IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

ALFREDO J. MOLINA, A SINGLE MAN; MOLINA, INC.,
AN ARIZONA CORPORATION, DBA MOLINA FINE JEWELERS; BLACK STARR &
FROST-PHOENIX, LLC, AN ARIZONA LIMITED LIABILITY COMPANY; SEDONA
LUXURY HOMES, LLC, AN ARIZONA LIMITED LIABILITY COMPANY,
Plaintiffs/Appellants,

v.

BMO HARRIS BANK, N.A., A BANKING ENTITY; JENNINGS HAUG &
CUNNINGHAM LLP, A LIMITED LIABILITY PARTNERSHIP; PHILLIP G. MITCHELL
AND JANE DOE MITCHELL, HUSBAND AND WIFE,
Defendants/Appellees.

No. 2 CA-CV 2022-0106
Filed November 7, 2022

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NOT FOR PUBLICATION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 Maricopa County
No. CV2015012839
The Honorable Joan M. Sinclair, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Eckerstrom and Judge Cattani concurred.

V Á S Q U E Z, Chief Judge:

¶1 Alfredo Molina and Sedona Luxury Homes, LLC (SLH) appeal from the trial court's grant of summary judgment in favor of BMO Harris Bank (BMO), Jennings Haug & Cunningham LLP (JHC), and Phillip Mitchell. On appeal, Molina and SLH argue the summary judgment ruling was erroneous because BMO, JHC, and Mitchell should have been precluded from asserting a ratification defense, that defense was meritless as a matter of law, and it was inconsistent with the court's later denial of a summary judgment motion from a different set of defendants. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences in the light most favorable to Molina and SLH, the parties opposing summary judgment below. *See Windhurst v. Ariz. Dep't of Corr.*, 252 Ariz. 240, ¶ 2 (App. 2021). This appeal involves two individual but related lawsuits, and we therefore recount the relevant facts from each.

CV2009-025724 (2009 Litigation)

¶3 Molina owns a controlling interest in SLH. In 2004, SLH received a $2,912,000 loan from M&I Marshall & Ilsley Bank (M&I) to purchase land for residential development. The next year, SLH entered into a management agreement for the development with Phoenix Holdings II,

LLC, which was managed by Brent Hickey. In 2006, the 2004 loan was refinanced, culminating in a $1,575,000 loan apparently to SLH. Although Molina had signed the 2006 loan application, Hickey signed the mortgage promissory note. In 2009, Molina and his wife signed a commercial guaranty of a 2008 loan—which partially refinanced the 2006 loan—covering all indebtedness between SLH and M&I, then-existing or thereafter arising.

¶4 M&I foreclosed on the SLH property securing the 2006 and 2008 loans and later sued SLH and the Molinas to collect the deficiency on the 2006 loan. SLH and the Molinas counterclaimed, alleging M&I had destroyed the value of the SLH property—the collateral securing the loan. In 2010, the trial court entered summary judgment in favor of M&I. Four years later, SLH and the Molinas successfully moved for a new trial and to vacate the judgment, arguing Hickey had lacked authority to sign the 2006 loan documents and the 2008 guaranty did not cover the 2006 loan. The parties filed competing motions for summary judgment, and the court entered summary judgment in favor of SLH and the Molinas, reasoning "when Hickey signed the 2006 Note, he did not have Molina's consent to do so" and the 2008 guaranty was for a different loan. Final judgment was entered against BMO, M&I's successor, from which no appeal was taken. In 2017, BMO unsuccessfully moved to set aside the judgment, claiming Molina had ratified the loan as a matter of law based on "newly discovered evidence."

CV2015-012839 (2015 Litigation)

¶5 In 2015, Molina and SLH sued BMO, JHC, Mitchell, the Cavanagh Law Firm, and Henry Timmerman alleging civil conspiracy, abuse of process, wrongful institution of civil proceedings, intentional infliction of emotional harm, false light invasion of privacy, injurious falsehood, negligence, and aiding and abetting. The complaint named additional plaintiffs and asserted several other claims that were later dismissed and are not relevant to this appeal. Mitchell was an attorney with JHC in 2009, but from 2009 to 2015, both he and Timmerman worked for the Cavanagh Law Firm and represented M&I in the previous litigation. The claims all arose from the defendants' alleged conduct in the 2009 Litigation involving the 2006 loan which Molina argued had not been authorized by him.

¶6 After several years of litigation, BMO, joined by JHC and Mitchell, moved for summary judgment, arguing Molina had ratified the 2006 loan by claiming beneficial deductions on his taxes related to the loan

and taking a litigation position that acknowledged the loan was his. Molina and SLH opposed summary judgment, contending the arguments were "either waived or adjudicated in the prior action" and meritless because Molina's acts "do not and cannot satisfy th[e] standard" for ratification. In October 2019, the trial court granted the motion for summary judgment, reasoning Molina and SLH's filing of a counterclaim in the 2009 action seeking damages for BMO's acts that impaired the value of the collateral securing the 2006 note "constituted a ratification of Hickey's act in entering into the loan transaction in 2006 and in signing the 2006 Note."

¶7 Timmerman and the Cavanagh Law Firm later moved for summary judgment similarly arguing SLH and Molina had ratified the loan and summary judgment for BMO necessitated summary judgment for BMO's lawyers. In response, Molina and SLH argued that the 2006 loan was not to SLH but was "made solely to" Phoenix Holdings II, Hickey had admitted he was not acting on SLH's behalf when he signed the loan documents, and that despite knowing this fact, BMO "allowed Hickey to proceed with the loan process in 2006." The trial court denied Timmerman and the Cavanagh Law Firm's motion, finding Molina and SLH's argument and the evidence presented in support of it "establish[ed] a dispute of fact as to whether Hickey was acting or purporting to act as the . . . agent at the time of the 2006 loan transaction." The court thereafter entered final judgment pursuant to Rule 54(b), Ariz. R. Civ. P., for BMO, JHC, and Mitchell. Molina and SLH unsuccessfully sought a new trial and then filed a notice of appeal.[1] We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

Discussion

¶8 Molina and SLH challenge the trial court's entry of summary judgment in favor of BMO, JHC, and Mitchell. We review a court's grant of summary judgment de novo and will affirm when "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." *Kalway v. Calabria Ranch HOA, LLC*, 252 Ariz. 532, ¶ 9 (2022) (quoting Ariz. R. Civ. P. 56(a)).

Preclusion of Ratification Argument

¶9 Molina and SLH first contend "[t]he doctrine of claim preclusion bars the [defendants'] newly concocted claim of 'ratification.'"

[1]Several days before filing the notice of appeal, Molina and SLH filed a motion for relief from judgment, which the trial court has held in abeyance pending resolution of this appeal.

Claim preclusion, which provides for the finality of claims, requires (1) an identity of claims in the suit in which a judgment was entered and the current litigation, (2) a final judgment on the merits in the previous litigation, and (3) identity or privity between parties in the two lawsuits. *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 212 Ariz. 64, ¶ 14 (2006).

¶10 The appellees assert the trial court correctly rejected the claim preclusion argument because the first element is lacking—that is, the 2009 Litigation raising contract claims and the 2015 Litigation raising a "kitchen sink of tort claims" are not identical. Although the elements necessary to prove the claims in both actions do not overlap and the evidence supporting those elements would not be identical,[2] the dispositive claim in both lawsuits was whether Molina or SLH had ratified the 2006 loan. Contrary to Molina and SLH's argument, BMO was not barred by claim preclusion from raising ratification in the 2015 Litigation based on its argument in the 2009 Litigation for two reasons. First, ratification in this action has been raised not as a separate claim but rather as an affirmative defense. As the trial court correctly acknowledged, "claims and defenses are not the same for preclusion purposes." *See Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, ¶ 14 (App. 2007) ("The doctrine of claim preclusion . . . does not bar a later action asserting claims alleged as affirmative defenses in a prior action because affirmative defenses are not claims."). Thus, BMO's failure to obtain relief on its contract claims against Molina and SLH

[2]*See Phoenix Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 240-42 (App. 1997) (same evidence test for determining identity of claims is satisfied when "no additional evidence is needed to prevail in the second action than that needed in the first"); *see also First Am. Title Ins. Co. v. Johnson Bank*, 239 Ariz. 348, ¶ 22 (2016) (breach of contract); *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Loc. No. 395 Pension Tr. Fund*, 201 Ariz. 474, ¶ 99 (2002) (civil conspiracy); *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, ¶ 11 (App. 2004) (abuse of process); *Wolfinger v. Cheche*, 206 Ariz. 504, ¶ 23 (App. 2003) (wrongful institution of civil proceedings); *Midas Muffler Shop v. Ellison*, 133 Ariz. 194, 197 (App. 1982) (intentional infliction of emotional harm); *Desert Palm Surgical Grp., P.L.C. v. Petta*, 236 Ariz. 568, ¶ 29 (App. 2015) (false light invasion of privacy); *W. Techs., Inc. v. Sverdrup & Parcel, Inc.*, 154 Ariz. 1, 4 (App. 1986) (injurious falsehood); *Gipson v. Kasey*, 214 Ariz. 141, ¶ 9 (2007) (negligence); *Chalpin v. Snyder*, 220 Ariz. 413, ¶ 45 (App. 2008) (aiding and abetting).

in the 2009 Litigation could not bar BMO and its attorneys' affirmative defense of ratification to the tort claims now brought against them.

¶11 Second, the trial court in the 2009 Litigation did not resolve the ratification issue on its merits. *See Banner Univ. Med. Ctr. Tucson Campus, LLC v. Gordon*, 252 Ariz. 264, ¶ 10 (2022) (for claim preclusion to apply, there must be final judgment on merits); *Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 212 Ariz. 64, ¶ 14. Instead, the court denied BMO's motion to set aside the judgment on the ground that it had not been filed within a reasonable time as required by Rule 60(c)(1), Ariz. R. Civ. P. *Cf. Banner Univ. Med. Ctr. Tucson Campus, LLC*, 252 Ariz. 264, ¶ 12 (certain procedural dismissals not adjudication on merits). We therefore agree with the court that BMO and the lawyers' ratification argument was not barred by claim preclusion.[3]

Merits of Ratification Defense

¶12 Molina and SLH also contend the trial court "incorrectly granted summary judgment in favor of" the appellees by improperly finding ratification. We disagree. "Ratification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority." Restatement (Third) of Agency § 4.01(1) (2006). "A person not bound by a contract may ratify the contract and thus become bound by its terms, by affirming the contract through words or deeds." *All-Way Leasing, Inc. v. Kelly*, 182 Ariz. 213, 216 (App. 1994). A person can ratify a contract "by taking a position in litigation that is warranted only by consent to be bound by the act." Restatement § 4.01 cmt. h; *see also Fairway Builders, Inc. v. Malouf Towers Rental Co.*, 124 Ariz. 242, 256 (App. 1979) ("[R]atification can occur when a purported principal brings a lawsuit to enforce a transaction negotiated by the purported agent.").

¶13 The undisputed facts presented to the trial court established that Molina and SLH ratified Hickey's signing of the 2006 loan documents, repeatedly asserting SLH was the true borrower. In bringing their counterclaim in the 2009 Litigation against M&I for taking "actions that impaired the value of the collateral which secured the . . . 2006 Mortgage Note," Molina and SLH alleged the real property "was purchased with a

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[3]Based on our resolution of the preclusion issue which encompasses all three appellees, we need not address Molina and SLH's argument that JHC and Mitchell were separately precluded from asserting ratification, despite not being parties in the 2009 Litigation, because they "controlled or even substantially participated in controlling" it.

combination of the Counterclaimants' funds and the proceeds of the loans provided by M&I to the Counterclaimants" and "[a]s guarantors, the Molinas have equitable rights of subrogation to the collateral." They stated SLH "intended to sell the lots it owned . . . to satisfy the debt owed" but that M&I had sold security instruments on adjacent parcels of land at discounted prices, resulting in a "decline in the market value of the very collateral [M&I] was using to secure the obligations of [SLH]."[4]

¶14 Further, although the trial court found ratification based only on the conduct described above, there was more on which it could have relied. *See Glaze v. Marcus*, 151 Ariz. 538, 540 (App. 1986) ("We will affirm the trial court's decision if it is correct for any reason, even if that reason was not considered by the trial court."). In the 2009 civil action, Molina declared under penalty of perjury that SLH took out the 2006 loan and that he personally guaranteed that debt. *See Levine v. Haralson, Miller, Pitt, Feldman & McAnally, P.L.C.*, 244 Ariz. 234, ¶ 16 (App. 2018) ("A party should not be permitted to blow hot and cold with reference to the same

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[4]As the trial court pointed out, the record does not support Molina and SLH's argument that the counterclaim "was a defensive, alternate legal theory." Nothing in the pleading indicated the counterclaim was being asserted in the alternative. *See City of Globe v. Shute*, 22 Ariz. 280, 290 (1921) (finding it "apparent from the whole pleading" that allegation was not pleaded "in the alternative"). We also reject Molina and SLH's argument that ratification was "done to avoid a loss attributable to the misconduct of Brent Hickey and the malfeasance of [BMO] and its lawyers." Molina and SLH have not explained how acknowledging the 2006 loan allowed them to avoid a loss or otherwise protected their interests. *See, e.g.*, *Fid. & Deposit Co. of Md. v. Bondwriter Sw., Inc.*, 228 Ariz. 84, ¶¶ 32-33 (App. 2011) ("sufficient evidence in the record" showed principal honored transaction with third party because it believed it was legally obligated to do so, it avoided time and expense of litigation, and protected its reputation). And they seem to miscomprehend the rule supporting their contention. Section 4.02(2)(b) of the Restatement provides, "Ratification is not effective . . . *in favor of an agent against a principal* when the principal ratifies to avoid a loss." (Emphasis added). In other words, "the principal's action is operative as to the principal's legal relations with third parties but, as to legal relations between the principal and the agent, does not exonerate the agent or constitute consent to the agent's actions." Restatement § 4.02 cmt. d. Thus, a third party like BMO can bind Molina and SLH to the loan transaction by ratification, but Hickey is not discharged from any potential liability to SLH.

transaction, or insist at different times on the truth of each of two conflicting allegations according to the promptings of his private interest." (quoting *Miles v. Franz Lumber Co.*, 14 Ariz. 455, 457 (1913))). JHC produced an email Molina had sent to an M&I employee in 2010 again stating in no uncertain terms that "[t]he debt was with [SLH], and I was the personal guarantor." There was evidence that Molina's other business entity made several payments toward the 2006 loan, and Molina claimed tax deductions for interest SLH paid on the 2006 loan, declaring that SLH had received the 2006 loan and had paid over $200,000 in interest to BMO.

¶15 At oral argument before this court, Molina and SLH asserted that there are disputed facts that preclude summary judgment. For instance, they argued the counterclaim mistakenly identifying the 2006 loan instead of the 2004 loan was simply "bad drafting." But the attorney who drafted the counterclaim testified that he had been referring to the 2006—not the 2004—loan and that the "recipients of the counterclaims" were "justified on believing . . . those assertions of fact." Molina and SLH also insisted that BMO "denied every single word" of the counterclaim. But in its response to Molina and SLH's counterclaim, BMO in fact admitted "that [it] loaned funds in connection with the acquisition of [the Sedona Heights] property." Molina and SLH also pointed to Molina's March 2016 declaration to refute the admissions Molina made regarding the 2006 loan in his declaration from the 2009 Litigation. In the 2016 declaration, Molina explained the earlier declaration "incorrectly states" the "March 6, 2006" date for when he obtained financing, when the correct date should have been "November 10, 2004." And in Molina and SLH's controverting statement of facts, they claimed Molina's 2016 declaration clarifies that Molina "thought he was testifying about the 2004 Acquisition, not the 2006 Refinance" in the earlier declaration, but that explanation is not a reasonable interpretation of Molina's earlier declaration, in which he unequivocally stated he "obtained financing from [BMO] on or about March 6, 2006." And although we are not permitted to determine credibility or weigh the evidence, *see Allstate Indem. Co. v. Ridgely*, 214 Ariz. 440, ¶ 19 (App. 2007), neither are we required to accept self-serving assertions without factual support in the record to reverse a summary judgment ruling, *see Florez v. Sargeant*, 185 Ariz. 521, 526 (1996).

¶16 Molina and SLH also claimed Molina's email referred to the 2004 loan, but JHC demonstrated that was "patently false," quoting the language of the email in which Molina wrote he "was not the debtor in the [breach of contract] suit to which" BMO referred because SLH was the debtor and he was the personal guarantor. Molina and SLH additionally urged that Molina claimed tax deductions for the loan payments "without

intending to" and he directed his accountant "to immediately file an amended return . . . which [wa]s done." But Molina and SLH's own filing in the trial court refutes that: in their response to BMO's motion for summary judgment, they said that "Molina tried to return and later donated [the tax benefit] to charity." As JHC pointed out at oral argument, Molina and SLH's opening brief cited their controverting statement of facts "exactly zero times." In a complex case with voluminous records like this one, we are not required to independently search the record to discover evidence placing factual matters in dispute; that burden was on Molina and SLH. *Tilley v. Delci*, 220 Ariz. 233, ¶ 10 & n.4 (App. 2009).

¶17 Finally, even assuming the foregoing facts were not in the record, as explained above, Molina and SLH's conduct surrounding the counterclaim was sufficient to demonstrate ratification. Therefore, the trial court did not err in granting summary judgment in favor of BMO, JHC, and Mitchell. *See* Restatement § 4.01 cmt. b ("The sole requirement for ratification is a manifestation of assent or other conduct indicative of consent by the principal.").

Cavanagh Law Firm and Timmerman Summary Judgment

¶18 Molina and SLH improperly attempt to bring the trial court's denial of the Cavanagh Law Firm and Timmerman's motion for summary judgment into our purview. They argue the court made "incompatible" and "inconsistent" rulings by granting the summary judgment motion at issue in this appeal but denying the Cavanagh Law Firm and Timmerman's subsequent motion for summary judgment and assert the later ruling "superseded the inconsistent 2019 ruling." We lack jurisdiction to consider the court's denial of the later motion for summary judgment. *See Ariz. City Sanitary Dist. v. Olson*, 224 Ariz. 330, ¶ 5 (App. 2010) (denial of motion for summary judgment is nonappealable, interlocutory order to be reviewed only by special action); *Navajo Freight Lines, Inc. v. Liberty Mut. Ins. Co.*, 12 Ariz. App. 424, 427-28 (1970) (denial of motion for summary judgment "not even reviewable in connection with a proper appeal from some later appealable order or judgment").

¶19 Moreover, to the extent the October 2019 ruling and the later summary judgment ruling are inconsistent, it is because Molina and SLH presented different evidence in opposition of the second motion that they did not present to the trial court in response to the earlier motion despite having opportunity to do so. The court noted this fact when it denied

Molina and SLH's second motion for reconsideration of the earlier ruling.[5] For example, Molina and SLH asserted for the first time in response to the Cavanagh Law Firm and Timmerman motion for summary judgment that the 2006 loan was not to SLH but was "made solely to" Phoenix Holdings II and Hickey had admitted he was not acting on SLH's behalf in signing the loan documents. The fact that Molina and SLH later produced evidence creating a genuine dispute of material fact that it did not identify earlier despite the opportunity to do so did not obligate the court to change its earlier summary judgment ruling. Any such later-produced evidence is not properly before us. *See Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, ¶ 8 (App. 2007) ("We review the [summary judgment] decision on the record made in the trial court, considering only the evidence presented to the trial court when it addressed the motion."); *see also Phoenix Baptist Hosp. & Med. Ctr., Inc. v. Aiken*, 179 Ariz. 289, 292 (App. 1994) (reviewing "the grant of summary judgment on the basis of the record made in the trial court"); *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4 (App. 1990) (unless evidence is "part of the record before the trial court at the time it considered the motion for . . . summary judgment, we cannot consider [it] on appeal"). Indeed, such a change based on Molina and SLH's opposition to the Cavanagh Law Firm and Timmerman's motion could have violated BMO, JHC, and Mitchell's due process rights. *See Salas v. Ariz. Dep't of Econ. Sec.*, 182 Ariz. 141, 143 (App. 1995) (due process requires notice and opportunity to be heard).

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[5] Molina and SLH also challenge the trial court's denial of their second motion for reconsideration of the October 2019 ruling, contending it was denied solely because the court concluded multiple reconsideration motions are not permitted. Contrary to Molina and SLH's assertion, the court did not deny the second motion merely because it was successive but rather correctly observed "[n]othing in the rules of civil procedure authorizes the filing of successive motions seeking reconsideration of the same ruling." And while the court noted that fact alone could warrant denial of the motion, it also articulated the legal grounds for denying the motion. Molina and SLH point out that "[m]ultiple motions for reconsideration are *not* expressly forbidden," *see* Ariz. R. Civ. P. 7.1(e)(1), but this is of no moment because in light of our foregoing analysis, Molina and SLH have demonstrated no legal error in the court's ruling that could have warranted a favorable outcome on reconsideration.

Attorney Fees

¶20 Molina and SLH request an award of attorney fees under A.R.S. § 12-341.01(A), asserting "this matter arises out of contract." Because they are not the successful parties on appeal, their request is denied. *See* § 12-341.01(A). BMO requests its attorney fees pursuant to Rule 25, Ariz. R. Civ. App. P., which gives this court discretion to impose sanctions, including awarding attorney fees, if we determine that "an appeal or a motion is frivolous, or was filed solely for the purpose of delay." BMO asserts "most of Molina's arguments are not supported by a 'reasonable legal theory.'" Although we rejected each of Molina and SLH's arguments on appeal including their assertions at oral argument, we do not find the appeal frivolous or filed for delay, and we therefore decline to award BMO its attorney fees as a sanction. BMO, JHC, and Mitchell however, are entitled to their costs on appeal upon compliance with Rule 21, Ariz. R. Civ. App. P. *See* A.R.S. § 12-341.

Disposition

¶21 We affirm the trial court's summary judgment in favor of BMO, JHC, and Mitchell.