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

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BMO HARRIS BANK NA, *Plaintiff/Appellee*,

*v.*

LIDIA TOHATAN, *Defendant/Appellant*.

No. 1 CA-CV 17-0013
FILED 2-6-2018

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Appeal from the Superior Court in Maricopa County
No. CV2015-013043
The Honorable David W. Garbarino, Judge *Pro Tempore*

**AFFIRMED**

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COUNSEL

Hinshaw & Culbertson LLP, Phoenix
By Stephen W. Tully
*Counsel for Plaintiff/Appellee*

Ivan & Kilmark PLC, Glendale
By Florin V. Ivan
*Counsel for Defendant/Appellant*

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**MEMORANDUM DECISION**

Judge Jennifer M. Perkins delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Jon W. Thompson joined.

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**P E R K I N S**, Judge:

**¶1** This appeal arises out of garnishment proceedings in which Appellant Linda Tohatan obtained an attorneys' fees and costs award against Appellee BMO Harris Bank NA. Tohatan challenges the trial court's ruling offsetting that award against the remaining balance on BMO's domesticated judgment. We affirm for the reasons set forth below.

**FACTUAL AND PROCEDURAL BACKGROUND**

**¶2** BMO initiated proceedings to domesticate an Illinois judgment in November 2015. At the same time, BMO filed an Illinois court order showing two separate judgments against the Tohatans in 2009, one for foreclosure and one for breach of the note secured by the foreclosed property. The order attached a copy of the latter judgment and recited the Illinois court's earlier approval of the sheriff's sale of the property at issue in January 2010. The order also stated, however, that the judgment for breach of the note "was entered before the sale of the Subject Property and did not take into account Plaintiff's receipt of $40,000 from the [eventual] sale" and, following the application of those sale proceeds to the original judgment amount, found "the amount now [remaining] due on the [breach of note] judgment is $41,218.24."

**¶3** BMO initiated garnishment proceedings against Tohatan's employer Realty Executives Pinnacle Peak ("Realty Executives") pursuant to Arizona Revised Statutes ("A.R.S.") section 12-1598.03. Realty Executives answered that it owed Tohatan nothing at that time. The trial court discharged Realty Executives and awarded Tohatan $2,800 in attorneys' fees and $249 in costs pursuant to A.R.S. § 12-1598.07(E).

**¶4** BMO then moved to set-off the fee and cost award against the remaining balance on the underlying judgment**.** Tohatan opposed the set-off, contending: (1) the judgment had not been timely renewed pursuant to A.R.S. § 12-1551(B); (2) BMO was not the proper judgment creditor because another lender brought the original lawsuit; and (3) the judgment had been

released via a $1,000 check BMO received in 2010. Tohatan also contended her counsel held a charging lien on the fee award that would have priority over any set-off order.

**¶5** The trial court granted BMO's motion, finding Tohatan's attorney's charging lien was "immaterial." The trial court also rejected Tohatan's challenges to the underlying judgment. Tohatan timely appealed that ruling. We stayed her appeal to allow her to obtain a signed order, which she did.

## DISCUSSION

**¶6** BMO contends we lack jurisdiction over Tohatan's appeal because the order was not final and lacked certifying language pursuant to Arizona Rule of Civil Procedure 54. We have an independent duty to determine whether we have jurisdiction. *Baker v. Bradley*, 231 Ariz. 475, 478, ¶ 8 (App. 2013).

**¶7** An appeal from a "special order made after final judgment" does not require compliance with either Rule 54(b) or 54(c). A.R.S. § 12-2101(A)(2); *Brumett v. MGA Home Healthcare, L.L.C.*, 240 Ariz. 420, 428, ¶ 15 (App. 2016). To be appealable under § 12-2101(A)(2), an order must raise issues different than those that would arise on appeal from the underlying judgment, and affect the judgment or relate to it by enforcing it or staying its execution. *Arvizu v. Fernandez*, 183 Ariz. 224, 226–27 (App. 1995).

**¶8** Tohatan's appeal raises two issues, whether set-off was appropriate, and whether her attorney's charging lien on the fee award had priority over the proposed set-off. Neither of these issues would necessarily arise in an appeal directly challenging the domesticated judgment. Moreover, the set-off order precluded Tohatan from collecting on her award and affected the remaining balance on the domesticated judgment. We therefore conclude we have jurisdiction under A.R.S. § 12-2101(A)(2) and address the merits of Tohatan's appeal.

### I. Domestication Efforts

**¶9** Tohatan argues set-off was inappropriate because the judgment was not timely renewed within five years pursuant to A.R.S. § 12-1551(B). But BMO did not commence domestication proceedings until 2015. *See Cristall v. Cristall*, 225 Ariz. 591, 595, ¶ 20 (App. 2010) (holding that the five-year renewal period runs from the date the trial court domesticated the judgment). Even if we assume the judgment had to be renewed at some point—an issue we do not reach here—Tohatan cites no authority

suggesting the holder of a foreign judgment must comply with § 12-1551(B) *before* domesticating its judgment in Arizona.

**¶10** Tohatan further argues set-off was unwarranted because BMO did not domesticate the judgment in Arizona within four years of its entry. A.R.S. § 12-544(3); *see Citibank (S.D.), N.A. v. Phifer*, 181 Ariz. 5, 7 (App. 1994) ("A.R.S. § 12-544(3) dictates the time within which a foreign judgment can be enforced in Arizona."). Tohatan did not raise this argument below before filing her notice of appeal and cannot assert it for the first time in this Court. *See*, *e.g.*, *Lemons v. Showcase Motors, Inc.*, 207 Ariz. 537, 541 n.1, ¶ 17 (App. 2004) ("Legal issues and arguments must be presented to the trial court and generally cannot be raised for the first time on appeal.").

## II. Proper Judgment Creditor

**¶11** Tohatan next contends BMO did not show it was entitled to enforce the judgment. Her sole evidence was that the original judgment listed "AMCORE Bank, N.A." as the plaintiff. But the domesticated order, issued in 2015, identified "BMO Harris Bank" as the plaintiff. BMO also presented evidence that it had received an assignment of the judgment. While BMO asserted facts sufficient to allow it to proceed in collection of the judgment, Tohatan failed to show BMO was not the proper judgment creditor. *See, e.g., Oyakawa v. Gillett*, 175 Ariz. 226, 229 (App. 1993) ("A party challenging the validity of a foreign judgment bears the burden of proof.").

## III. Accord and Satisfaction

**¶12** Tohatan further alleges the judgment was satisfied via accord and satisfaction. An accord and satisfaction discharges a cause of action when the parties agree to exchange something of value in resolution of the claim and then perform on that agreement. *Abbott v. Banner Health Network*, 239 Ariz. 409, 413, ¶ 11 (2016). To show an accord and satisfaction, Tohatan must establish four elements, namely, proper subject matter, competent parties, an assent or meeting of the minds, and consideration. *Id.*

**¶13** Tohatan cites a check Citywide Title Corporation issued to BMO labeled "Judgment Release Payment - $1,000" as evidence of an accord and satisfaction. However, Tohatan provided no evidence BMO accepted the alleged check in full satisfaction of the domesticated judgment. We therefore reject Tohatan's accord and satisfaction defense.

## IV. Charging Lien

**¶14** Tohatan contends her attorney's charging lien has priority over BMO's set-off claim. A charging lien is an attorney's lien that attaches after a judgment is obtained in litigation. *Langerman Law Offices, P.A. v. Glen Eagles at Princess Resort, LLC*, 220 Ariz. 252, 254, ¶ 9 (App. 2009). To establish a charging lien, the attorney must show he is owed fees and there is a judgment in the client's favor to which the lien can attach. *Id*. at 254, ¶ 6.

**¶15** The remaining balance on the underlying judgment in this case is greater than the fee award, leaving no existing recovery to which a charging lien could attach. "When the client is the net loser, there is … no judgment to which a charging lien could attach." *Id.* at 255, ¶ 10. As the net loser, Tohatan has no favorable judgment to which a charging lien could attach.

**¶16** Tohatan's argument regarding priority does not alter this conclusion. Other states have recognized the "general rule" that "an attorney's lien is subordinate to the rights of the adverse party to offset judgments in the same actions or in actions based on the same transaction." *See, e.g.*, *Galbreath v. Armstrong*, 193 P.2d 630, 634 (Mont. 1948). This Court previously relied on the *Galbreath* language in determining the failure to conduct set-off math in a final judgment was irrelevant given the client at issue was the net loser. *Langerman*, 220 Ariz. at 256, ¶ 14.

## CONCLUSION

**¶17** We affirm the trial court's order permitting set-off. BMO is the successful party in this appeal and may recover its taxable costs upon compliance with Arizona Rule of Civil Appellate Procedure 21.

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