

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  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

---

GREGORY BEST, *Plaintiff/Appellant*,

*v.*

DRIGGS TITLE AGENCY, INC., et al., *Defendants/Appellees*.

No. 1 CA-CV 19-0037  
FILED 12-24-2019

---

Appeal from the Superior Court in Maricopa County  
No. CV2016-015284  
The Honorable Christopher A. Coury, Judge

**AFFIRMED**

---

COUNSEL

Gregory Best, Phoenix  
*Plaintiff/Appellant*

Gust Rosenfeld P.L.C., Phoenix  
By Scott A. Malm, Mina C. O'Boyle, Charles W. Wirken  
*Counsel for Defendants/Appellees*

---

**MEMORANDUM DECISION**

Presiding Judge Maria Elena Cruz delivered the decision of the Court, in  
which Judge Kent E. Cattani and Judge Jennifer M. Perkins joined.

---

BEST v. DRIGGS TITLE, et al.  
Decision of the Court

C R U Z, Judge:

¶1 Gregory Best (“Best”) appeals from a court order dismissing his claims against Driggs Title Agency, Inc. (“Driggs Title”), Rachel Anaya (“Anaya”), and Randy Anaya (collectively “Appellees”), and awarding attorneys’ fees to Appellees. We affirm.

**FACTUAL AND PROCEDURAL HISTORY**

¶2 The conflict underlying this case dates back to 2004, when Best entered into a contract to purchase real property (“Property”) from Manuel and Leticia Garcia (“the Garcias”). For reasons irrelevant to the instant case, the sale did not close. Best initiated a lawsuit in 2005, which was dismissed. Best filed a second suit later that year. Seven years later, that lawsuit resulted in a default judgment for Best for specific performance by the Garcias, after the Garcias failed to appear at a pretrial conference and a damages hearing. *Best v. Garcia*, 1 CA-CV 13-0271, 2014 WL 2599921, at \*1, ¶¶ 4-5 (Ariz. App. June 10, 2014) (mem. decision). Although Best filed a notice of *lis pendens* on the property title regarding the first lawsuit, he did not file a notice of *lis pendens* for the second litigation.

¶3 Shortly before default judgment was entered as to the second lawsuit, the Garcias sold the property (“2012 Sale”). The Property was sold again fourteen months later (“2013 Sale”). Driggs Title served as the escrow agent for the 2012 Sale and as the settlement agent for the 2013 Sale. The judgment for specific performance became impossible to execute against the Garcias, because at the time the court entered its default judgment, the Garcias no longer owned the Property. Best moved to set aside the judgment but was unsuccessful at the superior court and on appeal. *Best*, 1 CA-CV 13-0271, at \*1, ¶ 6.

¶4 Later in 2014, Best filed a third lawsuit (“2014 Lawsuit”), naming, among others, the Garcias, the buyers in both the 2012 Sale and the 2013 Sale, and Driggs Title as defendants. In the 2014 Lawsuit, Best alleged that Driggs Title engaged in fraud, conspired to interfere with a business expectancy, and breached duties not to interfere with Best’s rights to the Property under contract. The court granted summary judgment to Driggs Title, finding Driggs Title did not owe a duty to Best because Best had not filed a notice of *lis pendens* as to the second lawsuit that resulted in the judgment for Best.

¶5 During litigation, Best also learned of other attempts to transfer the Property that occurred prior to the 2012 Sale; these additional

BEST v. DRIGGS TITLE, et al.  
Decision of the Court

attempts did not close and these transactions were not recorded. Best, believing the disclosure of this information was relevant to his prior lawsuits and untimely disclosed, attempted to set aside the summary judgment; he was unsuccessful. *See Best v. Residential Prop. Inv. & Mgmt. LLC*, 2 CA-CV 2017-0128, 2018 WL 2068300 (Ariz. App. May 3, 2018) (mem. decision).

¶6 In 2016, Best commenced this litigation. In this fourth lawsuit, Best named more than a dozen defendants, some of whom Best had named in the 2014 Lawsuit, including Driggs Title. Best also named Anaya, a notary who worked for Driggs Title, and her husband, Randy Anaya.<sup>1</sup> The superior court dismissed the complaint against Driggs Title and Anaya under Arizona Rule of Civil Procedure (“Rule”) 54(b) and granted an award of attorneys’ fees to Appellees. Best timely appealed.

## DISCUSSION

### I. Dismissal of Claims

¶7 Dismissal of claims based on claim preclusion and issue preclusion<sup>2</sup> is a question of law that we review *de novo*. *Phx. Newspapers, Inc. v. Dep’t of Corr.*, 188 Ariz. 237, 240 (App. 1997); *Campbell v. SZL Props., Ltd.*, 204 Ariz. 221, 223, ¶ 8 (App. 2003).

#### A. Claims Against Driggs Title

¶8 As to claims against Driggs Title, Best argues the court erred in dismissing the claims as precluded because Best referenced new evidence in the Third Amended Complaint. Under the doctrine of claim preclusion, a judgment on the merits in a prior suit involving the same

---

<sup>1</sup> The Third Amended Complaint also named Randy Anaya in his capacity as a broker for the real estate firm Equity Realty Group, LLC that served as a dual agent in the 2012 Sale. After the superior court dismissed the claims against Randy Anaya and his employer, he remained a party as Rachel Anaya’s husband. The dismissal as to Randy Anaya and Equity Realty Group, LLC are not part of this appeal.

<sup>2</sup> We use the more modern terms “claim preclusion” instead of *res judicata* and “issue preclusion” instead of collateral estoppel. *See Circle K Corp. v. Indus. Comm’n*, 179 Ariz. 422, 425 (App. 1993). “Preclusion in either form promotes: (1) finality in litigation; (2) the prevention of harassment; (3) efficiency in the use of the courts; and (4) enhancement of the prestige of the courts.” *Id.* at 426.

BEST v. DRIGGS TITLE, et al.  
Decision of the Court

parties bars a second suit based on the same cause of action. *Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 573 (1986). A cause of action is the same if “no additional evidence is needed to prevail in the second action than that needed in the first.” *Phx. Newspapers*, 188 Ariz. at 240 (describing so-called “same evidence” test).

¶9 In the Third Amended Complaint, Best alleges a litany of claims against Driggs Title, including “tortuous” interference with a contract and business expectancy, breach of duties associated with the covenant of good faith and fair dealing, and breach of a duty to “preserve [Best’s] contracted interests and marketable title.” The superior court found that the judgment in the 2014 Lawsuit binds both Best and Driggs Title, thus precluding Best from bringing the same claims against Driggs Title in this suit. As the court explained,

Almost one third of the Third Amended Complaint is a verbatim copy of the complaint he filed in the 2014 Lawsuit. The remaining allegations simply rehash issues Mr. Best actually raised in the 2014 Lawsuit. The additional evidence on which he focuses was the subject of his Rule 60 Motion in the 2014 Lawsuit.

*See Best*, 2 CA-CV 2017-0128, at \*3. The court added that “Mr. Best had his day in court in the 2014 Lawsuit. He is not entitled to a second day.”

¶10 On appeal, Best does not dispute that his claims against Driggs Title in this suit are the same as the claims against Driggs Title in the 2014 Lawsuit. Rather, he contends the test for claim preclusion “is not whether the causes are the same but whether additional evidence is needed to prevail.” This is an inaccurate representation of the same evidence test. In determining whether claims are precluded, courts consider whether the new cause of action requires the plaintiff to establish *a distinct element* through different or additional facts. *E.C. Garcia & Co. v. Ariz. State Dep’t of Revenue*, 178 Ariz. 510, 520 (App. 1993). Best’s claims in the instant lawsuit do not require that any additional element be established as compared to the elements in the claims for the 2014 Lawsuit. We find no error in the superior court’s determination that Best was precluded from bringing these claims against Driggs Title a second time.

B. Claims Against Anaya

¶11 Best also argues that Anaya waived the Rule 12(b)(6) defense of failure to state a claim upon which relief can be granted by omitting the defense from her answer to the Third Amended Complaint. We review the

BEST v. DRIGGS TITLE, et al.  
Decision of the Court

superior court's interpretation of court rules *de novo*. *Balestrieri v. Balestrieri*, 232 Ariz. 25, 26, ¶ 3 (App. 2013). Waiver under Rule 12(h)(1) does not apply to the Rule 12(b)(6) defense. Pursuant to Rule 12(h)(2), a party may raise a Rule 12(b)(6) defense "by a motion under Rule 12(c)." Although Anaya raised the defense in a motion to dismiss, the court considered that filing as a motion for judgment on the pleadings under Rule 12(c). We find no error in the court considering Anaya's motion.

¶12 Issue preclusion applies when (1) the issue or fact to be litigated was actually litigated in a prior suit, (2) resolution of the issue was essential to the decision, (3) a final judgment was entered, and (4) the party against whom issue preclusion is invoked had a "full opportunity to litigate the matter and actually did litigate it." *Chaney Bldg. Co.*, 148 Ariz. at 573; see *Campbell*, 204 Ariz. at 223, ¶ 9. A new defendant in a subsequent case may use issue preclusion to avoid relitigating an issue. *Bridgestone/Firestone N. Am. Tire, LLC v. Naranjo*, 206 Ariz. 447, 452, ¶ 19 (App. 2003). A party bound by a prior judgment cannot avoid issue preclusion "by producing at a second trial new arguments or additional or different evidence in support of the proposition which was decided adversely to him." *Barassi v. Matison*, 134 Ariz. 338, 340 (App. 1982).

¶13 The Third Amended Complaint contains a number of allegations that, as an employee of Driggs Title, Anaya conspired to commit fraud or aided fraud, interfered with a contract, and breached various duties owed to Best. In the 2014 Lawsuit, in which Anaya was not a defendant, the court found that Driggs Title had no relationship with Best and that he failed to show Driggs Title owed him a duty to make them liable for damages. The allegations referring to Anaya are restyled versions of the same claims appearing in the 2014 Lawsuit and include detail about an investigation by the Attorney General into Anaya's notary practices.

¶14 Best's claims against Anaya similarly do not clear the hurdle of issue preclusion.<sup>3</sup> The superior court found that Best "essentially su[ed] Defendant Rachel Anaya for actions taken in her capacity as a Driggs Title Agency employee." Best does not argue that Anaya acted beyond her authority as an employee of Driggs Title. See *Aldrich & Steinberger v. Martin*, 172 Ariz. 445, 449 (App. 1992). As alleged by Best, Anaya acted merely as an agent of Driggs Title, and Best does not allege Anaya owed a distinct

---

<sup>3</sup> Although the superior court did not explicitly dismiss Best's claims against Anaya under the doctrine of issue preclusion, the court stated that the claims against Driggs Title were "actually litigated" in the 2014 Lawsuit, language reflecting issue preclusion analysis.

BEST v. DRIGGS TITLE, et al.  
Decision of the Court

duty to him under any theory of liability. The elements of issue preclusion are met: The issue of whether Driggs Title owed a duty to Best was litigated in the 2014 Lawsuit and was essential to the court's final judgment dismissing claims against Driggs Title in that action. As the superior court acknowledged, Best "had his day in court in the 2014 Lawsuit" when he litigated whether Driggs Title owed him a duty. Accordingly, we find the court did not err in determining Best's claims against Anaya were precluded by the prior litigation determining Driggs Title had no duty to Best.

¶15 Even if issue preclusion did not apply to Best's claims against Anaya, Best's allegations would be barred by claim preclusion. "[W]here a judgment is in favor of the principal, a judgment is *res judicata* in an action against the agent, a derivative responsibility being present." 46 Am.Jur.2d Judgments § 570 (quoted in *Aldrich & Steinberger*, 172 Ariz. at 448). In *Aldrich & Steinberger*, the court found that claim preclusion applied where allegations against the agent are the same as those previously litigated against the principal and the agent did not exceed her authority. Here, although the claims in the Third Amended Complaint feature slightly different phrasing, the claims are the same as those Best alleged against Driggs Title in the 2014 Lawsuit. Because Anaya served as an agent of Driggs Title, and the 2014 Lawsuit resulted in judgment for Driggs Title on the same claims alleged in this lawsuit, Best's claims against Anaya are also precluded.

## II. Award of Attorneys' Fees

¶16 Best contests the court's award of attorneys' fees to Driggs Title and Anaya, arguing they did not include a request for attorneys' fees in their respective motions to dismiss. He cites *Balestrieri*, 232 Ariz. at 28, ¶ 11, which held that a defendant who fails to request fees in a Rule 12 motion or in a pleading forfeits any claim to fees. See Ariz. R. Civ. P. 54(g)(1).

¶17 Pursuant to Appellees' joint application for attorneys' fees, the court awarded attorneys' fees under A.R.S. §§ 12-341.01 (action arising out of a contract) and 12-349 (unjustified actions). Anaya's motion to dismiss did in fact include a request for attorneys' fees. Driggs Title's motion to dismiss did not. But we find this omission from Driggs Title's motion moot. Even if *Balestrieri* applied to Driggs Title's request for attorneys' fees, Best did not respond to the joint application and did not otherwise raise this issue below. Because we do not consider issues raised for the first time on appeal, we do not address this issue. *Englert v.*

BEST v. DRIGGS TITLE, et al.  
Decision of the Court

*Carondelet Health Network*, 199 Ariz. 21, 26-27, ¶ 13 (App. 2000). Best raises no other argument disputing the validity of the award, and we affirm.

¶18 Appellees request attorneys' fees and costs on appeal. In reviewing the record, we find that Best brought this action against Appellees without substantial justification. The superior court declared Best a vexatious litigant and subsequently found Best's claims were precluded by the 2014 Lawsuit. Best's arguments on appeal are groundless, are not made in good faith, and lack any support in law. Accordingly, we award reasonable attorneys' fees on appeal to the Appellees as a sanction against Best pursuant to ARCAP 25 and A.R.S. §§ 12-349 and 12-350, and taxable costs pursuant to A.R.S. § 12-341 contingent upon Appellees' compliance with ARCAP 21.

**CONCLUSION**

¶19 For the foregoing reasons, we affirm the superior court's judgment and award Appellees' their taxable costs and reasonable attorneys' fees.



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