IN THE
# ARIZONA COURT OF APPEALS
## DIVISION ONE

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ROBERT J KOZINSKI, *Plaintiff/Appellee*,

*v.*

MILLICIENT A MCNEIL, *Defendant/Appellant*.

No. 1 CA-CV 16-0372
FILED 12-7-2017

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Appeal from the Superior Court in Maricopa County
No. CV2014-092209
The Honorable David M. Talamante, Judge

**AFFIRMED**

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APPEARANCE

Millicient A. McNeil, Tempe
*Defendant/Appellant*

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**MEMORANDUM DECISION**

Presiding Judge James P. Beene delivered the decision of the Court, in which Judge Randall M. Howe and Judge Kent E. Cattani joined.

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**B E E N E**, Judge:

**¶1** Millicient A. McNeil ("McNeil") appeals from the superior court's entry of judgment in favor of Robert J. Kozinski ("Kozinski") on his breach of contract claim following a bench trial. For the following reasons, we affirm.

**FACTS AND PROCEDURAL HISTORY**

**¶2** McNeil and Kozinski dated for approximately two years. After their relationship ended, McNeil signed a promissory note providing:

> I Millicient Amelia McNeil owe Robert Kozinski $13,000 for helping me during 2012-2014. (Cell phone, rent, food, spending money, hotels . . . .).

Thereafter, in a text message, McNeil confirmed her commitment to pay Kozinski the money owed.[1]

**¶3** When McNeil failed to pay, Kozinski filed a complaint in superior court for breach of contract arising from the promissory note. After McNeil answered, Kozinski moved for summary judgment. The court denied Kozinski's motion and transferred the case to mandatory arbitration. Following an arbitration hearing, the arbitrator entered an award in favor of Kozinski for $13,000. McNeil appealed from the award.

**¶4** After a bench trial, the superior court granted judgment in favor of Kozinski for $13,000 plus interest. McNeil timely appealed, and

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[1] McNeil's text message stated, "I will follow through on the obligation to pay you back ALL the money you [gave] me. (For dinners, help with anything I ever needed, going out. . .) You will get it all back 100 percent."

we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1).

## DISCUSSION

**¶5** Following a bench trial, we defer to the "superior court's findings of fact unless clearly erroneous" but review the court's conclusions of law *de novo*. *Town of Marana v. Pima Cty.*, 230 Ariz. 142, 152, ¶ 46 (App. 2012).[2]

### I. Promissory Note

**¶6** On appeal, McNeil argues that the superior court "erred by ruling as a matter of law that [McNeil] has a duty to pay on the promissory note."

**¶7** McNeil first argues that she executed the note under duress, citing the Restatement (Second) of Contracts § 175, which provides that a contract is voidable if a party's manifestation of assent to the contract "is induced by an improper threat by the other party that leaves the victim no reasonable alternative[.]" Restatement (Second) of Contracts § 175 (1981). We have previously held that to constitute duress, an act must preclude "the exercise of free will and judgment." *USLife Title Co. of Ariz. v. Gutkin*, 152 Ariz. 349, 357 (App. 1986) (citations omitted).

**¶8** The parties presented conflicting testimony at trial. McNeil testified that she and Kozinski "had a heated argument" with "lots of yelling and screaming" and that she signed that contract so that Kozinski would get away from her. Conversely, Kozinski testified that the parties had a disagreement after which McNeil herself prepared and signed the contract.

**¶9** On appeal, "we do not reweigh conflicting evidence or redetermine the preponderance of the evidence[.]" *In re Estate of Pouser*, 193 Ariz. 574, 579, ¶ 13 (1999). Rather, we examine the record "to determine whether substantial evidence exists" to support the superior court's decision. *Id.* Here, the evidence supports a finding that McNeil exercised free will and judgment when executing the promissory note. Accordingly, we affirm the court's decision finding that McNeil did not act under duress.

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[2] Kozinski has not filed an answering brief. In our discretion, we decline to treat his omission as an admission of error. *See In re Marriage of Diezsi*, 201 Ariz. 524, 525, ¶ 2 (App. 2002).

**¶10** McNeil next argues that "Kozinski testified to being aware of incorrect and fallacious elements within the note." More specifically, she argues that Kozinski testified the amount of debt was $12,000 rather than $13,000. While McNeil is correct that Kozinski stated the amount of debt was "somewhere[] around $12,000," he also testified that McNeil herself prepared the contract and "wrote 13,000."

**¶11** "Written contracts are presumed to be fair and honest in their inception and execution." *Lawless v. Ennis*, 3 Ariz. App. 451, 456 (1966) (citation omitted). It is the duty of the party claiming fraud or mistake of fact to prove circumstances evidencing the same. *See id.* Here, it was proper for the superior court to presume that the promissory note was a fair and honest representation of the debt that McNeil owed Kozinski. McNeil did not meet her burden of proving otherwise.

**¶12** McNeil also argues that both parties were "aware of ambiguities within the note." Because McNeil was the party who drafted the promissory note, any ambiguities in the note should be construed against her. *See Abrams v. Horizon Corp*., 137 Ariz. 73, 79 (1983) (citing the Restatement (Second) of Contracts § 206).[3]

**¶13** Accordingly, we affirm the superior court's decision to enforce the promissory note.

## II. Counterclaim

**¶14** McNeil next argues that the superior court's post-trial ruling is not final because it did not address her counterclaim.[4]

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[3] On appeal, McNeil also raises the issue of "whether the trial court erred in determining" that Kozinski proved "the conditions" set forth in the promissory note, specifically that she was required to pay the debt only when she became "financially stable." She argues that the court should have defined "financial stability." McNeil admits that this issue "was not litigated" in superior court. Because McNeil did not raise this issue below, she has waived it on appeal. *See Englert v. Carondelet Health Network*, 199 Ariz. 21, 26, ¶ 13 (App. 2000) ("[W]e generally do not consider issues . . . raised for the first time on appeal.").

[4] McNeil previously moved this court to dismiss her appeal or, alternatively, to stay the appeal pending entry of a final judgment. We denied her motion explaining that a final judgment had been entered.

**¶15** After entry of the arbitration award, McNeil moved for permission to file a counterclaim alleging defamation. The superior court denied her motion without prejudice.

**¶16** Upon appeal from a final judgment, we "shall review any intermediate orders involving the merits of the action and necessarily affecting the judgment, and all orders and rulings assigned as error[.]" A.R.S. § 12-2102(A). The superior court's order denying McNeil's counterclaim became appealable upon entry of the final judgment. It was unnecessary for us to include this interlocutory ruling in the final judgment.[5]

## III. Disclosure

**¶17** McNeil also argues the superior court erred when it permitted "Kozinski to submit new and undisclosed evidence into the record at trial."

**¶18** Pursuant to Arizona Rule of Civil Procedure 37(b), the superior court may impose "just orders" on a party for failure to obey a discovery order, including "prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence[.]" Ariz. R. Civ. P. 37(b)(2)(A)(ii). The court has wide discretion to impose discovery sanctions, and we will not disturb its rulings absent an abuse of discretion. *State ex rel. Babbitt v. Arnold*, 26 Ariz. App. 333, 334 (1976).

**¶19** At trial, the superior court handled Kozinski's failure to timely disclose evidence by restricting the admission of evidence:

> [T]o the extent that there was a failure to disclose, a failure to provide discovery, that has been dealt with today, by not allowing [Kozinski] to introduce evidence that was not disclosed or was not responded to in discovery.

In fact, the court admitted only one of Kozinski's exhibits into evidence, which was a copy of the promissory note. The note was already part of the record having been attached to Kozinski's complaint and his motion for summary judgment. Accordingly, it was not new or undisclosed evidence.

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[5] On appeal, McNeil attempts to argue the merits of her counterclaim. She does not argue, however, that the superior court erred in denying her motion to add a counterclaim.

**¶20** We find no abuse of discretion in the superior court's handling of Kozinski's disclosure and discovery failures.

## IV. Due Process

**¶21** McNeil finally argues that her due process rights were violated because Kozinski was permitted to "move forward with [the] case" despite his failure to abide by the discovery rules.

**¶22** "Procedural due process requires notice and an opportunity to be heard in a meaningful manner and at a meaningful time." *Webb v. State ex rel. Ariz. Bd. of Med. Examiners*, 202 Ariz. 555, 558, ¶ 9 (App. 2002) (citation omitted). In this case, McNeil had an opportunity to be heard in a meaningful manner and at a meaningful time both at the arbitration hearing and at trial. We find no violation of McNeil's due process rights.[6]

## CONCLUSION

**¶23** For the foregoing reasons, we affirm the decision of the superior court.


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

[6] McNeil also argues that the court erred by not commencing "with opening statements by the parties." Because McNeil did not object at trial to the omission of opening statements, she waived this argument. *See Health For Life Brands, Inc. v. Powley*, 203 Ariz. 536, 538, ¶ 11 (App. 2002) (holding that "procedural defects are usually waived if not raised and preserved in the trial court").