IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

JAMES EDWARD CONTRERAS,
AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF GILBERT L. CONTRERAS,
Plaintiff/Counterdefendant/Appellee,

v.

GILBERT J. CONTRERAS AND MONICA JEAN CONTRERAS,
Defendants/Counterclaimants/Appellants.

No. 2 CA-CV 2018-0145
Filed July 22, 2019

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Cochise County
No. CV201700184
The Honorable Karl D. Elledge, Judge

AFFIRMED

COUNSEL

Law Office of Robert E. Fee, Tucson
By Robert E. Fee
Counsel for Plaintiff/Counterdefendant/Appellee

West, Longenbaugh & Zickerman P.L.L.C., Tucson
By Joseph Mendoza
Counsel for Defendants/Counterclaimants/Appellants

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Eppich and Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 Gilbert J. Contreras and Monica Jean Contreras ("the Contrerases") appeal from the trial court's ruling that a settlement agreement entered into by their attorney was binding. They argue both that the agreement was not binding as a matter of law and that the attorney did not have the authority to enter an agreement on their behalf. For the following reasons, we affirm.

Background

¶2 Before his death in April 2019,[1] Gilbert L. Contreras ("Gilbert L.") owned a parcel of real property in Cochise County. Around 1986, he agreed to allow the Contrerases, his son and daughter-in-law, to live on the property, but there was no written agreement. The Contrerases placed a mobile home on a ten-acre portion of the property and have lived there ever since.

¶3 In 2011, Gilbert J. Contreras claimed he owned the portion of the property on which the mobile home sat, and the Contrerases excluded Gilbert L. from that area by erecting a fence and locked gate. Over the next several years, Gilbert L. denied the Contrerases' claims to any interest in the property and sent them a notice to vacate in April 2016. Following a series of communications between the parties' attorneys, Gilbert L. sued the Contrerases, seeking to quiet title and recover possession of the property, as well as recovery of past rent and attorney fees. In their counterclaim, the Contrerases alleged unjust enrichment and an equitable lien on the property based on several improvements they had made.

¶4 Beginning in June 2017, several filings were made on behalf of the Contrerases by attorneys Mark Heckele, Robert Pearson, and Gerald Giordano. In August of that year, Heckele sent an email to Gilbert L.'s attorney, Robert Fee, stating Giordano was now "lead counsel on this

[1]The personal representative of Gilbert L.'s estate, James Edward Contreras, has been substituted as appellee.

matter." In November, Giordano signed a joint report, submitted to the trial court, as the only listed "Attorney[] for Defendants."

¶5 On February 5, 2018, Fee emailed Giordano a proposal to settle the case before "enter[ing] into a more labor-intensive and also a much more expensive phase of this litigation." Giordano responded on February 7, saying "[his] clients [were] willing to settle on the terms of [the] offer . . . with one modification," and then relayed the Contrerases' "wish to keep (and relocate) the carport located at the property." On February 9, after meeting with Gilbert L., Fee emailed a letter to Giordano noting his client had "agreed with the settlement terms outlined in [the February 5 letter] and [the] qualification that the carport and footings will be removed." He then offered to draft a settlement agreement and did so, sending it to Giordano on February 26. There was no further communication between the parties indicating any objection to the terms of the agreement or to Giordano's representation of the Contrerases.

¶6 At a settlement conference in early May 2018, the Contrerases were represented by a different lawyer, Joseph Mendoza. When the trial court asked the parties whether there was a settlement agreement, Fee answered in the affirmative, but Mendoza said "No," because "[his] clients never agreed." The court then ordered briefing on two questions: 1) whether there was a binding agreement; and 2) whether Giordano had apparent authority to bind the Contrerases. The court thereafter ruled in Gilbert L.'s favor, finding that Giordano had the authority to bind the Contrerases and that the agreement was binding. The Contrerases appealed, and we have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

Apparent Authority

¶7 We first address the Contrerases argument that the trial court erred by "finding that the defendants' previous counsel had apparent authority" to enter into the settlement agreement. Arizona law has long recognized that "attorneys can bind clients who have cloaked them with apparent authority to act on their behalf." *Robertson v. Alling*, 237 Ariz. 345, ¶ 14 (2015). The Contrerases correctly note that simply "retain[ing] an attorney does not establish apparent authority to settle a dispute." *Id.* ¶ 17. But, attorneys "without actual authority to settle a dispute can nevertheless do so if the other party to the agreement 'reasonably assumes that the lawyer is authorized to do the act on the basis of the client's (and not the lawyer's) manifestation of such authorization.'" *Id.* (quoting Restatement (Third) of Law Governing Lawyers § 27 (2000)). The party seeking to

enforce the agreement must show it was reasonable to rely on the attorney's apparent authority. *Id.*

¶8 In arguing Gilbert L. failed to prove that Giordano's apparent authority "was a result of [their] manifestation of such authorization," the Contrerases distinguish the facts of this case from those in *Robertson*. There, the lawyer and his clients had participated in in-person mediation with the opposing party, but an agreement was not reached. *Id.* ¶ 2. At the close of mediation, the clients extended a settlement offer valid for "forty-eight hours," which expired before it was accepted. *Id.* Mistakenly believing his clients had authorized him to do so, their lawyer then sent another offer that "mirrored the prior offer," extending the deadline to respond. *Id.* ¶¶ 3-4. After acceptance of that offer, the clients objected, arguing they had not authorized it. *Id.* ¶ 4. Our supreme court found the settlement binding because by engaging in settlement talks and then leaving their lawyer to "hash out" the final terms of the offer, the clients had manifested an intention to the opposing side that their lawyer had authority to conclude the settlement. *Id.* ¶¶ 18-20. It was therefore reasonable for the opposing party to rely on the attorney's apparent authority. *Id.* ¶ 20.

¶9 Here, the Contrerases point out the record shows no personal meeting of the parties that would allow the same type of reliance as in *Robertson*. The court in *Robertson*, however, also noted that a manifestation of authorization can be made via "written or spoken words or other conduct." *Id.* ¶ 17 (quoting Restatement (Third) of Agency § 1.03 (2006)). Such conduct "is not limited to spoken or written words, although it often takes those forms." Restatement § 1.03 cmt. b.[2] Silence may also "constitute a manifestation when, in light of all the circumstances, a reasonable person would express dissent to the inference that other persons will draw from silence." *Id.* "Failure then to express dissent will be taken as a manifestation of affirmance." *Id.*

¶10 The question then is whether it was reasonable for Fee to assume Giordano had apparent authority to settle the dispute as a result of the Contrerases' silence. As noted above, Giordano was among the Contrerases' attorneys from the inception of the case, he signed numerous filings as their attorney, and was identified as "lead counsel." Further, Giordano's counteroffer included specific terms that implied he had discussed the settlement with the Contrerases. The Contrerases argue these

[2]We adopted this comment to § 1.03 in *Ruesga v. Kindred Nursing Ctrs. W., L.L.C.*, 215 Ariz. 589, ¶ 35 (App. 2007).

instances were not sufficient for Fee to reasonably assume Giordano had authority to settle, and rather "simply prove[d] Mr. Giordano, to some extent, represented" them. We disagree.

¶11 The Contrerases at no point indicated Giordano was not authorized to settle the case until after his counteroffer had been accepted. If they had doubts about his actions once negotiations began, reasonable people in their position would have manifested such doubts, if not an objection, to avoid the natural inference that Giordano was vested with authority to see those negotiations to their conclusion. *See* Restatement § 1.03 cmt. b. Their silence was unreasonable in light of the potential consequences at stake and is "taken as a manifestation of affirmance." *Id.* At the time the offers were made—given the nature of Giordano's representation of the Contrerases throughout the litigation and the manifestation of authorization via lack of any indication to the contrary—it was reasonable for Fee to assume Giordano was authorized to settle the case. *See Robertson*, 237 Ariz. 345, ¶ 17.

Mutual Assent

¶12 The Contrerases also claim the trial court "did not properly apply the law by finding that there was a binding agreement between the parties." Because the court ruled based on arguments of counsel and documentary evidence rather than holding an evidentiary hearing, in essence, it "granted summary judgment regarding the [settlement agreement's] existence, terms, and enforceability," and we therefore apply the summary judgment standard of review. *Id.* ¶ 8. We review de novo whether any genuine disputes of material fact exist and whether the trial court correctly applied the law, viewing the facts in the light most favorable to the Contrerases as the non-prevailing parties. *Id.* We will affirm if the facts "are such that reasonable people could only agree that the parties had entered into a binding, written settlement agreement." *Canyon Contracting Co. v. Tohono O'Odham Hous. Auth.*, 172 Ariz. 389, 389 (App. 1992), *disapproved on other grounds by Robertson*, 237 Ariz. 345.

¶13 For a settlement agreement to be binding and enforceable, the elements of a valid contract must be met. *Muchesko v. Muchesko*, 191 Ariz. 265, 268 (App. 1997). The gravamen of the Contrerases' argument is that the trial court "failed to address" whether those elements were satisfied. They argue that one such essential element—mutual assent—was not achieved in this case due to "added and modified terms by [Gilbert L.'s] counsel" after the February 7 email, and Fee's "portrayal of on-going negotiations." *See id.* (mutual assent an essential element of a contract).

Mutual assent is reached when a "distinct intent common to both parties [exists] without doubt or difference." *Hill-Shafer P'ship v. Chilson Family Tr.*, 165 Ariz. 469, 473 (1990). Such assent is based on "the objective manifestations of assent by the parties" rather than any hidden intent. *Id.* at 474.

¶14 Under general contract principles, an acceptance must be unequivocal and on virtually the exact same terms as the offer; any attempt to accept the offer on terms materially different than those in the original offer constitutes a rejection and counteroffer. *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 270-71 (App. 1983); *see also Clark v. Compania Ganadera de Cananea, S.A.*, 94 Ariz. 391, 400 (1963); Restatement (Second) of Contracts § 59 (1981) ("A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer."). Giordano's February 7 email indicating the Contrerases were willing to settle on Gilbert L.'s terms "with one modification" regarding the carport is therefore properly considered a counteroffer. At that point, the power of acceptance shifted to Fee, which he exercised on February 9 after discussing the terms with Gilbert L. *See United Cal. Bank*, 140 Ariz. at 271 ("A counter-offer can become the basis of a contract if it is accepted by the person who made the original offer.") (quoting F. Slavin & D. Burton, *Arizona Construction Law,* 4 (3d ed. 1982)). The February 9 letter, which noted Gilbert L. had "agreed with the settlement terms . . . and [the] qualification that the carport and footings will be removed" was an unequivocal acceptance of the counteroffer, and the agreement became binding at that time. *See* Restatement (Second) of Contracts § 63 (acceptance "is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession").

¶15 The Contrerases provide no authority for their argument that post-acceptance changes to a contract can retroactively void mutual assent. Although there were additional terms outlined in the settlement agreement regarding the carport's removal, the trial court correctly struck them before accepting the remainder of the agreement. *See Lerner v. Brettschneider*, 123 Ariz. 152, 155 (App. 1979) ("Under ordinary principles of contract law, a term is included in a contract only when the parties assent to that term."). Thus, we find no error in the trial court's determination the parties entered into a binding, enforceable settlement agreement.

Fees and Costs

¶16 Gilbert L. requests his attorney fees on appeal pursuant to A.R.S. §§ 12-341.01(A) and 12-349. Section 12-341.01(A) provides that the prevailing party in an action arising out of contract may be entitled to its attorney fees. "An action arises out of contract if it could not exist but for the contract," but does not so arise if "the contract is only a factual predicate to the action but not the essential basis of it." *Kennedy v. Linda Brock Auto. Plaza, Inc.*, 175 Ariz. 323, 325 (App. 1993). Here, the underlying action is not one based on contract—but rather sought recovery of real property and rents, and to quiet title—and the settlement agreement only exists as a peripheral issue to the underlying claim. *Perry v. Ronan*, 225 Ariz. 49, ¶ 19 (App. 2010) (although the existence of settlement agreement was central to appeal, underlying action was not based on contract, and party was therefore not entitled to attorney fees). Accordingly, Gilbert L. is not entitled to his attorney fees on that basis. *Id.*

¶17 Section 12-349, A.R.S., provides that "the court shall assess reasonable attorney fees, [and] expenses" if the attorney or party brings or defends a claim "without substantial justification" or "solely or primarily for delay or harassment," unreasonably delays or expands the proceeding, or abuses discovery. Gilbert L. argues "[t]he very fact [the Contrerases] changed counsel just four days before the [s]ettlement [c]onference and moved for the continuance of all matters scheduled" is "evidence enough of [their] intention to delay the eventual outcome of the trial court proceedings as long as possible." He further argues the Contrerases' arguments show a "lack of reasonableness." While we have found their arguments unpersuasive, we cannot say they were unreasonable, nor can we say the appeal was intended primarily to delay the proceedings. In our discretion, we therefore deny Gilbert L.'s request for attorney fees on appeal, but award his costs on appeal pursuant to A.R.S. § 12-341 and upon compliance with Rule 21, Ariz. R. Civ. App. P.

Disposition

¶18 For the foregoing reasons, the trial court's judgment is affirmed.