IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

CHARLES and JOAN CLANCY, *Plaintiffs/Appellants*,

v.

DESERT SCHOOLS FEDERAL CREDIT UNION, a Federal Credit Union; SOUTHWEST COMMERCIAL PROPERTIES, L.L.C., a Delaware limited liability company; MARK D. HUNTON, a single man; EARL YOUNG and LENAE YOUNG, husband and wife; LORI M. SEVENSKY and JOHN S. SEVENSKY, wife and husband, *Defendants/Appellees*.

No. 1 CA-CV 16-0018
FILED 3-14-2017

Appeal from the Superior Court in Maricopa County
No. CV2014-010511
The Honorable James T. Blomo, Judge

AFFIRMED IN PART, VACATED IN PART

COUNSEL

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MEMORANDUM DECISION

Judge Patricia A. Orozco[1] delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge Randall M. Howe joined.

O R O Z C O, Judge:

¶1 Appellants Charles and Joan Clancy challenge the entry of summary judgment in favor of Desert Schools Federal Credit Union ("Desert Schools"). Because the Clancys should have asserted the claims asserted here as counterclaims in the parties' earlier litigation, the entry of summary judgment on those claims is affirmed. However, because Desert Schools did not show an entitlement to an award of attorney fees, that award is vacated.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The Clancys own and manage several commercial and residential properties in Arizona. Between 2004 and 2007, certain entities the Clancys controlled obtained four loans from Desert Schools on four properties. The Clancys personally guaranteed each loan.

¶3 Joan Clancy met with Mark Hunton of Desert Schools on March 29, 2010, to discuss a possible modification of two of the loans. The parties had several discussions by email and in person over the next several months leading up to a January 2011 meeting where Desert Schools told the Clancys to provide additional collateral to finalize the modification. Desert Schools declared a default in April 2011, then proposed a modification in June 2011 which would have obligated the Clancys to grant Desert Schools a lien on their home. The Clancys rejected the proposal, and the Clancys' business entities filed for Chapter 11 bankruptcy protection shortly thereafter.

¶4 Desert Schools sued the Clancys on their personal guaranties (the "Original Litigation"). The Clancys counterclaimed, alleging breach of

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[1] The Honorable Patricia A. Orozco a Retired Judge of the Court of Appeals, Division One, have been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

the contractual covenant of good faith and fair dealing and promissory estoppel. The Clancys alleged that while Hunton repeatedly told them that the modification they sought would be approved, Desert Schools never intended to consider modification, thereby depriving the Clancys of any chance to refinance through another lender.

¶5 After full briefing and oral argument, the court granted summary judgment to Desert Schools on the Clancys' promissory estoppel claim, finding that neither Desert Schools nor Hunton made an "actionable promise to modify the loan." The court also found that the Clancys were "sophisticated investors who knew that any loan modification would need to be approved by a loan committee, and could not be promised by Mr. Hunton."

¶6 A bench trial followed, where Desert Schools prevailed on its breach of contract claims. As for the Clancys' remaining counterclaim, the trial court determined that "[t]he weight of the evidence demonstrate[d] that Desert Schools seriously considered the loan modification and acted in good faith to consider the loan modification." The court also found, however, that Desert Schools "did not act in good faith diligence to reach a decision concerning a modification agreement." The court therefore ruled that the Clancys had "prevailed in their counterclaim" alleging breach of the contractual covenant of good faith and fair dealing.

¶7 The Clancys did not appeal the judgment in the Original Litigation. They instead filed this case against Desert Schools, Hunton, and others alleging the following tort claims and an implied cause of action under a statute: common law fraud, consumer fraud, negligent misrepresentation, aiding and abetting, and civil conspiracy. In pressing these torts, the Clancys again recounted their discussions with Hunton and others regarding modification and again alleged that they "did not seek other sources of financing" due to "Hunton's repeated assurances that the Modification would be approved." The Clancys also alleged that Desert Schools falsely represented that

> a) [the Clancys'] Loans were being formally reviewed for a loan modification on the favorable terms discussed with Defendant Hunton; b) [the Clancys'] loan modification request had been presented to the loan and credit committee for final approval; c) [the Clancys'] loan modification request had been approved and was merely awaiting formal document preparation; and d) that [Desert Schools] would cooperate in the marketing and sales of the Properties . . . .

¶8 Desert Schools moved for summary judgment, arguing that the Clancys' claims were barred by collateral estoppel, were compulsory counterclaims that should have been asserted in the Original Litigation under Arizona Rule of Civil Procedure ("Rule") 13(a), and were time-barred. The Clancys responded to the motion and separately moved for relief under Rule 56(f), and to compel discovery, arguing they were entitled to full responses to their discovery requests regarding Southwest Commercial Properties, LLC, the company that held and managed the Clancys' former properties at that time.

¶9 The trial court granted Desert Schools' motion on all three grounds, finding that the issues the Clancys raised were "the exact issues raised and adjudicated . . . in the original litigation." The court subsequently denied the Clancys' motion to compel. The court entered final judgment awarding Desert Schools attorney fees and costs. The Clancys timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") § 12-2101(A)(1).

DISCUSSION

¶10 We review a grant of summary judgment de novo to determine whether any genuine issue of material fact exists, viewing the evidence and all reasonable inferences in the non-moving party's favor. *Russell Piccoli P.L.C. v. O'Donnell*, 237 Ariz. 43, 46-47, ¶ 10 (App. 2015). "The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). Summary judgment should be granted "if the facts produced in support of [a] claim . . . 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 . . . ." *Orme School v. Reeves*, 166 Ariz. 301, 309 (1990).

I. The Clancys' Current Claims Were Compulsory Counterclaims in the Original Litigation.

¶11 Litigants must state as a counterclaim any claim which, at the time of serving the pleading, the pleader has against an opposing party if it "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Ariz. R. Civ. P. 13(a). If a compulsory counterclaim is not pled in the first action, it is waived. *Mirchandani v. BMO Harris Bank, N.A.*, 235 Ariz. 68, 70, ¶ 8 (App. 2014). A claim arises from the same "transaction or occurrence" if there is a logical relationship between the current cause of action and the previous one. *Id*. at 70-71, ¶ 8.

¶12 The Clancys concede their current claims arise out of the same "transactions or occurrences" as their Original Litigation counterclaims. They contend, however, that their current claims had not yet "matured" when they filed their answer and counterclaims in the Original Litigation. *See Lansford v. Harris*, 174 Ariz. 413, 419 (App. 1992) ("[A] claim must be 'mature' to be compulsory.") (citing *O'Brien v. Scottsdale Discount Corp.*, 14 Ariz. App. 224, 227 (1971)).[2] Specifically, the Clancys say they could not have asserted their current claims "until they received the minutes of the meetings from [Desert Schools'] loan review committees," which they argue showed "that Hunton had lied to them throughout 2010" regarding the status of the modification.

¶13 Actual knowledge is not a prerequisite to the accrual of the Clancys' claims. *See Mister Donut of Am., Inc. v. Harris*, 150 Ariz. 321, 323 (1986) (stating a fraud claim can accrue "before a person has actual knowledge of the fraud or even all the underlying details of the alleged fraud"); *Coronado Dev. Corp. v. Superior Court*, 139 Ariz. 350, 352 (App. 1984) ("[A] person does not have to know every fact about his fraud claim before the statute begins to run."); *see also Anson v. Am. Motors Corp.*, 155 Ariz. 420, 423 (App. 1987) (stating negligence-based causes of action accrue when the plaintiff "discovers or by the exercise of reasonable diligence should have discovered that he or she has been injured by the defendant's negligent conduct"). Rather, causes of action generally accrue once the plaintiffs are damaged and know or should know the "who" and "what" elements of causation. *Kool Radiators, Inc. v. Evans*, 229 Ariz. 532, 535, ¶ 13 (App. 2012) (quoting *Lawhon v. L.B.J. Institutional Supply, Inc.*, 159 Ariz. 179, 183 (App. 1988)).

¶14 There is no doubt that, to the extent they were damaged, the Clancys were damaged when they asserted counterclaims in the Original

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[2] *Lansford*, and *O'Brien* before it, use the term "mature" in determining whether a claim is a compulsory counterclaim. 174 Ariz. at 132; 14 Ariz. App. at 227. The difference, if any, between the term "mature" for purposes of Rule 13, and "accrue" for purposes of a statute of limitations, is not explored in the briefs on appeal. The Clancys, quite correctly, note that "[g]uidance on what constitutes a 'mature' claim for the purposes of Rule 13(a) is rather sparse." It is clear, however, that a claim is "mature" under Rule 13(a) if it has "accrued" under a statute of limitations. Accordingly, and given the facts of this case, the court looks to cases determining whether a claim has accrued under a statute of limitations to decide whether the Clancys' claims are barred, leaving for another case and day delineating any difference between "mature" and "accrue."

Litigation. The record also shows the Clancys' current claims shared the same "who" and "what" causation elements as their Original Litigation counterclaims. The Clancys based their Original Litigation counterclaims on "Mr. Hunton's repeated insistence that [the Clancys'] loan modification request was going to be submitted to the loan committee 'for approval' on multiple separate occasions." That same theme permeated the current claims, as the Clancys again alleged that they did not seek alternative financing based on "Hunton's repeated assurances that the Modification would be approved."

¶15 The Clancys also admitted they suspected Hunton was misrepresenting the status of the modification by December 2010, ten months before Desert Schools commenced the Original Litigation. The trial court therefore did not err in finding the Clancys could have, and should have, raised their current claims in the Original Litigation. *Cf. Mirchandani*, 235 Ariz. at 71, ¶ 9 ("The Mirchandanis' allegation that TradeCor conspired to wrongfully acquire their property is logically related to the underlying facts that gave rise to TradeCor's lawsuit to enforce the Mirchandanis' personal guarantees.").

¶16 Given our decision on this issue, we do not reach the parties' arguments regarding collateral estoppel, the applicable statutes of limitations, or the Clancys' motion to compel.[3] *See Greenwood v. State*, 217 Ariz. 438, 441 n.7, ¶ 12 (App. 2008) ("[W]e will affirm the entry of summary judgment if it is correct for any reason.").

II. The Clancys' Current Claims Did Not Arise Out of Contract.

¶17 The Clancys also challenge the trial court's attorney fees award to Desert Schools, contending their claims did not arise out of contract under A.R.S. § 12-341.01(A).[4] We review this issue de novo. *ML*

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[3] The Clancys also challenge the trial court's order denying their Rule 56(f) motion for the first time in their reply brief. The Clancys waived this argument by not raising it sooner. *See Marquette Venture Partners II, LLP v. Leonesio*, 227 Ariz. 179, 184 n.8, ¶ 18 (App. 2011) ("[W]e will not consider issues first raised in a reply brief.").

[4] Both sides appear to assume that the trial court also awarded fees under A.R.S. § 12-349(A), but the court did not mention § 12-349(A) in its award. We therefore do not reach the issue. *See* A.R.S. § 12-350 (obligating the court to "set forth the specific reasons" for an award of fees under § 12-

Servicing Co., Inc. v. Coles, 235 Ariz. 562, 569–70, ¶ 29 (App. 2014). We are not bound by the form of the pleadings in determining whether claims arise out of contract; we instead consider both the nature of the action and the surrounding circumstances. *Hiatt v. Shah*, 238 Ariz. 579, 584, ¶ 18 (App. 2015).

¶18 Generally, an action does not arise out of contract if the contract is a factual predicate to, but not the essential basis of, the claims. *Perry v. Ronan*, 225 Ariz. 49, 54, ¶ 19 (App. 2010). Unlike the Original Litigation, which involved contract claims alleging breaches of two of the loan contracts between Desert Schools and the Clancys' entities, in this action, the Clancys press tort claims and one implied cause of action under statute solely arising from the parties' modification discussions.

¶19 Neither party has argued Desert Schools had a contractual obligation to consider any modification. The loan contracts thus were, at most, peripheral to the current lawsuit. *See Morris v. Achen Const. Co., Inc.*, 155 Ariz. 512, 514 (1987) ("The duty not to commit fraud is obviously not created by a contractual relationship."). We therefore vacate the trial court's fee award. For the same reasons, we decline to award attorney fees incurred on appeal to either side.

CONCLUSION

¶20 We affirm the trial court's summary judgment ruling but vacate its attorney fee award to Desert Schools. We award the Clancys their costs incurred on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21.

AMY M. WOOD • Clerk of the Court
FILED: AA

349); *Rogone v. Correia*, 236 Ariz. 43, 50, ¶ 22 (App. 2014) (stating that § 12-350 findings must be "specific enough to allow a reviewing court to test the validity of the judgment").