IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 05/26/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

RITA FARNSWORTH, as Personal Representative of the ESTATE OF ROBERT KEEN, Plaintiff-Counter-defendant-Appellee v. RAYBURN EVANS and ROBIN EVANS, husband and wife, dba EVANS FARMS, Defendants-Counter-claimants-Appellants.	)	1 CA-CV 10-0456 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in LaPaz County

Cause No. CV-2007-0022

The Honorable Randolph A. Bartlett, Judge

REVERSED AND REMANDED

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W E I S B E R G, Judge

¶1 Rayburn Evans and Robin Evans, husband and wife ("Evans") dba Evans Farms appeal the trial court's grant of summary judgment in favor of Rita Farnsworth, as Personal Representative of the Estate of Robert Keen ("the estate"), and the court's dismissal with prejudice of their counterclaim. For reasons that follow, we reverse and remand the matter to the trial court for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶2 Rita Farnsworth is the personal representative of the estate of her father, Robert Keen, who died on July 29, 2006. Prior to his death, Keen was a hay broker doing business as Keen Hay Sales ("Keen Hay") and Evans were hay farmers in La Paz County. Robin kept books both for Keen Hay and Evans Farms. As a hay broker, Keen bought and sold hay and made loans to farmers. He also made advances on crops whereby "he would advance a farmer some money, he would then buy and sell their hay; and as the hay moved, [he] he would deduct that off of the amount advanced."

¶3 Pursuant to an oral agreement, on March 26, 2003, Keen loaned Evans Farms $12,000 with interest at 12 percent per annum, payable at the rate of $500 per month to begin after 60 days. The loan was evidenced by an entry in a ledger kept by

Robin for transactions between Keen Hay and Evans Farms. Pursuant to a written agreement, on October 6, 2003, Keen loaned Evans Farms $16,000 with interest at the rate of 12% per annum.

¶4 On November 16, 2003, Keen Hay and Evans Farms entered into a written contract whereby "Evans Farms agrees to sell, and Keen Hay Sales agrees to buy all alfalfa hay produced by Evans Farms during the calendar year 2004." The contract terms were that the "[p]rice to Evans Farms shall be market price in the Parker Valley at the time hay is stacked less $5/Ton broker fee" and that the "[p]rice shall be established within 10 days of hay being put in the stack, and value of hay shall be deducted from any amount owed to Keen Hay." The contract gave Evans Farms "the right to sell [the] hay if a better price [could] be negotiated" with Keen Hay Sales receiving any amount due from that sale. It also gave Keen Hay Sales the "right to place a lien on [Evans Farms'] equipment" until Evans Farms paid the amount owed in full.

¶5 The contract further provided that "Keen Hay shall make available on the first of each month a line of credit to Evans Farms" in specified amounts according to a monthly schedule ending in July 2004. Keen Hay agreed to advance Evans Farms as much as $386,000 with interest at the rate of 12 percent per annum, and in November 2003, to advance $39,000 (less $16,000 already advanced). Rayburn understood that the

reference to the $16,000 deduction, which had been handwritten by Robin, referred to the October 6, 2003 loan, and that "this loan went away and went into the advance."

¶6 On November 20, 2003, Keen Hay paid Evans Farms $20,000 as evidenced in an entry made by Robin in the ledger. In December 2003, Keen informed Rayburn that he would not make further advances under the November 16 contract. As a result of Keen's repudiation of the contract, Evans allege they had to borrow against their home, obtain alternate financing, lost a lease on a 488-acre parcel, and lost profits on two other leases. They also allege that it became "impossible" for them to repay the amounts Keen had advanced and that they have "still not recovered from the losses" suffered.

¶7 Farnsworth replaced Robin as Keen Hay's bookkeeper in 2004, and for over two years Farnsworth sent billing statements to Evans Farms for payment of the principal amount of $48,000 plus interest. Evans made one interest payment to Keen on April 3, 2006 on the $12,000 loan, which they did not dispute, but did not make any payments on the November 16 contract.[1] Keen made no collection attempts because, according to Evans, Keen knew that "he had caused [them] to nearly lose [their] farm." However,

[1]Evans made another payment to Keen on August 27, 2004 in the amount of $1,591.20, but this did not relate to the November 16, 2003 contract.

Evans never made a demand upon Keen or Farnsworth for damages allegedly caused by Keen's repudiation of the contract.

¶8 Robin continued to make entries in the Evans Farms' ledger. The ledger entry ending on March 25, 2006, showed a principal balance of $47,846.62. Next to entries for January 2004, the ledger contained an entry stating, "Bob defaulted on contract. No interest on $36,000." Robin prepared a spreadsheet on the "2004 Keen contract," which showed a principal balance of $36,000 as of December 26, 2004. It contained an entry at the bottom stating, "Bob Keen broke contract December 2003. Will repay principle [sic] but not interest after 12/26/03." Robin could not remember why she created this spreadsheet. According to Evans, however, the entries did not reflect their intention or an agreement to repay Keen the $36,000, but were used for internal record-keeping purposes only to "keep track of all money either loaned or advanced" by Keen.

¶9 Robin inadvertently sent the ledger to Farnsworth in April 2006. After receiving it, Farnsworth realized that a dispute existed with Evans over the November 16, 2003 contract, but assumed they intended to pay the principal sum of $36,000. She and Evans previously had a dispute about payment of a February 2004 bill in the amount of $445.73 for work Robin had performed for Keen Hay. Farnsworth claimed an offset in a

greater amount and did not pay it. She also disputed an April 2004 bill in the amount of $1,354.86 for harvesting work done by Rayburn for another hay farmer, at Keen's request. The latter obligation was reflected on the ledger as an amount owed by Keen Hay to Evans Farms. According to Evans, Robin sent Keen Hay an invoice for this amount and Farnsworth returned it, stating "Do not Pay."[2]

¶10 After Keen died in July 2006, Farnsworth and Robin stopped sending each other statements. Farnsworth thought it was a "forget-it-thing" and that it was wasting her time. Evans believed that Farnsworth had acknowledged liability for damages caused by Keen's breach.

¶11 In September and October, 2006, a notice to creditors of the estate of Robert Keen advising them to present claims within four months was published in Mohave County pursuant to Arizona Revised Statutes ("A.R.S.") section 14-3801(A) (2005). Farnsworth asserted that she had no knowledge that Evans claimed the estate owed them money for the alleged breach of the

[2]After Farnsworth refused to pay the bill for work performed for another hay farmer, Rayburn stated in his affidavit that he called Keen and told him, "you cost me a lot of money when you pulled out of our deal." At his deposition, he could not remember this conversation. Subsequently, Farnsworth sent Evans an invoice for an interest charge with a note asking whether Evans intended that Keen "take all of [their] hay this year?" She also stated that Keen had been "in no mental condition" to enter into the November 16 contract, suggested Rayburn had "badgered" Keen into signing it, and told Rayburn "not to bother" him again.

November 16 contract. She did not provide the estate lawyer with documentation regarding Evans' claims for services rendered by Robin or for payment to Rayburn for work performed by him for another hay farmer because she and Robin "had kind of quit sending each other statements a while back." Evans did not receive written notice of the claim period pursuant to A.R.S. § 14-3801(B). They did not present a creditor's claim to the estate within the four-month period, but allege that had they received notice, they would have consulted with their attorney and presented a claim.

¶12 In February 2007, the estate filed an action against Evans dba Evans Farms for breach of contract and unjust enrichment and requested judgment in the principal amount of $56,277.64,[3] together with pre- and post-judgment interest, attorneys' fees and costs. Evans answered and raised numerous affirmative defenses, including offset. They also asserted a counterclaim in which they alleged that Keen had breached the November 16, 2003 contract and as a result, they had suffered damages in an amount of not less than $75,500.

¶13 The estate filed a motion for summary judgment claiming it was entitled to judgment on the full amount of the

[3]This amount included a claim for $8,227.64 for the value of hay delivered to Keen pursuant to an unrelated advance he made to Evans in October 2003. That claim was resolved in Evans' favor and is not part of this appeal.

unpaid loan balances. The estate alleged that Evans had admitted liability in the ledger Farnsworth had received and that this admission evidenced an account stated and barred Evans' offset. It claimed that the offset was also barred by waiver. The estate asserted that Evans' offset and counterclaim were barred by A.R.S. § 14-3801(A) because they failed to timely present their claim to the estate, and by laches because they waited too long to assert them.

¶14 In their response and controverting statement of facts and supplement thereto, Evans disputed that the November 16, 2003 agreement, which they alleged incorporated the October 3, 2006 agreement, was a loan. Instead, they claimed it was a hay purchase contract or an advance. They alleged that Keen repudiated the contract, which excused them from fulfilling their obligations under it and entitled them to assert an offset and counterclaim for damages. Evans disputed the estate's contention that the entry in their ledger was intended as an admission of liability or an account stated. Instead, Evans claimed it was intended as a mere bookkeeping entry.

¶15 Evans also maintained that the offset was not barred by the disputed admission or waiver because they could not calculate damages until 2007, and/or were unaware of their legal rights at the time Keen breached the contract. They further alleged that their offset and counterclaim were not barred by

A.R.S. § 14-3801(A) because Farnsworth knew they were creditors of the estate, thus entitling them to receive written notice of the claim period pursuant to A.R.S. § 14-3801(B). Alternatively, they argue that the notice should have been published in La Paz County. They attached affidavits, deposition testimony and documentary evidence in support of their response.

¶16 In its reply and supplemental reply, the estate made numerous objections to the Evans' supporting evidence and argued that the evidence upon which the court could rely did not create a genuine issue of material fact. At argument, the court explained that Evans' affirmative defense of offset and their counterclaim were barred because they failed to file a claim against the estate within four months as required by A.R.S. § 14-3801(A). After oral argument, the trial court sustained all of the estate's objections without explanation, granted the motion for summary judgment, and awarded the estate its costs and attorneys' fees. The court entered a final judgment for the estate for $48,000, plus pre- and post-judgment interest at the rate of 12 percent per annum until paid in full and costs and attorneys' fees. The court also dismissed the counterclaim. Evans timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B)(2003).

DISCUSSION

¶17 On appeal, Evans claim the trial court erred in (1) sustaining the estate's objections to evidence supporting their controverting statement of facts; (2) granting summary judgment in the estate's favor when genuine issues of material fact exist; (3) barring their offset and dismissing their counterclaim based upon A.R.S. § 14-3801(A); (4) awarding the estate prejudgment interest contrary to its legal theory of liability; and (5) awarding the estate it attorneys' fees.

Standard of Review

¶18 Summary judgment is properly granted only if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c); *Orme Sch. v. Reeves,* 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). It is appropriate "when there is no substantial evidence to support an alleged factual dispute, either because the tendered evidence is too incredible to be accepted by reasonable minds, or because, even conceding its truth, it leads to an inevitable legal conclusion against its proponent." *Hill-Shafer P'shp. v. Chilson Family Trust,* 165 Ariz. 469, 472, 799 P.2d 810, 813 (1990). In reviewing a summary judgment, we view the evidence in the light most favorable to Evans as the non-prevailing party. *Id.* Further, "if a material issue concerns the state of mind or intent of one of the parties, summary

judgment normally is not appropriate." *Mid-Century Ins. Co. v. Duzykowski,* 131 Ariz. 428, 429, 641 P.2d 1272, 1273 (1982). Here, genuine issues of material fact exist that preclude summary judgment.

The October 3 and November 16, 2003 Contracts

¶19 The estate contends that, as a matter of law, the October 3 and November 16, 2003 contracts evidence loans, and in the case of the November 16 contract, a line of credit, that Evans had unconditionally promised to repay "regardless of whether they produced sufficient hay." The estate denies that the October 3 contract was incorporated into the November 16, 2003 contract and became subject to its terms. Evans asserts that the November 16 contract was a hay purchase contract with reciprocal rights and obligations between the parties beyond merely an advance of money and a promise to repay. They allege that the parties intended the October 3 contract to be incorporated into the November 16 contract and that the latter was a substituted contract for the former.

¶20 Evans' interpretation of the October 3 and November 16 contracts is supported by its express language. The November 16 contract explicitly refers to the "$16,000 already advanced." Although it states that Keen will supply a "line of credit," it does not specify that repayment of either principal or interest shall be made on a designated date or in a specific amount.

Rather, it states that Keen will purchase all of Evans' hay produced during 2004, that "the price to Evans Farms shall be market price . . . at the time hay is stacked less $5/Ton broker fee." It further states that Keen is to be repaid according to a price "established within 10 days of hay being put in the stack, and value of hay shall be deducted from any amount owed to Keen Hay." The contract terms and conditions arguably reflect that it was a crop financing agreement rather than merely a loan or line of credit with an unconditional promise to pay. *See Gerber v. Cook,* 90 Ariz. 390, 391, 368 P.2d 458, 459 (1962)(under crop financing agreement in which plaintiffs were to finance defendants' crops and had exclusive right to sell them on commission, there were factual questions on whether parties intended that an advance was made for planting and harvesting the lettuce or the cantaloupe crop and whether plaintiffs should share in the loss on the sale of the cantaloupe crop).

¶21 Evans' interpretation is also supported by extrinsic evidence. Rayburn stated in his affidavit that "the hay purchase contract was not a loan, nor was it intended to be a loan" but was a contract in which Keen "agreed to purchase our 2004 hay crop, and he was to pay for it by advancing the money necessary to grow that crop" and that "all sums advanced were to be paid back in hay or from the proceeds from the sale of hay."

He also stated that Keen knew that they needed financing to pay for pending obligations, including "lease and water payments" and it would be impossible to fulfill them, or to repay Keen, if he did not make advances as agreed.[4] Farnsworth admitted in her deposition that Keen sometimes made outright loans to farmers and sometimes made advances to farmers which, among other things, obligated Keen to purchase their hay as it was produced. The language of the November 16 contract together with extrinsic evidence creates questions of fact on the issue of whether the November 16 contract was a loan, a line of credit or a hay purchase contract, and whether the parties intended to incorporate the October 6 contract into the November 16 contract. *See Johnson v. Earnhardt's Gilbert Dodge, Inc.,* 212 Ariz. 381, 385-86, ¶¶ 17-23, 132 P.3d 825, 829-30 (2006) (conflicting language in service contract together with parol evidence in form of plaintiff's affidavit regarding his

[4]Evans' interpretation is also supported by the affidavit of Wayne Gordon, an established hay broker in Parker who opined that the November 16 contract was a "typical hay purchase agreement," and "not a loan." Although the estate objected to Gordon's affidavit as irrelevant, and the court sustained the objection, because there is a genuine issue of material fact about the terms and conditions of the November 16 contract, Gordon's opinions may become relevant at trial. The same is true of other evidence to which the estate objected on grounds of relevance, hearsay, lack of personal knowledge and because a statement in Rayburn's affidavit conflicted with a statement in his deposition testimony. deposition. Evans challenge the court's ruling on these objections, but because of our resolution of this appeal, we need not address these evidentiary issues.

understanding of contract, precluded entry of summary judgment on issue of whether defendant-dealership was a party to the contract); *Burkons v. Ticor Title Ins. Co. of Cal.*, 168 Ariz. 345, 349-50, 813 P.2d 710, 714-15 (1991)(ambiguous financing documents and letter of intent created genuine issues of material fact on whether parties intended that a loan would be used to finance construction and whether the plaintiff had agreed to unconditionally subordinate his lien to the lien of the buyer's lender).

¶22 Farnsworth alleges that neither Keen's breach of the November 16 contract nor the alleged damages caused by the breach was material to whether Evans were unconditionally obligated to repay the loans/line of credit. However, this begs the question. If Keen breached the contract by failing to perform his obligations under it, a question of fact exists as to whether the breach was material. In *Foundation Dev. Corp. v. Loehmann's, Inc.,* 163 Ariz. 438, 446-47, 788 P.2d 1189, 1197-98 (1990), our supreme court applied the "analytical framework" of the Restatement (Second) of Contracts § 241 (1981) to determine whether a breach was material. In this analysis, the trier of fact considers:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

> (b) the extent to which the injured party can be adequately compensated [by damages] for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Id.

¶23 The Restatement further provides that an uncured material breach suspends the non-breaching party's duty to perform and may also discharge the non-breaching party from the contract. Restatement (Second) of Contracts § 242 cmt. a. *See Queiroz v. Harvey,* 220 Ariz. 132, 138, ¶ 22, 204 P.3d 390, 396 (App. 2008) (citing § 242, cmt. a, and noting that material breach allows injured party to suspend performance and if breach not cured, injured party may be discharged from contract), *vacated on other grounds,* 220 Ariz. 273, 205 P.3d 1120 (2009). *See also 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."). Thus, viewing the facts in the light most favorable to Evans, there are genuine issues of material fact (1) regarding the parties' understanding of their respective contractual obligations under the October 3 and November 16 contracts, and (2) whether there was a material breach by Keen, precluding summary judgment.

Admission of Liability and Account Stated

¶24 The estate asserts that as a matter of law, Evans' "actions, admissions and inactions" demonstrated an account stated. **"**An account stated is an agreed balance between the parties to a settlement" and seeks judgment "for a sum certain." *Monte Produce, Inc. v. Delgado,* 126 Ariz. 320, 321, 614 P.2d 862, 863 (App. 1980). As explained in *Trimble Cattle Co. v. Henry & Horne,* 122 Ariz. 44, 47, 592 P.2d 1311, 1313 (App. 1979), an account stated "signifies an agreed balance between the parties to a settlement; that is, that they have agreed after an investigation of their accounts that a certain balance is due from one to the other" (quoting *Chittenden & Eastman Co. v. Leader Furniture Co.,* 23 Ariz. 93, 94, 95, 201 P. 843, 844 (1921)). "The element of agreement is an absolute requisite to the legal concept of account stated." *Holt v. W. Farm Serv., Inc.,* 110 Ariz. 276, 278, 517 P.2d 1272, 1274 (1974). "The mere furnishing of a purported statement of account which is not

understood by the debtor as a final adjustment of the parties' demands does not constitute an account stated." *Id.* Further, an account stated must be a "final accounting of all sums due" and where a dispute exists between the parties as to whether they intended an account to be a "final accounting," it is for the trier of fact to resolve. *Eng v. Stein,* 123 Ariz. 343, 347, 599 P.2d 796, 800 (1979).

¶25 Here, Robin and Rayburn contended in their affidavits that the ledger inadvertently sent to Farnsworth was intended only for internal bookkeeping purposes and was not intended as an agreement to pay a sum certain. Also, the ledger showed that Evans disputed payment of interest on the $36,000, and claimed a credit for work Rayburn had performed for another hay farmer, an amount that Farnsworth had refused to pay. There is a material question of fact as to whether the ledger entry constitutes a mutual agreement between the parties to finally settle their respective demands for a sum certain, precluding summary judgment.[5]

Offset Barred by Waiver

¶26 The estate asserts that as a matter of law, Evans waived their alleged offset for damages because they admitted

[5]Because of our resolution of this issue, we need not address Evans' argument that the court erred in awarding the estate pre-judgment interest on the $36,000, contrary to its legal theory that the ledger entry was an account stated.

liability in the ledger entry and spreadsheet, made an interest payment on the $12,000 loan, made no demand for damages from Keen or Farnsworth for Keen's breach, and did not assert the claimed offset until after the estate filed its complaint. "For a waiver, there must be the relinquishment of a known right of conduct which would warrant an inference of an intentional relinquishment." *United Cal. Bank v. Prudential Ins. Co.*, 140 Ariz. 238, 283, 681 P.2d 390, 435 (App. 1983). "A clear showing of intent to waive is required for waiver of rights" and "[d]oubtful cases will be decided against waiver." *Goglia v. Bodnar,* 156 Ariz. 12, 19, 749 P.2d 921, 928 (App. 1987). Whether a right has been waived is a question of fact. *Id.*

¶27 As explained above, Evans assert the entries in the ledger and spreadsheet were not necessarily admissions of liability. Robin and Rayburn stated in their affidavits that they made the interest payment on the $12,000 because that loan was not disputed, but made no payments on the disputed November 16 contract. Evans also claim they were unaware of their setoff rights until after they were sued by the estate and consulted with their attorney. Viewing the evidence in the light most favorable to Evans, there are disputed fact questions about whether Evans intended to waive their claimed offset that precludes summary judgment.

Offset and Counterclaim Barred By A.R.S. § 14-3801

¶28 The estate maintains that as a matter of law, both Evans' offset and counterclaim for damages are barred because Evans failed to present a claim to the estate within four-months of the published notice to creditors. Evans assert that Farnsworth knew they were creditors, that the estate should have given them written notice, and that if they had received it, they would have presented a claim.

¶29 Under A.R.S. 14-3801(A), the "personal representative shall publish a notice to creditors once a week for three successive weeks in a newspaper of general circulation in the county" and among other things, "notifying creditors of the estate to present their claims within four months and the date of the first publication of the notice or be forever barred." Under A.R.S. § 14-3801(B), the personal representative "shall give written notice by mail or other delivery to all known creditors" notifying them to present their claim within four months if notice is given under subsection A, or within sixty days after mailing and delivery, "whichever is later, or be forever barred." A known creditor must be given actual notice. *Matter of Estate of Barry,* 184 Ariz. 506, 508, 910 P.2d 657, 659 (App. 1996)(due process requires known creditor be given actual notice); A.R.S. § 14-3801(A).

¶30 When actual notice has not been given to a known creditor, a claim against an estate arising before the decedent's death that is presented more than two years after the decedent's death is barred. *Barry,* 184 Ariz. at 509, 910 P.2d at 660; A.R.S. § 14-3803(A),(B)(2005). A creditor's claim includes all claims "whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort or other legal basis." A.R.S. § 14-3802(A)(2005). A known creditor may be a potential creditor as well as an actual creditor. *In re Estate of Travers,* 192 Ariz. 333, 335, 965 P.2d 67, 69 (App. 1998).

¶31 The estate argues that as a matter of law Farnsworth did not know nor could she have known that Evans had claims against the estate. Evans respond that Farnsworth knew they were creditors because she refused to pay the bill for services rendered by Robin to Keen Hay and the bill for harvesting work done by Rayburn for another farmer as reflected in the ledger. They also assert that Farnsworth knew there was a dispute about the November 16 contract and knew or should have known that Evans had a potential claim for damages arising out of Keen's repudiation of the contract based on Rayburn's telephone call to Keen in 2004 and Farnsworth's written response to him. Whether a creditor is known for purposes of the claim statute is a question of fact for the trier of fact to resolve. *Matter of*

Estate of Kopley, 159 Ariz. 391, 394, 767 P.2d 1181, 1184 (App. 1988) (remand for evidentiary hearing to determine if creditor was known or reasonably ascertainable).[6] Here, viewing the evidence in the light most favorable to Evans, there is a question of fact about whether Farnsworth knew that Evans Farms was a creditor of the estate entitled to written notice under A.R.S. § 14-3801(B). *Cf. Walk v. Ring,* 202 Ariz. 310, 321, ¶ 43, 44 P.3d 990, 1001 (2002) (summary judgment inappropriate where question of fact existed about whether plaintiff knew or should have known of facts to put her on notice to investigate whether her injury was wrongfully inflicted); *Havasupai Tribe v. Ariz. Bd. of Regents,* 220 Ariz. 214, 230, ¶¶ 61-63, 204 P.3d 1063, 1079 (App. 2008) (question of fact existed as to whether Tribe knew or should have known that it had claim for damage for purposes of determining timeliness of filing notice of claim).[7]

Counterclaim Barred by Laches

¶32 The estate asserts that the doctrine of laches bars their counterclaim because they waited over two years to assert it. Although it does not appear that the court dismissed the counterclaim on the basis of laches, the estate is not entitled

[6]In 1998, the legislature amended A.R.S. § 14-3801(B) and changed the reference to "all creditors known or reasonably ascertainable" to "all known creditors." 1998 Ariz. Sess. Laws, Ch. 203, § 10.

[7]Because of our resolution, we need not decide the issue of the sufficiency of the published notice.

to summary judgment on that issue. In order to bar a claim on the basis of laches, "a court must find more than mere delay in the assertion of the claim." *McComb v. Superior Court (Maricopa),* 189 Ariz. 518, 525, 943 P.2d 878, 885 (App. 1997). "The delay must be unreasonable under the circumstances, including the party's knowledge of his or her right, and it must be shown that any change in the circumstances caused by the delay has resulted in prejudice to the other party sufficient to justify denial of relief." *Id.* (quoting *Mathieu v. Mahoney,* 174 Ariz. 456, 459, 851 P.2d 81, 84 (1993)). Generally, "[w]hat is a reasonable time [to take action] is a question of fact for the trier of fact unless the facts are such that only one inference could be derived therefrom in which case it would become a question of law." *Jones v. CPR Div., Upjohn Co.,* 120 Ariz. 147, 151, 584 P.2d 611, 615 (App. 1978) (quoting *Mahurin v. Schmeck,* 95 Ariz. 333, 340, 390 P.2d 576, 580 (1964)). Even if the delay was unreasonable, there are no facts from which we could conclude that the estate suffered prejudice, precluding summary judgment.

Attorneys' Fees and Costs

¶33 Evans ask us to reverse the award of attorneys' fees. Because we have reversed the trial court's grant of summary judgment, we reverse the award of attorneys' fees. *Enyart v. Transam. Ins. Co.,* 195 Ariz. 71, 78, ¶ 22, 985 P.2d 556, 563

(App. 1998). Both parties have requested attorneys' fees pursuant to A.R.S. § 12-341.01. In our discretion, we decline to award attorneys' fees on appeal pending resolution of the claims below. *Id.*

CONCLUSION

¶34 For the foregoing reasons, we reverse the trial court's grant of summary judgment and its award of attorney's fees. We remand the matter to the trial court for further proceedings consistent with this court's decision.

/S/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

/S/_____
MAURICE PORTLEY, Presiding Judge

/S/_____
LAWRENCE F. WINTHROP, Judge