DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WALTER C. PETERS, a single man, Plaintiff/Appellant, v. MARQUE HOMES, INC., an Arizona corporation, Defendant/Appellee.	)	1 CA-CV 10-0720 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-006693

The Honorable Dean M. Fink, Judge

REVERSED AND REMANDED

Walter C. Peters, *In Propria Persona*	Phoenix
The Cavanagh Law Firm By Kerry M. Griggs and Kelton G. Busby and Taylor C. Young Attorneys for Defendant/Appellee	Phoenix

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N O R R I S, Judge

¶1 This timely appeal arises out of the superior court's entry of summary judgment in favor of Marque Homes, Inc. ("Marque") and its dismissal of Walter Peters' construction

defect warranty claims on the basis of claim preclusion, or, as it used to be called, res judicata. In dismissing Peters' warranty claims, the superior court found those claims had been raised and resolved by agreement in a prior case between the parties.

¶2 On appeal, Peters argues the warranty claims were neither raised nor could have been raised in the prior case. Peters further argues the parties never agreed to preclude those claims in subsequent litigation. We agree with Peters, reverse the superior court's entry of summary judgment, and remand the case for further proceedings consistent with this decision.

FACTS AND PROCEDURAL BACKGROUND[1]

¶3 In June 2002, Peters contracted with Marque to build a luxury home in Glendale. In October 2003, Peters and Marque signed a "Joint Venture Agreement" which, by its terms, superseded the prior contract. Under the Joint Venture Agreement, Peters agreed to provide land and funding for the home and Marque agreed to build it without charging Peters for overhead, profits, or supervision fees. Profits resulting from the construction of the home -- presumably from a sale, although

[1]We view the facts and "the inferences to be drawn from those facts in the light most favorable to" Peters, the party contesting summary judgment. *Verma v. Stuhr*, 223 Ariz. 144, 151 n.2, ¶ 23, 221 P.3d 23, 30 n.2 (App. 2009).

no such sale was described in the thinly-worded one-page agreement -- were to be divided equally after "all Job and Land related costs [were] paid."

¶4 Nearly two years later, in August 2005, Marque sued Peters and asserted it had finished building the home but Peters had wrongfully refused several offers made by third parties to buy the home and had, therefore, breached his obligations under the Joint Venture Agreement.[2] Marque sought, among other relief, a judicial dissolution and winding up of the joint venture and a court-ordered sale of the home. Peters denied Marque's allegation of liability and asserted, as an affirmative defense, that Marque had

> failed to perform various conditions precedent to any alleged legal duty . . . [owed by] Peters. Specifically, [Marque] has failed to complete the home so it is habitable to prospective purchasers. Indeed, Peters has retained an expert inspector who has identified numerous defects associat[ed] with the construction of the home.

In raising this defense Peters was thus essentially asserting the home could not be sold under the Joint Venture Agreement

[2]The superior court took judicial notice of the records in the underlying Joint Venture Agreement action, noting that "[a] court may take judicial notice of its own records or those of another action tried in the same court" and citing to, among other cases, *State v. Rushing*, 156 Ariz. 1, 4, n.1, 749 P.2d 910, 913, n.1 (1988). We may take judicial notice of anything which the trial court could take notice of, and we do so here. *In Re Sabino R.*, 198 Ariz. 424, 425, ¶ 4, 10 P.3d 1211, 1212 (App. 2000).

until Marque had cured these defects.

¶5 In August 2006, the court issued an order appointing a Special Commissioner to list the home for sale and spelling out the process for selling the home ("the original sale order"). The original sale order permitted either party to purchase the home and instructed that "[n]o party shall reject an offer unless that party can make a factual showing as to a reasonable basis for the rejection." The original sale order further instructed that "[a]ll such offers that are rejected may be submitted to the Court for approval."

¶6 Peters then made two purchase offers pursuant to the original sale order, but the parties disagreed about the essential terms of these purchase offers. As discussed in more detail below, the parties eventually agreed as to certain matters in two stipulations which the court subsequently issued as orders (collectively, "the stipulated orders"). The first stipulated order, issued in November 2006, modified the original sale order to reflect the parties' agreement about how the home should be sold ("the stipulated sale order"). The second stipulated order, issued in May 2007, approved Peters' purchase of the home and required Peters to pay half of the resulting joint venture profit to Marque without withholding any amount for construction defects ("the stipulated purchase order"). The

superior court then dismissed the case with prejudice.

¶7 Six months later, Peters sued Marque asserting express and implied warranty claims arising out of alleged construction defects in the home. Both parties moved for summary judgment on preclusion grounds, with Peters arguing his claims were not precluded by the prior joint venture dispute and Marque arguing they were. The superior court granted Marque's cross-motion on grounds of claim preclusion, finding that the stipulated purchase order and dismissal with prejudice "operated as a final adjudication on all issues raised in the joint venture litigation, including issues of construction defects now raised in this action." In so doing, the court did not address other defenses to Peters' construction defect claims Marque raised in its cross-motion. This appeal followed.

DISCUSSION

¶8 On appeal, Peters argues his warranty claims were not barred by claim preclusion and therefore Marque was not entitled to summary judgment. We review a grant of summary judgment de novo. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). Summary judgment is warranted when "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); *see* Ariz. R. Civ. P. 56(c)(1). Marque, the party asserting preclusion, "has the burden of proving that an issue was in fact litigated and determined." *Bayless v. Indus. Comm'n*, 179 Ariz. 434, 439, 880 P.2d 654, 659 (App. 1993).

I. Claim and Issue Preclusion

¶9 Claim preclusion 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 privities was, or might have been, determined in the former action." *Hall v. Lalli*, 194 Ariz. 54, 57, ¶ 7, 977 P.2d 776, 779 (1999). A consent judgment, while not a judgment on the merits, "is just as valid as a judgment resulting from a trial on the merits, and a decree of dismissal with prejudice made upon that stipulation is a final determination and is res judicata as to all issues that were raised or could have been determined under the pleadings." *Suttle v. Seely*, 94 Ariz. 161, 163-64, 382 P.2d 570, 572 (1963). Thus, the stipulated orders, which the parties agreed to in their dispute over the Joint Venture Agreement, barred, through claim preclusion, any claims that were raised or could have been determined under the pleadings in the prior case.

¶10 Here, neither party raised warranty claims in the prior case. Although Peters asserted, as an affirmative defense, that Marque had "failed to complete the home so it is habitable to prospective purchasers," claim preclusion "does not bar a later action asserting claims alleged as affirmative defenses in a prior action because affirmative defenses are not claims." *Airfreight Exp. Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, 108, ¶ 14, 158 P.3d 232, 237 (App. 2007).

¶11 Further, Peters' warranty claims were not among those claims that "could have been determined under the pleadings" in the prior case. *Suttle*, 94 Ariz. at 163, 382 P.2d at 572. We apply the "same evidence" test to decide whether a claim is "based on the same cause of action asserted in the prior proceeding." *Phoenix Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 240, 934 P.2d 801, 804 (App. 1997). Under the same evidence test, if "no additional evidence is needed to prevail in the second action than that needed in the first, then the second action is barred." *Id.* Here, although Peters alleged in the prior case the home was plagued by various construction defects and presented the court with factual information supporting those allegations, he raised those arguments and presented that evidence to support his core assertion he had not breached the Joint Venture Agreement. Peters neither raised

these allegations nor presented this evidence in support of any warranty claim. Simply put, although in this case Peters has asserted he purchased the home and became the beneficiary, so to speak, of express and implied warranties, the record in the prior case is silent, from an evidentiary standpoint, as to the existence of any such warranties. Thus, in this case, Peters is entitled to present and argue evidence concerning whether Marque expressly or impliedly warranted the home. Peter's warranty claims are therefore not barred by claim preclusion.

¶12 We also agree with Peters the parties never agreed to preclude future warranty claims. As a general matter, many courts have recognized that even though a claim has not been raised for purposes of claim preclusion, parties may nevertheless agree to preclude it in a consent judgment. *See, e.g., In Re General Adjudication of All Rights to Use Water in Gila River System and Source*, 212 Ariz. 64, 72, ¶ 24, 127 P.3d 882, 890 (2006) (applying federal law and emphasizing that "[w]hatever the appropriate test for establishing identity of claims in two actions, it is clear that parties to a consent decree can agree to limit the decree's preclusive effects"). Similarly, though collateral estoppel, or issue preclusion, does not apply to consent judgments because "none of the issues is actually litigated," a consent judgment "may be conclusive, with

respect to one or more issues, if the parties have entered an agreement manifesting such intention." *Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 573, 716 P.2d 28, 30 (1986) (citing Restatement (Second) of Judgments § 27 cmt. e (1982)).

¶13 Assuming, without deciding, Arizona law would be consistent with federal law on claim preclusion by agreement, nothing in the stipulated orders reflect the parties agreed to preclude Peters' warranty claims. Instead, the stipulated orders demonstrate the parties only conclusively agreed to resolve their disputes over the sale of the home and the distribution of profits resulting from that sale, as contemplated by the Joint Venture Agreement.

¶14 Specifically, nothing in the language of the stipulated sale order evidences an agreement to preclude future warranty claims. The parties agreed in the stipulated sale order that "[t]he sale of the Property to a *third party* shall be 'as is' with a 10-year structural warranty," (emphasis added) but made no reference to a warranty, or to selling the home "as is" in the event one of the parties purchased the home. As the superior court noted, the stipulated sale order also specified that if Peters purchased Marque's interest in the home, he could not "claim that amounts should be held back from the purchase price or from distribution [of profits] pursuant to the Joint

Venture Agreement because of any workmanship issues or alleged defects. . . ." This provision, like the stipulated sale order in general, is limited to the disposition of joint venture assets and makes no reference to claims or warranties between the parties after the home is sold.

¶15 In addition, the record clearly demonstrates there was no agreement at the time about anything other than what was memorialized in the stipulated sale order.[3] For example, in its September 2006 motion to approve a purchase offer, pursuant to the court's original sale order, Marque declared that "[o]n August 15, 2006, ... Marque Homes . . . agreed to provide a

[3]Settlement offers contained in communications exchanged by the parties in the prior case also strongly suggest there was no agreement to preclude warranty claims. Indeed, in one email, Marque's counsel stated: "I do not want a $2 million sale, $1 million covering the cost of construction, carrying, [etc.] to arrive at net proceeds under the Joint Venture Agreement, and then have the net-net distribution of $500,000 or so to each party . . . being held up and not distributed because Peters wants to complain about construction, conduct, or something else. The proceeds get distributed." Counsel further wrote: "If someone wants to file a lawsuit later, great, but it is based upon a breach outside of the Joint Venture Agreement."

On appeal, Marque challenges Peters' reliance on these communications and other similar material, asserting they are impermissible extrinsic evidence under *In Re Marriage of Zale*, 193 Ariz. 246, 972 P.2d 230 (1999). Because the record demonstrates no agreement, even if we disregard all letters, affidavits, and emails and consider only the motions and stipulations submitted to the superior court, we do not need to decide whether Peters was entitled to rely on this material. We note, however, that in the superior court Marque did not object to the court's consideration of letters exchanged by counsel and, indeed, relied on some of these letters in asserting Peters' warranty claims were precluded.

structural 10-year transferable warranty" to Peters. In his response to Marque's motion, Peters explained he had rejected that offer.

¶16 There is also nothing in the language of the stipulated purchase order that evidences an agreement to preclude warranty claims. The provision in the stipulated purchase order that "parties waive any right to contest the accounting of the joint venture expense or the division of joint venture profits" simply confirmed that the parties had agreed to resolve financial disputes arising out of the joint venture, not to preclude any and all future claims between the parties. If the parties had intended to broadly preclude future warranty claims, they could have framed an agreement to that effect. *See, e.g., Harrison v. Bloomfield Bldg. Indus., Inc.*, 435 F.2d 1192, 1195 (6th Cir. 1970) (court gives preclusive effect to agreement releasing party "from all claims, demands, actions or causes of action arising out of or in connection with any agreements, transactions or activities of whatsoever kind or character"). The stipulated purchase order also does not make any reference to a warranty aside from instructing Marque to "provide Peters all documents in its possession relating to . . . appliance and materials warranties." In sum, there is nothing in the parties' agreements and stipulations manifesting

an intention to either preclude or preserve claims or issues relating to warranties.

II. Marque's Other Defenses

¶17 On appeal, Marque raises additional defenses to Peters' warranty claims as alternate bases for summary judgment. In essence, Marque argues that even if Peters' claims are not barred by res judicata, there are no implied or express warranties available to him. Although Marque raised these defenses in its cross-motion for summary judgment, the superior court did not address them. Because some of these defenses may present issues of fact, the superior court should address them first. We therefore express no opinion on these defenses.

CONCLUSION

¶18 For the foregoing reasons, we reverse the superior court's entry of summary judgment in favor of Marque and remand for further proceedings consistent with this decision. As the prevailing party on appeal, Peters is entitled to recover his

costs on appeal, subject to his compliance with Arizona Rule of Civil Appellate Procedure 21.

__/s/_
PATRICIA K. NORRIS, Judge

CONCURRING:

__/s/_
PATRICK IRVINE, Presiding Judge

__/s/_
DANIEL A. BARKER, Judge