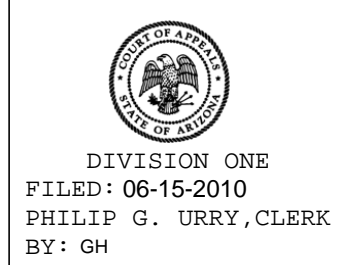


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



JEANNE FORSYTH,) 1 CA-CV 09-0181
)
Plaintiff/Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
)
FOUR CROWN CONSTRUCTION, LLC;)
TODD MCLAREN and TERRI MCLAREN,) Not for Publication -
husband and wife,) (Rule 28, Arizona Rules
) of Civil Appellate Procedure)
Defendants/Appellants.)
)
)
)
)

Appeal from the Superior Court in Yavapai County

Cause No. P-1300-CV-0020060617

The Honorable Howard D. Hinson, Jr., Judge (Retired)

AFFIRMED IN PART; REVERSED IN PART

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B A R K E R, Judge

¶1 Appellants Four Crown Construction LLC ("Four Crown"),
Todd McLaren, and Terri McLaren (collectively "Appellants")

appeal the trial court's grant of summary judgment in favor of Appellee Jeanne Forsyth. For the following reasons, we affirm in part and reverse in part.

Facts and Procedural History

¶12 In June 2004, Forsyth entered into a construction contract with Four Crown in which Four Crown agreed to build a new house and barn on Forsyth's property. Four Crown held a license to construct residential homes, which was issued by the Arizona Registrar of Contractors ("ROC"). Todd McLaren formed Four Crown and is its sole member. Todd McLaren also was the qualifying party on Four Crown's ROC license. Four Crown began construction, but Forsyth stopped construction on the project in July 2005 because she discovered alleged financial improprieties and defective workmanship.

¶13 On May 19, 2006, Forsyth filed a complaint against Four Crown with the ROC alleging defective workmanship, failure to abide by the contract, misrepresentation of the construction work and bank draws, financial improprieties, and use of unlicensed contractors. On May 26, 2006, Forsyth filed a lawsuit against Appellants asserting common law fraud, consumer fraud/statutory fraud, fraudulent concealment, and breach of fiduciary duty. Forsyth amended the complaint to include claims for negligent misrepresentation/concealment and negligence against Appellants and claims for breach of contract and breach

of implied warranty of workmanship and habitability against Four Crown.

¶4 In August 2007, an administrative law judge ("ALJ") held hearings on Forsyth's ROC complaint. The ALJ determined Four Crown violated Arizona Revised Statutes ("A.R.S.") section 32-1154(A)(2), (3), and (7) (2008)¹ and ROC Rule R4-9-108 on standards of workmanship. Section 32-1154(A) provides:

The holder of a license or any person listed on a license pursuant to this chapter shall not commit any of the following acts or omissions:

. . . .

2. Departure from or disregard of plans or specifications or any building codes of the state or any political subdivision of the state in any material respect which is prejudicial to another without consent of the owner or the owner's duly authorized representative and without the consent of the person entitled to have the particular construction project or operation completed in accordance with such plans and specifications and code.
 3. Violation of any rule adopted by the registrar.
-
7. The doing of a wrongful or fraudulent act by the licensee as a contractor resulting in another person being substantially injured.

¹ We cite the 2008 version as there were no material changes to the statute subsequent to the ROC proceeding.

Rule R4-9-108 states:

- A. A contractor shall perform all work in a professional and workmanlike manner.
- B. A contractor shall perform all work in accordance with any applicable building codes and professional industry standards.
- C. All work performed by a contractor in a county, city, or town that has not adopted building codes or where any adopted building codes do not contain specific provisions applicable to that aspect of construction work shall be performed in accordance with professional industry standards.

The ALJ recommended that the ROC revoke Four Crown's license. On September 19, 2007, the ROC adopted the ALJ's findings of fact and conclusions of law and revoked Four Crown's license.

¶15 On June 13, 2008, Forsyth filed a motion for summary judgment in the civil court proceeding arguing that the ROC's decision was binding on Appellants under the doctrines of res judicata and collateral estoppel and that she was entitled to judgment as a matter of law on all claims. Appellants conceded that the ROC's decision had binding effect on Four Crown regarding negligence and breach of implied warranty of workmanship and habitability. They admitted partial summary judgment was appropriate for those claims but denied that the ROC decision had any binding effect on any claims against the McLarens or in regard to the other claims asserted against Four

Crown in the amended complaint.² Following oral argument on Forsyth's motion for summary judgment, the trial court determined that Appellants were bound by the ROC decision and that, to the extent this was not sufficient to result in summary judgment in Forsyth's favor, Appellants failed to contest other undisputed facts of record to avoid entry of summary judgment. The trial court granted summary judgment in favor of Forsyth, and entered judgment against Appellants as to all claims, and awarded Forsyth costs and attorneys' fees. Appellants filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

Discussion

¶16 We review a grant of summary judgment *de novo* to determine whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996). We view the facts and all reasonable inferences in the light most favorable to the party against whom judgment was entered. *Id.*

² On April 25, 2008, the McLarens filed a motion for summary judgment on the claims of personal liability. The court denied the motion because Forsyth "raise[d] factual issues about Defendant's individual conduct which, if established, would provide for personal and individual liability on behalf of the Defendant."

¶17 The trial court's grant of summary judgment against Appellants on all claims was based in part on the binding effect of the ROC decision under the doctrines of res judicata and collateral estoppel as well as other uncontested factual assertions in Forsyth's statement of facts. See *J.W. Hancock Enter., Inc. v. Ariz. State Registrar of Contractors*, 142 Ariz. 400, 410, 690 P.2d 119, 129 (App. 1984) (finding decision by the ROC had preclusive effect on civil court action under doctrines of res judicata and collateral estoppel). "Res judicata bars a later suit based on the same cause of action and will preclude a claim when a former judgment on the merits was rendered by a court of competent jurisdiction and the matter now in issue between the same parties or their privies was, or might have been, determined in the former action." *Better Homes Constr., Inc. v. Goldwater*, 203 Ariz. 295, 298, ¶ 13, 53 P.3d 1139, 1142 (App. 2002). The doctrine of collateral estoppel precludes relitigation of an issue of law or fact when "[1] the issue was actually litigated in the previous proceeding; [2] there was a full and fair opportunity to litigate the issue; [3] resolution of the issue was essential to the decision; [4] there was a valid and final decision on the merits; and [5] there is common identity of the parties." *Irby Constr. Co. v. Ariz. Dep't of Revenue*, 184 Ariz. 105, 107, 907 P.2d 74, 76 (App. 1995). We

address these doctrines in turn as they apply to the claims at issue on appeal.

1. Negligence

¶8 In her motion for summary judgment, Forsyth contended that violation of A.R.S. § 32-1154(A)(2), (3), and (7) was negligence per se because these statutes establish a statutory standard of care. See *Gunnell v. Ariz. Pub. Serv. Co.*, 202 Ariz. 388, 392, 46 P.3d 399, 403 (2002) ("Violation of a statutory standard of care is usually held to be negligence per se."). The ROC found that "[t]he weight of the credible evidence of record was sufficient to support a finding that [Four Crown's] work on this project was indicative of substandard and unacceptable workmanship." The ROC then made twenty specific findings, some regarding failure to follow plans and specifications. Four Crown conceded that res judicata and collateral estoppel prevented relitigation of negligence and that summary judgment in favor of Forsyth and against Four Crown on this claim was appropriate. The trial court subsequently entered judgment against not just Four Crown but also against the McLarens. The McLarens argue the ROC determination did not have preclusive effect on the claim of negligence against them in the civil court proceeding.

¶9 Entry of judgment against the McLarens for negligence was appropriate if Four Crown was the alter ego of Todd McLaren.³ A party may "pierce the corporate veil" to hold an individual personally liable for the acts of the corporation "where the corporation is shown to be the alter ego or business conduit of a person, and where observing the corporate form would work an injustice." *Standage v. Standage*, 147 Ariz. 473, 476, 711 P.2d 612, 615 (App. 1985). A corporation is the alter ego of its owners when there is "such unity of interest and ownership that the separate personalities of the corporation and owners cease to exist." *Dietel v. Day*, 16 Ariz. App. 206, 208, 492 P.2d 455, 457 (1972). Relevant factors in establishing alter ego include: failure to maintain corporate formalities, commingling corporate and personal finances, plaintiff's lack of knowledge about a separate corporate existence, and diversion of corporate property for personal use. *Deutsche Credit Corp. v. Case Power & Equip. Co.*, 179 Ariz. 155, 160, 876 P.2d 1190, 1195 (App. 1994).

¶10 Piercing the corporate veil is a doctrine well-recognized in corporate law, but our courts have not determined

³ To the extent Todd McLaren is personally liable for any claim, no argument has been asserted that his wife, Terri McLaren, is not liable pursuant to A.R.S. § 25-215. See A.R.S. § 25-215(D) (2007) (requiring a cause of action based on a community obligation be brought against both husband and wife).

whether the doctrine applies to limited liability companies. We need not make this determination because, even if the doctrine applies to Four Crown, Forsyth did not present facts sufficient to prevail on summary judgment under an alter ego theory. Forsyth presented no evidence that Four Crown failed to maintain corporate formalities, that she lacked knowledge of Four Crown's existence, that Four Crown and Todd McLaren's finances were commingled, or that Four Crown's property was diverted for Todd McLaren's personal use. This, however, does not end our inquiry into Todd McLaren's potential personal liability.

¶11 Arizona recognizes personal liability in tort against a tortfeasor who is acting on behalf of a corporate entity. Under this rule, "a corporate officer or director may be personally liable for torts committed by a corporation if the officer or director *personally participates* in the tort." *Warne Inv., Ltd. v. Higgins*, 219 Ariz. 186, 197, ¶ 51, 195 P.3d 645, 656 (App. 2008) (emphasis added); see also *Bischofshausen, Vasbinder, & Luckie v. D.W. Jaquays Mining & Equip. Contractors Co.*, 145 Ariz. 204, 210-11, 700 P.2d 902, 908-09 (App. 1985) ("To be held liable, the directors or officers must participate or have knowledge amounting to acquiescence or be guilty of negligence in the management or supervision of the corporate affairs causing or contributing to the injury."). As Forsyth puts it,

McLaren argues that because he owned an LLC at the time of his actions, he should evade liability for those actions. That is analogous to an inebriated truck driver driving his truck through a building arguing that he is not individually liable because he was on company business.

We agree with this description of the theory of potential personal liability for tortious conduct.

¶12 In terms of the ROC's findings, it is clearly established that Four Crown engaged in "substandard and unacceptable workmanship." There are no specific findings by the ROC, however, that it was McLaren who actually performed this work, but it is apparent that McLaren hired the subcontractors and may also have to some extent supervised this work as well. As mentioned earlier, however, Forsyth's motion for summary judgment was based not solely on the ROC's decision but on her own statement of facts. In the statement of facts Forsyth asserted:

31. Although McLaren knew the foundation was never square nor level he had the framing contractor install the walls which resulted in the walls, windows, and doors being out of square, out of level, and not plumb and the walls being placed inside and outside the plane of the foundation. Exhibit F, page 11-12, Paragraph 15.

32. The out of square out of level foundation was also not to the depth required by code. Exhibit F at pg.11, paragraph 15.b.

33. Notwithstanding the above facts McLaren determined to proceed with stucco installation resulting in the installation of stucco with weep screen that could not drain in violation of code. Exhibit F at pg. 11, paragraph 15.f.

In essence, Forsyth's statement of facts clearly asserts that McLaren knew of, directed, and/or directly participated in the substandard work.

¶13 McLaren's only response to Forsyth's factual assertion of McLaren's own direct involvement (which can clearly be inferred from the ROC findings) is McLaren's statement that he "believed that any problems with the foundation could be corrected prior to the completion of construction." We are hard pressed to understand how any reasonable juror could conclude that a "foundation [that] was never square nor level [upon which McLaren] had the framing contractor install the walls which resulted in the walls, windows, and doors being out of square, out of level, and not plumb," could be "corrected prior to the completion of construction." In short, following the analogy Forsyth employs, the undisputed facts of record show that at a minimum McLaren was the "driver of this truck" that was negligently driven. Accordingly, summary judgment on the negligence claim in favor of Forsyth and against the McLarens was appropriate.

2. Negligent Misrepresentation/Concealment

¶14 The trial court also entered judgment against Appellants on Forsyth's claim for negligent misrepresentation/concealment. We infer from the trial court proceedings that liability for negligent misrepresentation/concealment was based on the conduct underlying the negligence claim. On appeal, Appellants do not argue a separate basis that precludes liability. Accordingly, the trial court properly granted summary judgment against Appellants on the claim for negligent misrepresentation/concealment.

3. Fraud Claims

¶15 The trial court granted summary judgment in favor of Forsyth and entered judgment against Appellants for common law fraud, consumer fraud/statutory fraud, and fraudulent concealment. Each of these claims requires proof of the party's intent in committing the fraud. Common law fraud requires proof of "(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it be acted upon by the recipient in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the right to rely on it; [and] (9) his consequent and proximate injury." *Enyart v. Transamerica Ins. Co.*, 195

Ariz. 71, 77, 985 P.2d 556, 562 (App. 1998). The consumer fraud statute states:

The act, use or employment by any person of any deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.

A.R.S. § 44-1522(A) (Supp. 2009). Fraudulent concealment requires "(1) the concealment of a material existing fact that in equity and good conscience should be disclosed; (2) knowledge on the part of the party against whom the claim is asserted that such a fact is being concealed; (3) ignorance of that fact on the part of the one from whom the fact is concealed; (4) the intention that the concealment be acted upon; and (5) action on the concealment resulting in damages." *Coleman v. Watts*, 87 F. Supp. 2d 944, 951-52 (D. Ariz. 1998) (diversity case applying Arizona law).

¶16 The doctrines of res judicata and collateral estoppel do not bar Appellants from litigating the fraud claims in the civil court action. Res judicata is not applicable because the ROC proceeding was not based on the same cause of action alleged here. The focus of the ROC proceeding was to determine whether

the work was defective and, ultimately, whether Four Crown's license should be suspended or revoked. See *J.W. Hancock Enter., Inc.*, 142 Ariz. at 406, 690 P.2d at 125 ("The [ROC's] power is limited to suspending or revoking a contractor's license, or attaching conditions to the license."). Unlike the cause of action here, fraud was not the central focus nor was it an ancillary issue. The ROC made no express determination regarding fraud.

¶17 To the extent the ROC's findings that Four Crown utilized unlicensed subcontractors and submitted false affidavits regarding requests for loan draws have preclusive effect under the doctrine of collateral estoppel,⁴ genuine issues

⁴ The ROC found:

17. Uncontroverted evidence of record established that [Four Crown] utilized numerous unlicensed contractors on the project and this conduct is also viewed as a wrongful act, within the meaning of the applicable charged section of the State's Contracting laws. Not only is this deemed to be a very serious and flagrant violation of the State's Contracting laws, but moreover, the use of an unlicensed electrician to perform the electrical work raises serious doubts regarding the safety and habitability of the structure.
18. It is determined and held that [Four Crown] submitted false affidavits regarding the request for construction loan draws. This conduct is not only a wrongful act, within the meaning of the

of material fact on the fraud claims remain. The ROC found the use of unlicensed subcontractors and submission of false affidavits was "wrongful" under A.R.S. § 32-1154(A)(7). The issue of fraud was not essential to the ROC proceeding, and the finding of "wrongful" was not a determination of whether or not the conduct was fraudulent.

¶18 At a minimum, there is a genuine dispute of material fact regarding Appellants' intent. In response to Forsyth's motion for summary judgment, Appellants presented the declaration of Todd McLaren in which McLaren declared that "[a]ny misrepresentations" were "inadvertent and not intended to deceive." Todd McLaren also declared that it was his "practice of including the cost of materials in the affidavits of contractor that resulted in differences between those amounts and the amounts paid to the related subcontractor." Accordingly, the trial court erroneously granted summary judgment in favor of Forsyth and against Appellants on the fraud claims.⁵

applicable charged section of the State's Contracting laws, but also raises serious doubts about whether or not McLaren has the necessary "good character" to be a licensed contractor.

⁵ We recognize that Forsyth asserts fraud claims against both the McLarens in their personal capacities and Four Crown. We need not address whether there is a record that permits personal liability as to the fraud claims, as the record does

4. Breach of Fiduciary Duty

¶19 Forsyth alleged Appellants breached their fiduciary duties to her in violation of A.R.S. § 33-1005 (2007). Section 33-1005 states:

Monies paid by or for an owner-occupant as defined in § 33-1002 to a contractor, as defined in § 32-1101, as payment for labor, professional services, materials, machinery, fixtures or tools for which a lien is not provided in this article shall be deemed for all purposes to be paid in trust and shall be held by the contractor for the benefit of the person or persons furnishing such labor, professional services, materials, machinery, fixtures or tools. Such monies shall neither be diverted nor used for any purpose other than to satisfy the claims of those for whom the trust is created and shall be paid when due to the person or persons entitled thereto.

In support of her motion for summary judgment on this claim, Forsyth relied on the ROC's finding that Four Crown "prepar[ed] fraudulent affidavits in order to obtain money." As discussed above, the ROC did not expressly find that Four Crown's submission of false affidavits (done by McLaren) was fraudulent. Accordingly, the trial court's grant of summary judgment against Appellants was erroneous.

not permit summary judgment as to the corporate entity, Four Crown. See *Warne Inv., Ltd.*, 219 Ariz. at 197, 195 P.3d at 656; *Bischofshausen, Vasbinder, & Luckie*, 145 Ariz. at 210-11, 700 P.2d at 908-09.

5. Breach of Contract and Breach of Implied Warranty of Workmanship and Habitability

¶20 The trial court granted summary judgment against Appellants for breach of contract. Appellants argue the ROC proceeding had no preclusive effect on this claim. We disagree.

¶21 Four Crown's construction contract with Forsyth provided that "[t]he construction of the New Home shall be completed in compliance with the plans and specifications in any Addendum referenced on Lines 312-313 and in compliance with any applicable governmental regulations or deed restrictions."

¶22 The ROC held that Four Crown violated A.R.S. § 32-1154(A)(2). Section 32-1154(A)(2) states:

Departure from or disregard of plans or specifications or any building codes of the state or any political subdivision of the state in any material respect which is prejudicial to another without consent of the owner or the owner's duly authorized representative and without the consent of the person entitled to have the particular construction project or operation completed in accordance with such plans and specifications and code.

This determination was supported by the ROC's findings that Four Crown's "work on this project was indicative of substandard and unacceptable workmanship" because:

- a. The home was not constructed to the applicable square footage.
- b. Footers were not constructed to the proper depth and width.

- c. Extensive cracking is present in the concrete slab.
- d. Slab edges are "blown out."
- e. Foundation is out of square.
- f. Weep screeds are blocked by concrete.
- g. Roof is wavy.
- h. Inadequate support for roof corbels.
- i. Failure to follow applicable plans and specifications for 2 x 10 lumber, by using 2 x 8 in specified areas.
- j. Significant variation in the thickness of the concrete slab.
- k. Walls are constructed out of plumb and out of square.
- l. Windows are out of plumb and out of square.
- m. There are humps in the concrete.
- n. There is a significant variation in the elevation of the slab.
- o. Rough grading failed to provide appropriate drainage for the site and the house was built in a hole.
- p. Rebar is exposed.
- q. Extensive cracks are present in the stucco.
- r. The foundation was not built according [to] the applicable plans and specifications.
- s. The front entry concrete slopes toward the house.

t. Inadequate "AB" was used in the construction of the foundation.

¶23 Breach of the construction plans and failure to abide by governmental building specifications were actually litigated during the ROC proceeding, and the ROC rendered a judgment on the merits that Four Crown violated A.R.S. § 32-1154(A)(2). Four Crown was a party to the ROC proceeding and is a party to the civil court action. Accordingly, the doctrine of res judicata prevents Four Crown from relitigating whether it is liable for breach of contract. The trial court correctly granted summary judgment against Four Crown for breach of contract.

¶24 Further, based on the doctrines of res judicata and collateral estoppel, Four Crown conceded that it was appropriate for the trial court to enter summary judgment in favor of Forsyth and against Four Crown for breach of implied warranty of workmanship and habitability. Therefore, the trial court properly entered judgment against Four Crown on this claim. The trial court, however, improperly granted summary judgment against the McLarens for breach of implied warranty of workmanship and habitability and breach of contract. In the amended complaint, these claims are only alleged against Four Crown.

6. Damages

¶125 The trial court granted summary judgment in favor of Forsyth on the issue of damages and awarded Forsyth direct and consequential damages on all claims asserted in the amended complaint. Appellants contend summary judgment on the issue of damages was inappropriate because Forsyth failed to mitigate her damages. Failure to mitigate damages is a question of fact, and the breaching party has the burden to prove "that mitigation was reasonably possible but not reasonably attempted." *Fairway Builders, Inc. v. Malouf Towers Rental Co.*, 124 Ariz. 242, 255, 603 P.2d 513, 526 (App. 1979). Appellants argue Four Crown could have made all necessary repairs to the home and barn had Forsyth allowed Four Crown to complete construction. This contention, however, does not create a material issue of fact or law because Forsyth was not required to allow Four Crown to fix the house after Four Crown materially breached the contract. See *Zancanaro v. Cross*, 85 Ariz. 394, 400, 339 P.2d 746, 750 (1959) ("Ordinarily the victim of a minor or partial breach must continue his own performance, while collecting damages for whatever loss the minor breach has caused him; the victim of a material or total breach is excused from further performance.").

¶126 Appellants also contend that Forsyth failed to mitigate damages because she waited ten months before filing complaints with the ROC and the trial court. Appellants,

however, failed to meet their burden of proof. McLaren declared that “[a]fter ordering Four Crown to stop construction, Plaintiff took no action to complete the construction of the house.” This evidence is insufficient because it does not demonstrate mitigation was reasonably possible. Having offered no evidence to contest Forsyth’s evidence of damages, the trial court properly granted summary judgment on the issue of damages in favor of Forsyth.⁶

7. Attorneys’ Fees

¶27 After granting Forsyth’s motion for summary judgment, the trial court awarded Forsyth attorneys’ fees and costs. Pursuant to the attorneys’ fees provision in the contract, Appellants request an award of attorneys’ fees for the trial court proceedings and on appeal because they obtained reversal of the trial court’s grant of summary judgment in favor of Forsyth. Forsyth also requests attorneys’ fees and costs on appeal pursuant to the terms of the contract, A.R.S. § 12-341.01(A) and (B), and A.R.S. § 12-1103(B). The contractual provision provides: “If Owner or Contractor files suit against the other to enforce any provision of this Contract or for damages sustained by reason of its breach, all parties prevailing in such action, on trial and appeal, shall receive

⁶ The amount of damages entered by the trial court is binding on Four Crown and the McLarens.

their reasonable attorneys' fees and costs as awarded by the court." According to the terms of the provision, attorneys' fees are awarded only in an action to enforce the contract or to recover damages under the contract. See *Alface v. Nat'l Inv. Co.*, 181 Ariz. 586, 600, 892 P.2d 1375, 1389 (App. 1994). Therefore, there is no basis under the contract to award fees for the claims of common law fraud, consumer fraud/statutory fraud, fraudulent concealment, breach of fiduciary duty, negligence, and negligent misrepresentation. Further, to be the prevailing party under the contract, the party must obtain a final judgment. See *Data Sales Co. v. Diamond Z Mfg.*, 205 Ariz. 594, 601, ¶ 33, 74 P.3d 268, 275 (App. 2003) ("A contractual provision for attorneys' fees will be enforced according to its terms."). Thus, based on the contract provision, Four Crown and the McLarens are not the prevailing parties on appeal because reversal of a grant of summary judgment does not result in a final judgment in their favor.

¶128 Additionally, we must vacate the trial court's award of attorneys' fees and costs to Forsyth. The award included fees on claims for which summary judgment was granted but which we have now vacated. Forsyth is entitled to (1) an award of attorneys' fees and costs incurred up through judicial resolution and on appeal against Four Crown because, under the terms of the contract, she was the prevailing party on the

claims for breach of contract and breach of implied warranty of workmanship and habitability; (2) a similar award of attorneys' fees and costs incurred against Four Crown and the McLarens because, pursuant to A.R.S. §§ 12-341 and -341.01, she was the successful party on the claims for negligence and negligent misrepresentation/concealment, which arose out of contract. However, Forsyth's award may be offset because claims remain against Appellants and the successful or prevailing parties on these claims will be determined at trial.

¶29 On the claims that are not based on the contract provision, we decline to award Four Crown or the McLarens attorneys' fees on appeal because they failed to identify a statutory basis for the request. See *Bed Mart, Inc. v. Kelley*, 202 Ariz. 370, 375, ¶ 24, 45 P.3d 1219, 1224 (App. 2002) (denying request for fees pursuant to Arizona Rule of Civil Appellate Procedure 21 because "it does not provide a substantive basis for a fee award"). We decline Forsyth's request for attorneys' fees on appeal under A.R.S. § 12-1103(B) because this is not an action to quiet title. In the exercise of our discretion, we decline to award Forsyth attorneys' fees on appeal pursuant to A.R.S. § 12-341.01, but without prejudice to Forsyth requesting those fees in the trial court if she is ultimately determined to be the successful party. We decline to

award costs on appeal because we do not deem any party to be the successful party.

Conclusion

¶30 For the foregoing reasons, we (1) affirm the trial court's grant of summary judgment in favor of Forsyth and against the McLarens for negligence, negligent misrepresentation/concealment, and damages, and against Four Crown for negligence, negligent misrepresentation/concealment, breach of contract, breach of implied warranty of workmanship and habitability, and damages; and (2) reverse the trial court's grant of summary judgment in favor of Forsyth on her claims against the McLarens for breach of contract and breach of implied warranty of workmanship and habitability and on her claims against Appellants for common law fraud, consumer fraud/statutory fraud, fraudulent concealment, and breach of fiduciary duty. Under the doctrine of collateral estoppel, Appellants are precluded from relitigating issues regarding workmanship, the falsity of affidavits, and the use of unlicensed subcontractors.

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

/s/

PATRICIA A. OROZCO
Presiding Judge

LAWRENCE F. WINTHROP, Judge