IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JP MORGAN CHASE BANK NA,
Plaintiff/Appellee,

v.

JAMES DUNLAP, et al.,
Defendants/Crossdefendants/Appellants.

RICHARD M. DUNLAP and KECIA DUNLAP,
Defendants/Crossclaimants/Appellees.

No. 1 CA-CV 21-0530
FILED 7-26-2022

Appeal from the Superior Court in Maricopa County
No. CV 2019-011362
The Honorable Katherine Cooper, Judge
Honorable Michael W. Kemp, Judge

AFFIRMED IN PART; VACATED IN PART; REMANDED

APPEARANCES

James and Susan Dunlap, Phoenix
Defendants/Crossdefendants/Appellants

Cronus Law PLLC, Phoenix
By Joel T. Fugate
Counsel for Defendants/Crossclaimants/Appellees, Richard and Kecia Dunlap

Ball Santin & McLeran PLC, Phoenix
By Jeffrey Messing
Counsel for Plaintiff/Appellee, JPMorgan Chase Bank, N.A.

MEMORANDUM DECISION

Presiding Judge Jennifer B. Campbell delivered the decision of the Court, in which Judge Randall M. Howe and Judge James B. Morse Jr. joined.

C A M P B E L L, Judge:

¶1 Defendants James and Susan Dunlap appeal from judgments granted in favor of plaintiff JP Morgan Chase Bank (Chase) and crossclaimants Richard and Kecia Dunlap. James and Susan contend, and we agree, that the superior court erred by entering judgment against Susan pursuant to A.R.S. § 25-215(B), holding her liable for James's premarital debt without determining the extent of James's contributions to the community. *See* A.R.S. § 25-215(B) (making community liable for premarital, separate debts "but only to the extent of the value of [the debtor-spouse's] contribution to the community property which would have been such spouse's separate property if single"). James and Susan also argue the court erred by awarding excessive damages to Chase and by awarding excessive damages and attorney's fees to Richard and Kecia. James and Susan's appeal is untimely regarding the crossclaim damages, so we dismiss that portion of their appeal. The record supports the court's remaining awards, so we vacate in part, affirm in part, and remand for further proceedings.

BACKGROUND

¶2 In 2005, Chase loaned $100,000 to Arizona Office Furniture Design, Inc. James Dunlap, Richard Dunlap, and Richard's wife, Kecia Dunlap, each signed an agreement to personally guarantee repayment of the loan.[1] James later married Susan Dunlap, who was not a party to the

[1] The furniture company is not a party to this appeal.

contract. The furniture company defaulted on the loan, and in 2019, Chase sued for breach of contract, naming as defendants the furniture company, Richard, Kecia, James, and, "for purposes of notice only," James's wife, "JANE DOE DUNLAP."[2] Richard and Kecia entered into a settlement agreement with Chase, agreeing to pay the bank $75,000, and then filed crossclaims against James and Susan for reimbursement and contribution.

¶3 Both the furniture company and Susan defaulted on Chase's complaint. After a default hearing, the superior court entered default judgment for Chase against the company and Susan, awarding about $80,000 in damages. The court later granted Chase's motion for summary judgment against James, again awarding about $80,000 in damages. On cross motions for summary judgment on the crossclaims, the court ruled in favor of Richard and Kecia, finding that James was the "principal obligor" on the loan. The court entered judgment on the crossclaims against both James and Susan pursuant to Rule 54(b) of the Arizona Rules of Civil Procedure (Rules), awarding $75,000 in damages and attorney's fees. The court entered final judgment pursuant to Rule 54(c) nine days later. Twenty-eight days after entry of the Rule 54(c) judgment, and eight days after the deadline to appeal the Rule 54(b) judgment passed, James and Susan filed this appeal. *See* ARCAP 9(a).

DISCUSSION

¶4 James and Susan challenge (1) the default and summary judgments against Susan pursuant to A.R.S. § 25-215(B), (2) the damages awarded to Chase, and (3) the damages and attorney's fees awarded to Richard and Kecia on their crossclaims. We address these challenges in turn.

I. Judgments Against Susan Dunlap Pursuant to A.R.S. § 25-215(B)

¶5 In both the default judgment and Richard and Kecia's summary judgment awards, the superior court awarded damages, attorneys' fees, and taxable costs, each in specific dollar amounts, and awarded post-judgment interest at a specified rate. In both judgments, however, the superior court awarded judgment against "Susan Dunlap (as

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[2] Chase never amended its complaint to name Susan as a defendant, or to clearly state a claim against her, but simply added Susan's name in parentheses after "JANE DOE" in some of its filings. Susan has not challenged and we need not address the superior court's personal jurisdiction, however, because we vacate the judgments against her.

to her interest in her community property with James Dunlap to the extent of the value of James Dunlap's contribution to the community property which would have been his separate property if single only, pursuant to A.R.S. § 25-215(B))."

¶6 James and Susan argue the superior court erred by entering judgment against Susan pursuant to A.R.S. § 25-215(B) without proof of James's contribution to the community. Chase, Richard, and Kecia counter that evidence of a debtor-spouse's contributions to the community is required only in actions to satisfy an existing judgment, particularly because those contributions could continue to grow after entry of judgment.

¶7 We need not reach that evidentiary issue, however, because the judgments entered against Susan are facially defective. The validity of a judgment is a legal question that we review de novo. *Duckstein v. Wolf*, 230 Ariz. 227, 233, ¶ 19 (App. 2012). "A judgment . . . should be definite and certain in itself, or capable of being made so by proper construction." *Solana Land Co. v. Murphey*, 69 Ariz. 117, 122 (1949) (quotation omitted). A judgment is an "act of a court which fixes clearly the rights and liabilities of the respective parties to litigation and determines the controversy at hand." *Cuellar v. Vettorel*, 235 Ariz. 399, 403, ¶ 13 (App. 2014) (quotation omitted). The judgments entered here do not clearly fix Susan's liability. Instead, the judgments impose an indefinite liability in an amount to be determined in a subsequent action. The judgments also lack specificity regarding whether the interest the court awarded is to be calculated using the amounts specified in the judgments or the amounts for which the community could later be held liable. In essence, the judgments against Susan are not judgments at all.[3] Because the judgments do not fix Susan's liability, they must be vacated.

[3] Because Susan timely appealed the judgments against her, we need not decide whether those judgments were void or merely erroneous. *Compare Byrd v. State*, 293 So. 3d 89, 95–96 (La. App. 2020) (holding ambiguous judgment was invalid and thus did not have preclusive effect) *with Imperial Cas. & Indem. Co. v. Sogomonian*, 243 Cal. Rptr. 639, 647–48 (Cal. App. 1988) (holding court erred by entering judgment without specifying or receiving evidence on damages sought in complaint).

II. Damages Awarded to Chase

¶8 In its complaint, Chase sought a little more than $102,000 in damages. During the course of the litigation, Chase repeatedly reduced its damage request. In support of its motion for summary judgment, Chase submitted a declaration of an employee responsible for managing the loan and exhibits showing the transaction history and balances for the loan. The employee averred, and the exhibits supported, that as of March 2, 2020, the outstanding balance due was $94,807.62. That balance appeared to account for two $5,000 payments made in January and February of 2020. In its reply, Chase further reduced its damage request to $79,807.62—the amount the court awarded on summary judgment—to reflect a $15,000 diminution in the loan balance after additional payments were made.

¶9 James and Susan argue the superior court erred by failing to account for the full value of Richard and Kecia's $75,000 settlement agreement in granting summary judgment to Chase. Summary judgment is appropriate "if the moving party shows that 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). We review the grant of summary judgment de novo, construing the facts in the light most reasonable to James, the non-movant. *See Engler v. Gulf Interstate Eng'g, Inc.*, 230 Ariz. 55, 57, ¶ 8 (2012).

¶10 On this record, we find no error in the court's award. The only evidence in the record of the outstanding balance on the note is Chase's employee's declaration, which, along with Chase's reply, supported the court's finding that $79,807.62 remained due on the note. James did not offer any controverting evidence in his response and, in fact, described the facts as "simple and undisputed."[4] James cited Richard and Kecia's crossclaim allegation that they "were forced to pay [Chase] $75,000." But James did not offer any evidence to support that allegation or to clarify

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[4] James and Susan appended a transcript of the default hearing to their reply brief. A document does not become part of the record on appeal by virtue of its attachment to a brief, however, and we may not consider facts that are not in the record. *See Gorney v. Meaney*, 214 Ariz. 226, 231, ¶ 16 n.5 (App. 2007); *see also* ARCAP 13.1(b). Appellants have a duty to timely order any relevant transcripts of superior court proceedings that are not otherwise in the record on appeal. ARCAP 11(b), (c). "[I]n the absence of a transcript, we presume the evidence and arguments presented at the hearing support the [superior] court's ruling." *Blair v. Burgener*, 226 Ariz. 213, 217, ¶ 9 (App. 2010).

whether it meant Richard and Kecia had actually paid Chase $75,000 or whether it meant they had merely agreed to pay Chase $75,000.

¶11 On appeal, James and Susan also point to the superior court's finding that Richard and Kecia "paid $75,000 of the amount due," but the court made that finding while ruling on the crossclaims, after granting summary judgment to Chase. And, following that ruling, James did not seek relief from the grant of summary judgment to Chase. *See* Ariz. R. Civ. P. 60(b)(5) (authorizing court, "on motion" from party, to grant relief from judgment that has been satisfied). Furthermore, the record contains no admissible evidence to support a finding that Richard and Kecia fully performed the settlement agreement.[5] Chase's motion for summary judgment supported an inference that Richard and Kecia had made $25,000 in payments, but those payments appear to be accounted for in the court's damage award.

¶12 In sum, James failed to meet his burden to establish a genuine issue of material fact about the amount due on the loan. Therefore, the superior court did not err in awarding the Bank $79,807.62 in damages.

III. Damages and Attorney's Fees Awarded to Richard and Kecia

¶13 Before considering the merits of James and Susan's arguments about Richard and Kecia's crossclaims, we must examine our jurisdiction. *Fields v. Oates*, 230 Ariz. 411, 413, ¶ 7 (App. 2012) (explaining court's independent duty to determine whether it has jurisdiction over appeal).

¶14 The superior court entered judgment on Richard and Kecia's crossclaims pursuant to Rule 54(b) on July 12, 2021.[6] Three days later, after

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[5] While this conclusion appears to support James's argument that the court erred in awarding damages to Richard and Kecia, as explained further below, James's appeal is untimely regarding the award of damages on Richard and Kecia's crossclaims.

[6] The certification indicated that "there [wa]s no reason for delay." *Cf.* Ariz. R. Civ. P. 54(b) (requiring court to "expressly determine[] there is no just reason for delay and recite[] that the judgment is entered under Rule 54(b)"). The omission of the word "just" did not render the certification ineffective, however, as the wording of a certification of finality need not exactly match the wording provided in Rule 54(b). *See Ariz. Bank v. Superior Ct.*, 17 Ariz. App. 115, 120 (1972) (explaining that Rule 54(b) only requires

considering James and Susan's untimely objection to Richard and Kecia's request for attorney's fees, the court issued an unsigned order "affirming" the Rule 54(b) judgment. James and Susan filed their notice of appeal on August 18, less than 30 days after the court entered final judgment but more than 30 days after the Rule 54(b) judgment.

¶15 To appeal a judgment, a party must file a notice of appeal within 30 days of its entry. ARCAP 9(a). We lack jurisdiction to consider untimely appeals. *James v. State*, 215 Ariz. 182, 185, ¶ 11 (App. 2007). A "ruling [that] resolves fewer than all claims as to all parties" is appealable as a final judgment under A.R.S. § 12-2101(A)(1) if it contains a certification of finality pursuant to Rule 54(b). *Brumett v. MGA Home Healthcare, L.L.C.*, 240 Ariz. 420, 427–28, ¶ 12 (App. 2016). Here, because James and Susan filed their notice of appeal more than 30 days after the superior court entered final judgment on Richard's crossclaims pursuant to Rule 54(b), their appeal is untimely as to that judgment.

¶16 James and Susan appear to argue their appeal is timely, however, because the superior court subsequently affirmed the Rule 54(b) judgment in the unsigned order that did not contain a certification of finality.[7] But, in issuing the unsigned order, the court did not modify the Rule 54(b) judgment; it merely determined that there were no grounds to do so. In essence, the court treated James and Susan's untimely objection as a motion for reconsideration of the Rule 54(b) judgment, and, finding it without merit, declined to grant it. The denial of a motion for reconsideration may be appealable, in certain circumstances, pursuant to A.R.S. § 12-2101(A)(2) as a "special order made after final judgment." To invoke our jurisdiction under A.R.S. § 12-2101(A)(2), however, an appeal must raise issues "different from those that would arise from an appeal from the underlying judgment," and the order appealed must affect, enforce, or stay the underlying judgment. *See Arvizu v. Fernandez*, 183 Ariz. 224, 226–27 (App. 1995) ("[A]n order that is merely 'preparatory' to a later

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court to determine that further delay is unwarranted but that "there is no requirement of any particular form for indicating that [determination] has been made").

[7] To the extent the unsigned order is appealable, it did not become appealable until the court entered its final Rule 54(c) judgment on July 21. *See Arvizu v. Fernandez*, 183 Ariz. 224, 227 (App. 1995) ("Before one can appeal from a post-judgment order, it must be signed by the judge . . . ."). James and Susan's appeal is thus timely as to the July 15 order.

proceeding that might affect the judgment or its enforcement is not appealable."). James and Susan's arguments about the award of damages on Richard and Kecia's crossclaims could have been made in an appeal from the underlying judgment. Thus, we lack jurisdiction over and must dismiss that portion of their appeal.

¶17 James and Susan's arguments about attorney's fees could not have been made in an appeal from the Rule 54(b) judgment, however, because, when it entered judgment, the superior court had not considered James and Susan's objections to Richard's fee request. Thus, assuming the court's unsigned order, and the subsequent Rule 54(c) judgment, affected or enforced the Rule 54(b) judgment by finalizing James and Susan's liabilities with respect to the award of attorney's fees, we have jurisdiction to consider the merits of their fee-related arguments.

¶18 On the merits, James and Susan contend the superior court erred in awarding attorney's fees pursuant to A.R.S. § 12-341.01 because its award included not just fees Richard and Kecia incurred on their crossclaims, but also fees they incurred defending Chase's complaint. Under A.R.S. § 12-341.01, the superior court has discretion to award reasonable attorney's fees to "the successful party" in a "contested action arising out of a contract" to mitigate the expense of "establish[ing] a just claim or a just defense." A.R.S. § 12-341.01(A), (B); *see Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 569, ¶ 9 (App. 2007). We review the award of attorney's fees for an abuse of discretion. *Fulton Homes Corp.*, 214 Ariz. at 569, ¶ 9.

¶19 The party requesting fees bears the initial burden to show its entitlement to fees by submitting a fee application and a supporting affidavit. *Nolan v. Starlight Pines Homeowners Ass'n*, 216 Ariz. 482, 491, ¶ 38 (App. 2007). The burden then shifts to the party opposing the award to making specific objections to "demonstrate the impropriety or unreasonableness of the requested fees." *Id.*; *see also Rudinsky v. Harris*, 231 Ariz. 95, 102, ¶ 34 (App. 2012) (affirming fee award because appellant did not object to reasonableness of specific time entries and did not identify any entries that pertained to defamation claim rather than contract claim).

¶20 Here, Richard and Kecia met their burden by submitting an application for fees that included an affidavit of counsel and an itemized breakdown of the fees. In their untimely objection and on appeal, James and Susan argue they cannot be held responsible for fees Richard and Kecia incurred in defending Chase's complaint. James and Susan have waived that argument, however, by failing to cite any supporting legal authority.

See Cruz v. City of Tucson, 243 Ariz. 69, 75, ¶ 23 (App. 2017) (citing ARCAP 13(a)(7)(A)). Waiver aside, James and Susan failed to object to any specific time entries and, although they argued that "roughly one fourth to one third of the fees sought [pre]date[d] the [filing of the crossclaims]" in "mid-February, 2020," they failed to give the superior court a definite cut-off date for the division of fees.[8] In sum, James and Susan failed to meet their burden to establish that Richard and Kecia's fee request was inappropriate or unreasonable. Thus, the court did not abuse its discretion in affirming its prior fee award.

IV. Attorneys' Fees and Taxable Costs on Appeal

¶21 Chase, Richard, and Kecia request their taxable costs and attorneys' fees pursuant to A.R.S. §§ 12-341, -341.01, and the guaranty agreement. Section 12-341 requires us to award taxable costs to "[t]he successful party to a civil action." A.R.S. § 12-341.01 gives us discretion to award attorneys' fees to the successful party. The guaranty agreement obligates the guarantors "to pay all expenses, including reasonable attorney's fees that [Chase] incurs in enforcing [the guaranty agreement]." "[C]ontracts for payment of attorneys' fees are enforced in accordance with the terms of the contract." *McDowell Mountain Ranch Cmty. Ass'n, Inc. v. Simons*, 216 Ariz. 266, 269, ¶ 14 (App. 2007) (quotation omitted); *see also* A.R.S. § 12-341.01(A) ("This section shall not be construed as altering, prohibiting or restricting present or future contracts or statutes that may provide for attorney fees.").

¶22 For purposes of A.R.S. §§ 12-341 and -341.01, Susan is the successful party because she is the only party who has completely prevailed in the litigation. Thus, under A.R.S. § 12-341, Susan is entitled to recover her taxable costs on appeal from Chase, Richard, and Kecia. Because Chase, Richard, and Kecia are not successful parties, they are not entitled to recover fees under A.R.S. § 12-341.01.[9] Under the terms of the guaranty agreement, however, Chase is entitled to recover its litigation expenses

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[8] Richard and Kecia actually filed their crossclaims on February 6, 2020.

[9] James and Susan proceeded pro se in this appeal.

from all three guarantors.[10] Thus, James, Richard, and Kecia are all liable for Chase's taxable costs and attorney's fees on appeal.

CONCLUSION

¶23 For the reasons above, we vacate Chase, Richard, and Kecia Dunlap's judgments against Susan Dunlap. We affirm all judgments against James Dunlap and remand for further proceedings on the claims against Susan. We order Chase, Richard, and Kecia to pay Susan Dunlap's taxable costs on appeal, and we order James, Richard, and Kecia to pay Chase's taxable costs and attorney's fees on appeal, pending the parties' compliance with ARCAP 21. We deny Richard and Kecia requests for attorney's fees and costs without prejudice to them renewing their request at the conclusion of the litigation.

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

[10] The guaranty agreement has no provision for the allocation of expenses based on a guarantor's partial satisfaction of the debt. To the extent Richard and Kecia's settlement agreement provides otherwise, the terms of that agreement are not in the record.