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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

KELLEY C. JUDD, *Plaintiff/Appellant*,

v.

CYNTHIA STOCKWELL, et al., *Defendants/Appellees*.

No. 1 CA-CV 16-0426
FILED 7-11-2017

Appeal from the Superior Court in Maricopa County
No. CV2015-011083
The Honorable Karen A. Mullins, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

COUNSEL

MacQueen & Gottlieb, PLC, Phoenix
By Patrick R. MacQueen, Benjamin Gottlieb
Counsel for Plaintiff/Appellant

Gordon & Rees, LLP, Phoenix
By Andrew S. Jacob
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Chief Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge James P. Beene joined.

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T H U M M A, Judge:

¶1 Plaintiff Kelley Judd appeals from the entry of summary judgment in favor of defendants Cynthia Stockwell and Biltmore Lifestyles Real Estate Company, LLC, (BLRE) and awarding defendants attorneys' fees. For the reasons that follow, the judgment is affirmed, except to the extent it rejected Judd's conversion claim relating to his personal property, with that portion of the judgment vacated and remanded for further proceedings consistent with this decision.

FACTS¹ AND PROCEDURAL HISTORY

¶2 Judd and Stockwell were involved in a romantic relationship for more than a decade. During that time, the parties purchased a home together in Phoenix, shared many of their personal expenses and worked together at BLRE, the real estate business Stockwell formed. By early July 2015, Stockwell ended the relationship and Judd's position at BLRE ended.

¶3 On July 18, 2015, Judd and Stockwell signed a "Release," which reads in its entirety as follows:

The undersigned parties, Cynthia J. Stockwell and Kelley C. Judd mutually agree that payment of \$20,000 by Cynthia J. Stockwell to Kelley C. Judd shall mutually release, absolve and forever discharge each other, and all heirs and agents, from any and all claims, causes of action, suits, costs, expenses, attorneys' fees, sums of money, covenants, contracts, controversies, agreements, promises, and damages of any kind as a result of the dissolution of their personal and/or business relationship.

The private property of Kelley C. Judd located at [a residential property] and in the storage

¹ This court views "the evidence and reasonable inferences in the light most favorable to" Judd, "the party opposing the motion" for summary judgment. *Andrews v. Blake*, 205 Ariz. 236, 240 ¶ 12 (2003).

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locker at Camelback & 19th Ave shall be returned to him at the earliest possible time.

The Parties agree not to make any statements, written or verbal, or cause or encourage others to make any statements, written or verbal, to any third-party that defames, disparages or in any way criticizes the person or business reputation, practices, or conduct of the above-identified released parties.

The Parties acknowledge and agree that this release does not, and shall not be construed to constitute an admission of liability or fault of any kind whatsoever by any of the Parties, and is made solely for the purpose of compromising, settling and ending any and all disputes at issue now or in the future.

¶4 In September 2015, Judd sued Stockwell and BLRE. The complaint, as amended, alleges Judd signed the Release “under duress” and asserts various contract, tort, equitable and statutory claims regarding BLRE, the house Judd and Stockwell purchased together and Judd’s personal property. In November 2015, defendants filed a “motion to dismiss and, in the alternative, motion for summary judgment,” arguing the Release barred Judd’s claims as a matter of law. After briefing and oral argument, in a six-page minute entry, the superior court granted defendants summary judgment on all claims. The court concluded that “[a]ll of the causes of action are predicated on acts preceding” the signing of the Release and that Judd’s duress allegation failed as a matter of law.

¶5 The court later awarded defendants \$31,250 in attorney’s fees and entered final judgment reflecting these rulings. *See* Ariz. R. Civ. P. 54(c)(2017).² This court has jurisdiction over Judd’s timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) and -2101(A)(1).

² Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

DISCUSSION

¶6 In addressing defendants' motion, the superior court considered matters outside of the complaint, thereby treating the motion "as one for summary judgment under Rule 56." Ariz. R. Civ. P. 12(d). Although Judd asserted in the superior court the motion was premature and additional discovery was needed, he does not press those arguments on appeal, meaning they are waived. See *MacMillan v. Schwartz*, 226 Ariz. 584, 591 ¶ 33 (App. 2011). Thus, the issue is whether defendants "show[ed] that there is no genuine dispute as to any material fact and [that they are] . . . entitled to judgment as a matter of law," Ariz. R. Civ. P. 56(a), an issue this court reviews de novo, see *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, 316 (App. 1998).

I. The Superior Court Properly Found The Release Was Enforceable.

¶7 Judd argues the superior court erred in rejecting his defense that he signed the Release under duress. Judd restates multiple alleged acts by Stockwell that he claims gave him "no choice but to execute the [R]elease." A contract entered under duress is voidable. *State v. Sands*, 145 Ariz. 269, 275 (App. 1985). A party to a contract may void the agreement if that party's "manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative." Restatement (Second) of Contracts § 175 (1979); see also *Frank Culver Elec., Inc. v. Jorgenson*, 136 Ariz. 76, 78 (App. 1983) (quoting Restatement (Second) of Contracts § 175(1)); *USLife Title Co. of Ariz. v. Gutkin*, 152 Ariz. 349, 357 (App. 1986) (quoting Restatement (Second) of Contracts § 175(2)).

¶8 The superior court properly applied the facts as presented to the law as written in concluding that the evidence of defendants' actions Judd proffered was not wrongful, in the context of duress, as a matter of law. Accordingly, this court adopts the superior court's analysis. See *State v. Whipple*, 177 Ariz. 272, 274 (App. 1993) (noting when superior court rules "in a fashion that will allow any court in the future to understand the resolution[. n]o useful purpose would be served by this court rehashing the superior court's correct ruling in [the] written decision").³

³ Judd's argument the superior court applied an improper definition of duress is not well taken. Judd has not shown the superior court applied a standard inconsistent with *Inter-Tel, Inc. v. Bank of Am.*, 195 Ariz. 111, 117 (App. 1999), the sole authority upon which Judd presses this argument, which quoted Restatement (First) of Contracts § 492 (1932) in addressing substantially different facts.

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¶9 Even assuming any of Stockwell’s alleged acts were improper, Judd did not provide facts showing that he had no reasonable alternative but to sign the Release and accept the \$20,000 payment. Among other things, he could have allowed Stockwell’s offer to lapse and pursued legal remedies. *See Republic Nat. Life Ins. Co. v. Rudine*, 137 Ariz. 62, 66 (App. 1983) (declining to find duress where party “failed to demonstrate that a litigation alternative to the compromise was unavailable”). Finally, Judd has not alleged that he returned the \$20,000 payment to Stockwell or was prepared to do so. *Cf. Gutkin*, 152 Ariz. at 357 (noting that, to avoid contract allegedly procured by “economic duress” or “coercion,” party claiming duress must return benefits received). For these reasons, Judd’s duress defense fails.

II. The Superior Court Properly Concluded The Release Applied To BLRE.

¶10 Judd argues the Release does not apply to BLRE, because it was not a named party or named in the Release, he and Stockwell were the only “undersigned parties” and BLRE’s signature is “nowhere to be found” in the Release. Alternatively, Judd argues that the Release is ambiguous and that this alleged ambiguity should be construed against Stockwell as the drafter. *See Leschorn v. Xericos*, 121 Ariz. 77, 81 (App. 1978).

¶11 “The construction of a contract — including whether its terms are ambiguous or uncertain — is a question of law subject to de novo review.” *Hanson v. Tempe Life Care Vill., Inc.*, 216 Ariz. 26, 27 ¶ 7 (App. 2007). This court construes a contract in accordance with its plain language, in light of the parties’ intentions and in view of all the circumstances. *See In re Estate of Lamparella*, 210 Ariz. 246, 250 ¶ 21 (App. 2005). “If the intention of the parties is clear from such a reading, there is no ambiguity.” *Id.* (internal quotations and citation omitted).

¶12 The relevant portion of the Release states that Stockwell and Judd mutually

release, absolve and forever discharge each other, and all heirs and agents, from *any and all claims, causes of action, suits*, costs, expenses, attorneys’ fees, sums of money, covenants, contracts, controversies, *agreements, promises, and damages of any kind* as a result of the dissolution of *their personal and/or business relationship*.

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(Emphasis added.) Notwithstanding this broad language, Judd baldly states “I believed that the Release pertained only to Defendant Stockwell” and that he “was releasing Defendant Stockwell, only.” He argues the phrase “business relationship” refers to portions of their personal lives that “were treated as business-like,” such as splitting the costs of their cable and cell phone bills.

¶13 Notwithstanding these arguments, Judd has shown no ambiguity in the Release suggesting it did not apply to all claims arising from both the couple’s personal and business dealings. Particularly at oral argument before this court, Judd claimed *Hamada v. Valley Nat. Bank*, 27 Ariz. App. 433 (1976) supports his argument that “business relationship” in the Release is ambiguous. *Hamada*, however, is distinguishable. The issues in that case included whether a letter was a purchase agreement or “a continuing guarantee” and the meaning of the phrase “a loan” used in the letter (given facts showing “a series of loans based on a continuing line of credit”) in a case where summary judgment was first denied and then, after the case was assigned to a different judge, was granted. 27 Ariz. App. at 433-35. Here, by contrast, there was no showing of such ambiguities; as the superior court correctly noted, “[t]he only business involving both parties was BLRE and [Judd] has not offered any facts to the contrary.”

¶14 Similarly, Judd’s argument that the Release refers to aspects of their personal relationship that they treated as “business-like” but excludes BLRE misses the mark. If the Release was to be interpreted as Judd suggests -- to conflate the terms “personal” and “business” -- the inclusion of the phrase “business relationship” would be superfluous. See *Hanson v. Tempe Life Care Vill., Inc.*, 216 Ariz. 26, 27 ¶ 7 (App. 2007) (“We interpret contracts to give effect to all their parts.”). Nor is Judd’s allegation, made post-dispute, about what he “believed” the Release “pertained to” dispositive. See *Tabler v. Industrial Comm’n of Ariz.*, 202 Ariz. 518, 521 ¶ 13 (App. 2002) (“The determination of the parties’ intent must be based on objective evidence, not the hidden intent of the parties.”).

¶15 Judd is correct that the Release does not name BLRE expressly. It is undisputed, however, that Stockwell is “the owner” of BLRE. Moreover, the couple’s business relationship ended contemporaneously with their personal relationship, further showing the Release encompassed both. And as noted above, the only “business relationship” the parties had was BLRE. For all of these reasons, the superior court properly concluded the Release applied to BLRE.

III. A Portion Of Judd’s Conversion Claim Could Not Properly Be Resolved By Summary Judgment On The Record Presented.

¶16 Judd argues the superior court “ignored” his claim for conversion of personal property left at the residence at the time the Release was signed but that he alleges has not been returned. Notwithstanding the statement in the minute entry granting summary judgment that all of Judd’s claims “are predicated on acts preceding [the] [R]elease,” this claim is based on alleged facts that occurred after the Release was signed. Moreover, Judd offered evidence that Stockwell retained “a number of [his] personal belongings” and, as a result, he “was forced to purchase new pots, pans, cookware, flatware, etc.” On this record, for this portion of Judd’s conversion claim (asserted in paragraph 81 of the Verified First Amended Complaint), disputed issues of material fact precluded entry of summary judgment. *See* Ariz. R. Civ. P. 56(a). Accordingly, that portion of the entry of summary judgment is vacated and remanded for further proceedings.⁴

IV. The Superior Court Properly Awarded Attorneys’ Fees Under A.R.S. § 12-341.01.

¶17 Judd argues the superior court erred in “determining that this matter arose out of contract” in awarding defendants’ attorneys’ fees under A.R.S. § 12-341.01. Instead, Judd argues, “[t]his matter ‘arose’ out of a personal and business relationship gone south and duress arising prior to or at the time of the execution of the Release.”

¶18 “In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees.” A.R.S. § 12-341.01(A). The applicability of this statute is a question of statutory interpretation that this court reviews *de novo*. *Modular Mining Sys., Inc. v. Jigsaw Technologies, Inc.*, 221 Ariz. 515, 521 ¶ 21 (App. 2009).

⁴ Although Judd also argues on appeal the superior court erred in addressing his “claim[] for breach of the Release,” no such claim is contained in his operative pleading, meaning there was no resulting error. Similarly, the court rejects without comment Judd’s assertion that the superior court committed reversible error by considering Stockwell’s reply brief filed six minutes after the filing deadline.

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¶19 In awarding attorneys' fees, the superior court properly found "that this action arises out of contract," citing Judd's various claims for breach of various agreements. The court also properly concluded that "the release upon which Defendants obtained summary judgment is also a contract." Judd's argument on appeal that this case does not arise out of contract is contrary to his claims in his operative pleading, which allege nearly a dozen times that he is entitled to attorneys' fees pursuant to A.R.S. § 12-341.01. On this record, the superior court properly concluded defendants were entitled to an award of attorneys' fees pursuant to A.R.S. § 12-341.01.

¶20 Defendants have requested their attorneys' fees on appeal under § 12-341.01(A). In this court's discretion, concluding defendants are the successful parties on appeal, they are awarded their taxable costs on appeal and their reasonable attorneys' fees incurred on appeal, contingent upon their compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶21 The judgment is affirmed, except to the extent it rejected Judd's conversion claim relating to his personal property, with that portion of the judgment vacated and remanded for further proceedings consistent with this decision.



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