NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

NORMAN CHAMBERLAIN and KRISTINA CHAMBERLAIN, husband and wife, Plaintiffs/Appellants, v. BANK OF AMERICA, N.A., a foreign corporation, Defendant/Appellee.	1 CA-CV 09-0046 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure) **FILED 03-11-2010**

Appeal from the Superior Court in Maricopa County

Cause No. CV 2006-016878; CV 2008-009572 (Consolidated)

The Honorable Edward O. Burke, Judge

AFFIRMED IN PART; VACATED IN PART;
REVERSED IN PART AND REMANDED

M. Philip Escolar Phoenix
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By Michael N. Poli
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I R V I N E, Presiding Judge

¶1 Plaintiffs-Appellants Norman and Kristina Chamberlain appeal the trial court's judgment in favor of Defendant-Appellee Bank of America, N.A. ("the Bank"). They contend the court erred

as a matter of law in granting summary judgment for the Bank and abused its discretion by awarding the Bank the full amount of attorneys' fees it requested. For the following reasons, we reverse the court's summary judgment and remand this matter for further proceedings, vacate the court's first award of attorneys' fees, and affirm its second award.

FACTUAL AND PROCEDURAL HISTORY

¶2 In January 1999, the Chamberlains purchased an unimproved lot in Fountain Hills, Arizona. In October 2001, they agreed with custom homebuilder Terry Geitz Fine Homes, Inc. (the "Builder") to a contract for the construction of a residence on the lot. The Chamberlains paid the Builder $32,250 as an initial deposit for construction of the residence.

¶3 The Chamberlains then entered a Residential Construction Loan Agreement ("Loan Agreement") with the Bank to obtain $620,000 to finance the construction of the residence.[1] As relevant, the Loan Agreement provided that the Bank would advance loan proceeds as the work progressed "in the amounts and for the work described in [the Bank's] Construction Loan Inspection Sheet." The Construction Loan Inspection Sheet was a

[1] The Loan Agreement also provided additional funds to the Chamberlains for the construction of a swimming pool and to allow them to pay off their existing loan for the purchase of the lot.

document to be completed by the Bank's inspector certifying the amount of work performed on the construction project. The Loan Agreement also stated that the Chamberlains' $32,250 deposit to the Builder would be deducted from the Builder's first draw from the Bank.[2]

¶4 The Builder began construction on the residence in February 2002. On March 15, 2002, a negative soil condition known as "expansive soil" was discovered on the property and the Town of Fountain Hills warned the Builder that it must cease all construction and obtain soil testing. The Town later issued a stop-work order for the property. The Chamberlains did not alert the Bank to the stop-work warning or direct it to withhold payments to the Builder.

¶5 On March 26, 2002, the Builder submitted a disbursement request for $28,266 to the Bank for completion of grading or "earthwork," plumbing work, and "General Conditions." On March 28, 2002, the Bank's appraiser, Christopher Cole, submitted a Construction Loan Inspection Sheet to the Bank that indicated the Builder had procured the building permits and completed clearing/grading/fill of the land. Mr. Cole assigned a

[2] In addition to the Loan Agreement, the Chamberlains and the Bank executed several related documents: a Construction Rollover Information Sheet, a Compliance and Hold Harmless Agreement, and a Disbursement Authorization and Agreement. The Chamberlains also acknowledged the Construction Loan Inspection Sheet.

value of six percent of the base cost of construction to the procurement of the building permits and three percent to the clearing/grading/fill work and indicated that work representing nine percent of the total construction amount had been completed. However, Mr. Cole mistakenly certified at the bottom of the Inspection Sheet that the Builder had completed zero, rather than nine, percent of the work.

¶6 On March 29, 2002, in response to the Builder's request for payment of construction costs, the Bank disbursed $23,550 to the Builder. The handwritten notes of the Bank's Draw Specialist, Dan Patten, on the disbursement letter indicate that the project was then "9% drawn," and that the $23,550 payment was equal to $55,800 (9% of the total construction loan amount of $620,000) less the $32,250 deposit the Chamberlains had given to the Builder. The Bank disbursed an additional $4716 to the Builder on April 2, 2002, and made another payment of $24,631 to the Builder on April 16, 2002. As a result, the Bank disbursed a total of $52,897 to the Builder. Thus, the Builder received $85,147 for the project ($52,897 from the Bank plus the Chamberlains' $32,250 deposit), 13.7% of the total construction cost, even though it only completed nine percent of the construction work.

¶7 On November 22, 2006, the Chamberlains filed this lawsuit against the Bank alleging claims for breach of the Loan

Agreement, negligence, consumer fraud, and breach of fiduciary duty. They also sought an injunction prohibiting the Bank from enforcing the Loan Agreement or the Deed of Trust on the property.[3] Several months after initiating the action, the Chamberlains moved to dismiss their negligence, consumer fraud, and breach of fiduciary duty claims without prejudice on the grounds that the claims might be time-barred under the applicable statute of limitations. The Bank opposed the motion, arguing that the claims should be dismissed with prejudice and the Bank awarded its attorneys' fees. The Bank moved for partial summary judgment on those claims and requested an award of attorneys' fees pursuant to Paragraph 11(a)(xvi) of the Loan Agreement and Arizona Revised Statutes ("A.R.S.") sections 12-341.01 (2003) and -349 (2003). The trial court denied the Chamberlains' motion to dismiss based on the Bank's opposition thereto, and granted the Bank's motion for partial summary judgment, dismissing the tort claims with prejudice. The court did not award attorneys' fees at that time.

¶8 The Bank then moved for summary judgment on the Chamberlains' breach of contract claim, arguing that it failed as a matter of law because the Bank had disbursed funds to the

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[3] The Chamberlains had previously filed a lawsuit against the property's developer and the Builder arising out of the Chamberlains' inability to complete construction of the residence as planned.

Builder in compliance with the Loan Agreement and had no duty to inspect the construction work before issuing disbursements to the Builder. It also argued the claim was precluded by the contractual waivers contained in the Loan Agreement and barred by the Chamberlains' failure to mitigate their damages. The Chamberlains responded that the Bank breached the Loan Agreement by disbursing project funds in excess of the completed percentage of work and by fraudulently altering Mr. Cole's Construction Loan Inspection Sheet. In addition, they argued that, as a result of the fraudulent alteration of the Inspection Sheet, the waivers and exculpatory clauses contained in the Loan Agreement did not apply as a matter of law. The Chamberlains also cross-moved for partial summary judgment regarding the Bank's liability for breach of the Loan Agreement as a result of its disbursement of a percentage of project funds greater than the percentage of construction work certified completed by Mr. Cole.[4] The court granted the Bank's motion for summary judgment and denied the Chamberlains' cross-motion. Over the Chamberlains' objection, the court awarded the Bank $68,000 in attorneys' fees pursuant to the Loan Agreement.

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[4] In addition, the Chamberlains argued that the Bank breached the implied covenant of good faith and fair dealing by failing to make a proper inspection of the property to justify the amount of the disbursed monies. Nevertheless, the Chamberlains did not plead a claim for breach of the implied covenant.

¶9 The Chamberlains then filed a new complaint against the Bank in a separate action (CV 2008-009572) alleging claims for consumer fraud, negligence, and negligent supervision.[5] The Bank answered the complaint, and moved to consolidate the action with the pending lawsuit (CV 2006-016878). The court granted the motion. After consolidation, the Bank moved for summary judgment, arguing that the claims were barred by the doctrines of collateral estoppel and res judicata, the Statute of Frauds, and the economic loss rule. Further, the Bank asked the court to award them attorneys' fees. The Chamberlains moved to voluntarily dismiss the complaint with prejudice on the grounds that they had newly discovered evidence that showed the claims were barred by the statute of limitations. The court granted the motion to dismiss with prejudice and awarded the Bank $17,435.30 in attorneys' fees.

¶10 The trial court entered judgment on December 15, 2008. The Chamberlains timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

¶11 The Chamberlains argue the trial court erred as a matter of law by granting summary judgment for the Bank and

[5] The Chamberlains complaint in CV 2008-009572 also alleged claims against Mr. Cole. However, the Chamberlains never served Mr. Cole with the complaint, and do not challenge on appeal the trial court's dismissal of those claims.

abused its discretion by awarding the Bank the full amount of attorneys' fees it requested.

A. Summary Judgment

¶12 The Chamberlains argue the court erred in granting summary judgment for the Bank because the undisputed facts show that the Bank breached several provisions of the Loan Agreement and its related documents. In particular, they argue the Bank breached: (1) the Construction Rollover Information Sheet; (2) the Disbursement Authorization and Agreement; and (3) Paragraphs 2(n) & 4(a) of the Loan Agreement by failing to deduct the $32,250 deposit the Chamberlains paid to the Builder from the first disbursement and by disbursing funds in excess of the percentage of construction work completed. The Bank contends it did withhold the Chamberlains' $32,250 deposit from the first disbursement, but that pursuant to its discretion under the Loan Agreement, it paid two Change Orders submitted by the Builder.

¶13 A court may grant summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz.R.Civ.P. 56(c). Summary judgment should be granted, "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*,

166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). Consequently, a "scintilla" of evidence or evidence creating the "slightest doubt" about the facts may still be insufficient to withstand a motion for summary judgment. *Id.* For a claim or defense to withstand a motion for summary judgment and be presented to a jury, the proponent of the claim or defense must present evidence from which a reasonable jury could find, directly or by inference, that the probabilities favor the proponent. *Id.* at 310, 802 P.2d at 1009. If the evidence would allow a jury to resolve a material issue in favor of either party, summary judgment is improper. *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990).

¶14 In reviewing a summary judgment, our task is to determine de novo whether any genuine issues of material fact exist and whether the trial court incorrectly applied the law. *L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co.*, 189 Ariz. 178, 180, 939 P.2d 811, 813 (App. 1997). We review the facts in the light most favorable to the party against whom summary judgment was entered, *Riley, Hoggatt & Suagee P.C. v. English*, 177 Ariz. 10, 12, 864 P.2d 1042, 1044 (1993), and will affirm the entry of summary judgment if it is correct for any reason. *Hawkins v. State*, 183 Ariz. 100, 103, 900 P.2d 1236, 1239 (App. 1995).

¶15 As discussed, on March 26, 2002, the Builder submitted a disbursement request for $28,266 to the Bank for completion of grading or "earthwork," plumbing work, and "General Conditions." Mr. Cole submitted an Inspection Sheet to the Bank that indicated the Builder had completed nine percent of the total construction.[6] On March 29, 2002, in response to the Builder's request for payment of construction costs, the Bank disbursed $23,550 to the Builder. The handwritten notes of the Bank's Draw Specialist, Dan Patten, on the disbursement letter indicate that the project was then "9% drawn," and that the $23,550 payment was equal to $55,800 (9% of the total construction loan amount of $620,000) less the $32,250 deposit the Chamberlains had given to the Builder.

¶16 The Bank disbursed an additional $4716 to the Builder on April 2, 2002, for a total paid as of that date of $28,266 (the amount of the Builder's March 26 request). The Bank made a final payment of $24,631 to the Builder on April 16, 2002. Thus,

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[6] We reject the Chamberlains' argument that a material dispute of fact exists regarding the amount of construction that was completed at the time of Mr. Cole's inspection. Mr. Cole indicated on his Inspection Sheet that nine percent of the construction work had been completed, but mistakenly certified that the Builder had completed zero, rather than nine, percent of the work. Given Mr. Cole's declaration stating that he intended to certify that the Builder's work was nine percent complete, and the Chamberlains' failure to dispute that the Builder had obtained the permits and completed grading/earthwork, we find no material dispute of fact.

the total amount disbursed from the Bank to the Builder was $52,897. This amount plus the $32,250 deposit given to the Builder by the Chamberlains equals a payment to the Builder of $85,147, 13.7% of the $620,000 total construction cost, even though it only completed nine percent of the construction work.

¶17 The Chamberlains argue the Bank made the April 2 and April 16 payments after improperly applying their $32,250 deposit to reduce the total loan amount from $620,000 to $587,750, and point out that the total amount the Bank disbursed, $52,897, equals 9% of $587,750. The Bank, on the other hand, claims that it properly deducted the Chamberlains' $32,250 deposit from its first disbursement and only issued the April 2 and April 16 payments to the Builder in response to Change Orders of $29,745.09 and $28,043.99 that the Loan Agreement allowed the Bank, in its discretion, to pay from the loan funds.

¶18 Mr. Patten indicated on the first disbursement letter, dated March 29, that the project was "9% drawn." Nevertheless, he noted on the April 2 disbursement letter, which released an additional $4716 to the Builder, that the project was only 4.8% drawn, and wrote on the April 16 disbursement letter accompanying the release of $24,631 more to the Builder that the project was "9% drawn." As the Chamberlains point out, the total amount the Bank had released to the Builder on April 2 ($23,550

plus $4,716) equals 4.8% of $587,750. Further, the total amount paid by the Bank as of the April 16 disbursement ($52,897) equals 9% of $587,750.[7] Given this evidence, a reasonable jury could find that the Bank improperly applied the Chamberlains' $32,250 deposit to reduce the total loan amount rather than, as required by the Loan Agreement, deducting that amount from the first disbursement and, as a result, disbursed a percentage of the loan funds greater than the percentage of completed construction in breach of the Loan Agreement. Summary judgment was inappropriate because there is a material question of fact regarding whether the Bank breached the Loan Agreement by failing to deduct the Chamberlains' $32,250 deposit from the first disbursement and instead applied that sum to reduce the total loan amount.[8]

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[7] Although the Bank claims it disbursed the funds on April 2 and April 16 in response to the Builder's Change Orders, the total amount the Bank paid to the Builder was $389.09 less than the amount of $55,800 minus $32,250 plus the $29,745.09 Change Order. Moreover, the Bank does not explain why, if it made the April 2 and April 16 payments in response to the Builder's Change Orders, it did not pay any amount for the second Change Order.

[8] The Bank argues that the Loan Agreement gave it the authority to pay the amount it disbursed to the Builder based on the Change Orders the Builder had submitted. This may also be an issue of fact for a jury. Even assuming the Bank is correct, if a finder of fact determines it did not pay those Change Orders but instead misapplied the $32,250 deposit resulting in an overpayment, it would not be entitled to judgment. Accordingly, the existence of a question of fact on that issue precluded summary judgment.

¶19 Further, we reject the Bank's argument that it was nevertheless entitled to summary judgment based upon several exculpatory clauses contained in the parties' contract documents. The provisions on which the Bank relies largely disclaim any obligation by the Bank to supervise or inspect the construction project to ensure that the work was satisfactory. *See* Loan Agreement ¶ 4(d) (stating the presentation of a draw request "shall additionally constitute [the Chamberlains'] unconditional waiver of any claims to the effect that such work was not performed in such manner"); Loan Agreement ¶ 4(f) ("Lender shall have no obligation, either express or implied, to Borrower, to Contractor or to any third parties, to verify that advances made pursuant to this Agreement are actually used to pay for labor or materials furnished in connection with the construction of the Residence. Borrower agrees to assume all risks in the event Contractor fails to pay for any labor or material so furnished."); Loan Agreement ¶ 4(g) ("Lender shall have no liability or obligations, either express or implied, to Borrower, to Contractor, or to any third parties, in connection with the Residence or its construction, *except to advance monies as provided under this Agreement*. Further, Lender is not liable for the performance of Contractor or any other parties nor for any failure to construct, complete, protect, or insure the Residence or Property.") (emphasis added); Loan Agreement ¶ 5

(stating the Bank shall have the right, but not the obligation, to inspect the property and that if the Bank makes such inspections it shall have no responsibility for the failure or default of the Builder and that the Chamberlains shall not have a right to rely on the Bank's inspection). Here, however, the Chamberlains' breach of contract claim is based upon the Bank's failure to disburse the loan monies in accordance with the terms of the Loan Agreement and not its failure to properly supervise the construction. Accordingly, these provisions do not preclude the Chamberlains' claim as a matter of law.[9]

B. Attorneys' Fees Award

¶20 After the court granted the Bank's motion for summary judgment on the Chamberlains' breach of contract claim, the Bank moved for an award of attorneys' fees pursuant to Paragraph 11(a)(xvi) of the Loan Agreement, A.R.S. §§ 12-341.01(A), -341.01(C), -349, and Arizona Rule of Civil Procedure 11. The court granted the Bank $68,000 in fees pursuant to Paragraph 11(a)(xvi) of the Loan Agreement. Once the court granted the Chamberlains' motion to dismiss their second complaint with prejudice, the Bank moved for an award of attorneys' fees pursuant to Paragraph 11(a)(xvi) of the Loan Agreement, A.R.S.

[9] Accordingly, we do not reach the Chamberlains' argument that those provisions violated their reasonable expectations and are therefore unenforceable.

§§ 12-341.01(A), -341.01(C), -349, and Rule 11. The court granted the motion and awarded the Bank $17,435.30, but did not specify the basis for its award. The Chamberlains contend that the court's awards of attorneys' fees to the Bank were an abuse of its discretion because they included fees the Bank was not entitled to recover. We review de novo the superior court's determination whether a statute awarding fees applies, but review the amount of the award under the abuse of discretion standard. *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, 13, ¶ 12, 6 P.3d 315, 318 (App. 2000) (citations omitted).

¶21 As we reverse the trial court's summary judgment for the Bank on the Chamberlains' breach of contract claim, we vacate the court's first award of fees to the Bank pursuant to Paragraph 11(a)(xvi) of the Loan Agreement.[10]

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[10] The Chamberlains argue the trial court abused its discretion by awarding the Bank fees incurred prior to the initiation of the litigation. Although this argument only pertains to the court's first award of fees and is therefore now moot, it may arise again on remand and we address it to guide the trial court. The Loan Agreement does not impose any limitation on the fees the Bank may recover pursuant to Paragraph 11(a)(xvi), but states that the Bank will be reimbursed for "all expenses of any kind, including without limitation attorney's fees," incurred by the Bank in connection with or arising out of the Loan Agreement. Accordingly, the Loan Agreement required the trial court to award the Bank its reasonable attorneys' fees it incurred in connection with the Chamberlains' claims prior to their filing of the first complaint. *See Bennett v. Appaloosa Horse Club*, 201 Ariz. 372, 378, ¶ 26, 35 P.3d 426, 432 (App. 2001) (stating trial court has no discretion to deny an award of

¶22 Nevertheless, we affirm the court's second award of fees. *See Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, 267, ¶ 25, 99 P.3d 1030, 1037 (App. 2004) (stating attorneys' fee award will be upheld if the record reflects a reasonable basis for the award). The Bank's motion was based on, among others, Paragraph 11(a)(xvi) of the Loan Agreement, which states that the Bank will be reimbursed for "all expenses of any kind, including without limitation attorneys' fees," incurred by the Bank in connection with or arising out of the Loan Agreement.

¶23 The Chamberlains contend that the tort claims did not arise out of the Loan Agreement and were based on duties that exist independent of the agreement. Yet, Paragraph 11(a)(xvi) does not limit a fee award to only those claims inextricably intertwined with a contract claim, but allows an award for all fees incurred by the Bank in connection with or arising out of the Loan Agreement. The attorneys' fees the Bank incurred in defending the Chamberlains' claims for negligence, consumer fraud, and negligent supervision arose in connection with the Loan Agreement because they concerned the manner in which the

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attorneys' fees when required by a contractual provision). Further, such an award is consistent with Arizona law allowing a party to recover fees for pre-complaint investigation and evaluation of a potential claim pursuant to A.R.S. § 12-341.01. *See First Nat'l Bank v. Cont'l Bank*, 138 Ariz. 194, 200, 673 P.2d 938, 944 (App. 1983) (stating "pre-complaint investigation and evaluation of the potential claim is part of the process and expense of litigation").

Bank performed its duties under the contract and conducted its dealings with the Chamberlains. The claims arose out of the Loan Agreement because but for the contract, there would have been no duty. Accordingly, the court properly awarded those fees pursuant to the Loan Agreement's fee award provision.

¶24 The Chamberlains also contend the trial court abused its discretion by awarding the Bank fees incurred for claims the Chamberlains agreed within a reasonable time to voluntarily dismiss. They argue A.R.S. § 12-349 does not allow an assessment of fees if a plaintiff voluntarily dismisses his action within a reasonable time after he learns it is without substantial justification, and contend they filed their motion to dismiss the second complaint within a reasonable time after they learned it was time-barred. Paragraph 11(a)(xvi) of the Loan Agreement does not contain a limitation similar to that set forth in A.R.S. § 12-349. Therefore, the trial court was authorized to award the Bank all of the attorneys' fees it incurred defending the second action.

CONCLUSION

¶25 For the foregoing reasons, we reverse the trial court's summary judgment and remand this matter for further proceedings, vacate the court's first award of attorneys' fees, and affirm its second award.

¶26 Both parties request an award of attorneys' fees on appeal pursuant to Paragraph 11(a)(xvi) of the Loan Agreement. We consider the Chamberlains to be the prevailing party on appeal but it is premature to award any fees until the trial court ultimately resolves the case and determines who is the prevailing party in the underlying litigation. As the prevailing party, the Chamberlains are entitled to an award of their costs incurred on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21. When the trial court determines the underlying action, it is authorized to consider the fees and costs incurred on appeal in determining how much to award as attorneys' fees.

/s/

PATRICK IRVINE, Presiding Judge

CONCURRING:

/s/

MICHAEL. J. BROWN, Judge

/s/

DONN KESSLER, Judge