally, we do not agree with Appellees that it would have been "inconsequential" if they had disclosed the re-rental because Appellees acted for "the *benefit*" of Appellants. Appellees contend that, "[h]ypothetically, if [Appellants] would have claimed that [Appellees] 'double dipped,' collecting rent from both [Appellants] and the subsequent tenant for the same time period, this might have reduced the amount owed . . . in the garnishment." But Appellees are incorrect that only a double rent payment is relevant. In *Mesilla Valley Mall Co. v. Crown Industries*, a commercial tenant abandoned the premises and the landlord allowed a museum to "occupy the space rent free in the interest of promoting good community relations." 808 P.2d 633, 634 (N.M. 1991). The landlord then initiated an action to collect rent from the tenant who abandoned the premises. *Id.* at 635. The court held that the landlord re-let the premises solely for its own benefit. *Id.* at 636. If re-letting does not benefit both the original tenant and the landlord, "the landlord's actions would be inconsistent with a continued landlord-tenant relationship to which the landlord seeks to hold the tenant." *Id.* The landlord, therefore, could not hold the original tenant liable for rent as of the date the premises were re-rented. *Id.* Likewise here, even if the new tenants did not pay rent for their

November occupancy, Appellees cannot hold Appellants liable for all of November's rent when Appellees clearly benefitted by the new tenant's occupancy during that time.

**¶21** Appellees acknowledge the mechanisms afforded Appellants under Rule 60(c). They argue that "[d]espite being aware of the judgment and the garnishment, [Appellants] took no action to vacate the judgment or object to the garnishment." Appellants maintain, however, that they did not object or otherwise seek recourse because they were unaware that the property was re-rented on November 23. Once aware, Appellants asserted in their complaint the alleged fraud upon the court. This is just the type of independent action Rule 60(c) contemplates. *See Andrew R. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 453, 459, ¶ 22, 224 P.3d 950, 956 (App. 2010); *Honk v. Karlsson*, 80 Ariz. 30, 33, 292 P.2d 455, 457 (1956) (extrinsic fraud defined as that by which "the defrauded person has thereby been prevented from learning of the proceeding or asserting his claim therein") (citation omitted).

**¶22** Because Appellants' fraud claim could be read as alleging fraud upon the court, the superior court should have considered whether Appellants' complaint was a proper independent action under Rule 60(c). Thus, the court erred in dismissing the fraud claim as an improper collateral attack because under Rule 60(c), such an independent action may be permitted at any time to

remedy fraud upon the court. We remand to the superior court to consider the fraud allegations in light of Rule 60(c).

**C. Award of Attorney's Fees and Costs.**

**¶23** Appellants also argue the superior court abused its discretion by awarding Appellees their attorney's fees and costs. Because we remand to the superior court to consider whether Appellants' fraud claim constitutes a valid independent action under Rule 60(c), we also vacate the court's award of attorney's fees and costs.

**D. Cross-Appeal on Denial of Sanctions.**

**¶24** Lastly, the Savilles cross-appeal from the superior court's denial of their motion for sanctions under A.R.S. § 12-349(A) and Rule 11. They argue sanctions were warranted given Appellants' motive to "harass and intimidate" them by filing a frivolous complaint. They also contend the superior court erred by "taking into consideration [Appellants'] claim they were indigent."

**¶25** Because we remand to the superior court to consider whether Appellants' fraud claim constitutes an independent action alleging fraud on the court under Rule 60(c), we cannot say Appellants' action was brought "without substantial justification" under § 12-349(A) or for an "improper purpose, such as to harass" under Rule 11. We therefore affirm the superior court's denial of the motion for sanctions.

## ATTORNEY'S FEES & COSTS ON APPEAL

**¶26** Appellees request this court to "impose sanctions and/or attorneys' fees" because this appeal is "frivolous" and pursued to "harass" Appellees. Because we remand on the fraud claim, we deny Appellees' request.

**¶27** Appellants, as the prevailing party on appeal, are entitled to their costs upon compliance with ARCAP 21.

## CONCLUSION

**¶28** For the foregoing reasons, we affirm the superior court's dismissal of all of Appellants' claims except the fraud claim and attorney's fees and costs. We remand to the superior court to consider whether Appellants' fraud claim constitutes an independent action under Rule 60(c). We also vacate the award of attorney's fees and costs.

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TERESA A. SANDERS, Judge Pro Tempore*

CONCURRING:

/S/
_____
PATRICIA A. OROZCO, Presiding Judge

/S/
_____
PETER B. SWANN, Judge

*The Honorable Teresa A. Sanders, Judge of the Maricopa County Superior Court, is authorized by the Chief Justice of the Arizona Supreme Court to participate in the disposition of this appeal pursuant to Article 6, Section 3, of the Arizona Constitution and A.R.S. §§ 12-145 to -147 (2003).