

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  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

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GERMAN MONSALVE SAENZ, *Plaintiff/Appellee*,

*v.*

MARCOS CAMPOS, *Defendant/Appellant*.

No. 1 CA-CV 20-0663  
FILED 8-5-2021

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Appeal from the Superior Court in Maricopa County  
No. CV2020-005139  
The Honorable James D. Smith, Judge

**AFFIRMED**

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COUNSEL

MacQueen & Gottlieb PLC, Phoenix  
By Benjamin L. Gottlieb, Patrick T. Nackley, Brandon P. Bodea  
*Counsel for Plaintiff/Appellee*

Marcos Campos, Phoenix  
*Defendant/Appellant*

**MEMORANDUM DECISION**

Judge Brian Y. Furuya delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Michael J. Brown joined.

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**FURUYA**, Judge:

¶1 Marcos Campos (“Campos”) appeals the superior court’s order granting German Saenz’s (“Plaintiff”) motion for summary judgment based on Campos’ failure to make payment on a promissory note and awarding Plaintiff his attorneys’ fees and costs. For the following reasons, we affirm.

**FACTS AND PROCEDURAL HISTORY**

¶2 In April 2018, defendants Campos and Daniel Ruiz entered into an agreement with Plaintiff to borrow money to purchase a residence in Phoenix (the “Property”). Plaintiff lent defendants \$390,000, with repayment in full to be made no later than April 13, 2020, pursuant to a promissory note. In the event of default, Plaintiff was entitled to take full ownership of the Property.

¶3 At the end of April 2020, because defendants failed to pay the promissory note, Plaintiff sued for breach of contract and to quiet title. The next month, Ruiz issued a quitclaim deed to Plaintiff, disclaiming his one-half interest in the Property in exchange for his dismissal from the instant lawsuit with prejudice. Later that year, Plaintiff successfully moved for summary judgment as to Campos. Plaintiff argued Campos failed to remit payment according to the note. Attached to Plaintiff’s motion was Ruiz’s affidavit indicating that neither defendant had made “any payments” toward the note.

¶4 The court entered judgment against Campos and named Plaintiff as the sole owner of the Property. The court also awarded Plaintiff his attorneys’ fees and taxable costs pursuant to the promissory note and Arizona Revised Statutes (“A.R.S.”) §§ 12-341 and -341.01. Campos timely appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

## DISCUSSION

### I. Summary Judgment

¶5 We review a grant of summary judgment *de novo*. *S & S Paving & Constr., Inc. v. Berkley Reg'l Ins. Co.*, 239 Ariz. 512, 514, ¶ 7 (App. 2016). Summary judgment is appropriate if “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). Further, where the moving party on a motion for summary judgment has made a *prima facie* showing that a genuine issue of material fact does not exist, “the burden shifts to the opposing party to produce sufficient competent evidence to show there is an issue, and it must demonstrate that evidence is available to justify trial on the issue.” *Nat'l Hous. Indus., Inc. v. E.L. Jones Dev. Co.*, 118 Ariz. 374, 377 (App. 1978) (citations omitted).

¶6 Campos argues the court improperly shifted to him the burden of producing evidence of his payments toward the promissory note. However, Plaintiff supported his motion with Ruiz’s affidavit to establish default of the note. In response, Campos did not deny Ruiz’s statements and he failed<sup>1</sup> to produce any evidence establishing that full payment was made in performance of the note. Campos cannot defeat Plaintiff’s motion for summary judgment “by his simple contention that an issue of fact exists.” *See Sewell v. Brookbank*, 119 Ariz. 422, 426 (App. 1978) (citing *W. J. Kroeger Co. v. Travelers Indem. Co.*, 112 Ariz. 285, 286 (1975)). Because he did not meet his burden, Campos failed to establish a disputed issue of material fact. Summary judgment was therefore appropriate.

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<sup>1</sup> For the first time on appeal, Campos argues he could not provide documentation of alleged partial payments he made toward the promissory note because he was unable to access where this documentation was kept. This argument is waived because it was not first raised before the superior court. *See Canyon Ambulatory Surgery Ctr. v. SCF Ariz.*, 225 Ariz. 414, 418, ¶ 10 n.11 (App. 2010); *see also Premier Fin. Servs. v. Citibank (Ariz.)*, 185 Ariz. 80, 86 (App. 1995). Further, the record does not reflect that he used the provisions of Rule 56(d) of the Arizona Rules of Civil Procedure to gain access to those materials. In any event, Campos’ argument is irrelevant because he does not maintain his alleged partial payments cured the failure to pay the note in full by the specified April 2020 deadline, which is the event of breach entitling Plaintiff to the relief sought in the complaint.

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¶7 Campos further argues the Property was part of a separate dissolution matter between Ruiz and Campos, and therefore, Plaintiff was required to address his claims exclusively within that proceeding. However, Campos did not cite any law supporting this position either to the superior court or now on appeal. Accordingly, the argument is waived. *See* ARCAP 13(a)(7); *Ritchie v. Krasner*, 221 Ariz. 288, 305, ¶ 62 (App. 2009) (citing *State v. Moody*, 208 Ariz. 424, 452, ¶ 101 n.9 (2004)).

¶8 Campos also argues the court ignored alleged “collusion” between Plaintiff and Ruiz – father and son – throughout the proceedings. But aside from his response to Plaintiff’s application for attorneys’ fees (after adjudication of the summary judgment motion), Campos did not raise any alleged collusion in prior proceedings. Thus, it is waived. *See Canyon Ambulatory Surgery Ctr.*, 225 Ariz. at 418, ¶ 10 n.11.

## II. Attorneys’ Fees & Costs

¶9 Campos contends he should not have been found solely liable for Plaintiff’s attorneys’ fees and costs because Ruiz was once a party to the litigation, and further argues the award was excessive because Plaintiff is a “wealthy litigant.”

¶10 We review the court’s award of attorneys’ fees and costs for an abuse of discretion. *Owner–Operator Indep. Drivers Ass’n v. Pac. Fin. Ass’n, Inc.*, 241 Ariz. 406, 416, ¶ 38 (App. 2017). We will affirm such an award if it has any reasonable basis. *Id.* We further review the amount of attorneys’ fees and costs awarded for an abuse of discretion. *Lee v. ING Inv. Mgmt., LLC*, 240 Ariz. 158, 161, ¶ 11 (App. 2016). The court has discretion to determine the successful party for purposes of awarding costs under A.R.S. § 12-341, but an award of costs to the successful party in a civil action is otherwise mandatory. A.R.S. § 12-341; *McEvoy v. Aerotek, Inc.*, 201 Ariz. 300, 302, ¶ 9 (App. 2001).

¶11 Here, the promissory note executed by all parties contained an express attorneys’ fees and costs provision in the event of default. The provision stated, in relevant part:

If Lender or Borrower sues to enforce this Note . . . , the prevailing party in any such proceeding shall be entitled to recover its reasonable attorneys’ fees and costs incurred in the proceeding (including those incurred in any . . . appeal) from the non-prevailing party.

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¶12 This provision makes an award of fees mandatory against a borrower, should the lender prevail in an action to enforce the promissory note against him. Further, the provision does not require apportionment of any award. Therefore, as borrower under the note, Campos is liable for Plaintiff's reasonable attorneys' fees and costs occasioned by his default. Campos provides no authority justifying otherwise. Moreover, the court granted a partial fee award of \$12,466.90 and taxable costs of \$630.87 after considering Plaintiff's fee application, supporting attorney's affidavit, and verified statement of costs, as well as the factors laid out in *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570 (1985), in evaluating the reasonableness of Plaintiff's request. Thus, the court did not abuse its discretion by awarding fees and costs against Campos as specified in the judgment. See *Cook v. Grebe*, 245 Ariz. 367, 370-71, ¶¶ 10-16 (App. 2018).

¶13 Finally, we grant Plaintiff's request for an award of his reasonable attorneys' fees and costs incurred on appeal pursuant to the terms of the promissory note upon compliance with ARCAP 21.

CONCLUSION

¶14 For the foregoing reasons, we affirm.



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