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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

LISA FRANK, INC., an Arizona corporation, Third-Party Plaintiff/Appellant, v. JAMES A. GREEN, a married man, Third-Party Defendant/Appellee.	2 CA-CV 2008-0120 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20061405

Honorable Javier Chon-Lopez, Judge

REVERSED AND REMANDED

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E S P I N O S A, Judge.

¶1 Appellant Lisa Frank, Inc. (LFI) appeals from the trial court's entry of summary judgment in favor of third-party defendant, James Green, after it concluded there were no genuine issues of material fact and Green was entitled to judgment as a matter of law on LFI's claim that Green could be liable to LFI for an alleged oral promise to an LFI employee. We reverse.

Factual and Procedural History

¶2 In March 2006, Rhonda Rowlette, a former LFI employee, sued LFI to enforce an alleged oral promise by LFI's principals to pay off her mortgage and "ensure her $2,000,000 in the bank" when she retired or in the event LFI terminated her employment. In her complaint, Rowlette alleged that LFI's two shareholders, founder and majority shareholder Lisa Frank, and president and chief executive officer James Green, had promised her this compensation "[o]n numerous occasions." In its answer, LFI denied that its authorized agents had made any promises to Rowlette. It also filed a third-party complaint for indemnification against Green, alleging that, if he had made such promises, he had done so without appropriate corporate authority.

¶3 Green thereafter moved for summary judgment on LFI's third-party complaint, arguing Rowlette's complaint was "based on a specific promise Lisa Frank [had] made to [Rowlette] . . . , [that] was repeated to her over the course of the next several years by Ms. Frank and Mr. Green." He additionally argued that, because LFI shareholders and directors annually ratified all actions taken by the officers and directors, if he had made any

unauthorized promises, LFI had ratified his actions. LFI opposed Green's motion, arguing that "[a]ny promise to Rowlette, if there was one, was made by Green" and that the "blanket ratifications . . . do not exonerate Green from his ultra vir[e]s or unauthorized act." LFI additionally argued that, if Green had made an independent, unauthorized, and unratified promise but had had the apparent authority to do so, LFI would be legally bound by the promise.

¶4 The trial court granted Green's motion for summary judgment, finding that no genuine issue of material fact existed and that Green was entitled to judgment as a matter of law. Specifically, the court found: "All of the evidence supports Green's claim that any promise he made to Rowlette was in confirmation of Lisa Frank's alleged original promise," and "LFI's indemnity claim against Green is a legal impossibility." The court explained that, if Green had made an independent, unauthorized promise to Rowlette and the blanket ratifications did not adopt that promise, LFI could not be liable to Rowlette. Conversely, the court found, if Green had made such a promise that LFI had subsequently ratified, LFI could not seek indemnification from Green because it had adopted and approved his acts. After LFI filed its notice of appeal, Rowlette and LFI reached an agreement to settle Rowlette's lawsuit against LFI. For the following reasons, we reverse the trial court's ruling.

Discussion

Green's Motion to Dismiss Appeal

¶5 As a preliminary matter, we address Green's arguments that we should "decline to review" LFI's appeal because the issue raised is both moot and barred by the doctrine of claim preclusion. Before filing his answering brief, Green moved to dismiss this appeal as moot on the ground Rowlette's claim against LFI had been settled. This court denied the motion. Having already considered and rejected Green's argument that LFI's appeal is moot, we see no need to reconsider this issue on appeal. *See Kadish v. Ariz. State Land Dep't*, 177 Ariz. 322, 327, 868 P.2d 335, 340 (App. 1993) (once appellate court rules on legal issue, decision is law of the case). Furthermore, it is well established that the settlement of a claim does not generally extinguish a paying party's right to seek indemnification. *See, e.g.*, *Citizens Utils. Co. v. New W. Homes, Inc.*, 174 Ariz. 223, 228, 848 P.2d 308, 313 (App. 1992) (approving judgment requiring indemnification for good-faith settlement of third-party claim).

¶6 Green also argues that because Rowlette's underlying action has settled, claim preclusion bars LFI's third-party claim against him and "prevents review of LFI's appeal." LFI's appeal, however, is premised on its contention that the trial court erred in granting summary judgment against it because it is entitled to indemnification from Green for amounts it paid to settle a lawsuit arising out of his unauthorized acts as a corporate officer. Claim preclusion is intended to prevent the relitigation of a claim that has been finally

adjudicated. *See Circle K Corp. v. Indus. Comm'n of Ariz.*, 179 Ariz. 422, 425, 880 P.2d 642, 645 (App. 1993). When a court enters a final judgment on the merits in a prior suit involving the same parties, claim preclusion bars the institution of a second lawsuit based on the same cause of action.[1] *See Norriega v. Machado*, 179 Ariz. 348, 351, 878 P.2d 1386, 1389 (App. 1994). But Green was not a party to the cause of action between LFI and Rowlette, so claim preclusion does not bar further action against him. *See id.* Moreover, the cause of action between Rowlette and LFI is not identical to the claim between LFI and Green. Claim preclusion applies when the same issues must be decided in the second cause as the first. *Rousselle v. Jewett*, 101 Ariz. 510, 512, 421 P.2d 529, 531 (1966). "Rights, claims, or demands—even though they grow out of the same subject matter—which constitute separate or distinct causes of action not appearing in the former litigation, are not barred in the latter action because of res judicata." *Id.* Although Rowlette's suit against LFI and LFI's indemnity suit against Green each stem from the alleged promises of compensation to Rowlette, they are different causes of action involving different factual and legal determinations. Stated differently, Rowlette's success against LFI essentially turned on proving the existence of a valid promise, but LFI's success against Green depends on the identity and authority of the purported promisor.

[1]Although the term "res judicata" has recently been applied to both claim and issue preclusion, traditionally it is synonymous with claim preclusion. *Pettit v. Pettit*, 218 Ariz. 529, n.2, 189 P.3d 1102, 1104 n.2 (App. 2008).

Summary Judgment

¶7 Having disposed of Green's preliminary requests to dismiss the appeal, we turn to its merits. LFI contends the trial court erred in entering summary judgment after finding there were no issues of material fact and concluding Green's liability would be legally impossible. We review de novo a trial court's grant of summary judgment, *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, n.3, 180 P.3d 977, 980 n.3 (App. 2008), viewing the facts in the light most favorable to the party against whom the judgment was entered, *see Ratliff v. Hardison*, 219 Ariz. 441, ¶ 2, 199 P.3d 696, 697 (App. 2008).

Apparent Agency

¶8 LFI complains the trial court overlooked its argument that Green could have been liable to LFI on a theory of apparent agency. Because Green's potential liability hinges on the ability of a corporation to hold a director liable for sums it paid to settle a lawsuit arising from a director's unauthorized promise made with apparent authority to make it, we address this point first.

¶9 In arguing that Green could be liable under an apparent agency theory, LFI correctly asserts that corporate officers acting beyond the scope of their authority can, in some circumstances, bind the corporation through their acts or promises. Generally, a corporation cannot be bound by the unauthorized promises of its officers. *See GM Dev. Corp. v. Cmty. Am. Mortgage Corp.*, 165 Ariz. 1, 7, 795 P.2d 827, 833 (App. 1990) (corporation not bound by contract unless executed by person with authority to bind). But

it may be bound by the unauthorized promises of a person who has the apparent authority to bind the corporation. *See O.S. Stapley Co. v. Logan*, 6 Ariz. App. 269, 273-74, 431 P.2d 910, 914-15 (1967); *O'Malley Inv. & Realty Co. v. Trimble*, 5 Ariz. App. 10, 18-19, 422 P.2d 740, 748-49 (1967). Therefore, if Green, acting without *actual* authority, made a promise to Rowlette, but *appeared* to have the authority to do so, his promise would bind the corporation.[2]

¶10 LFI is also correct in its argument that a corporate officer can be liable to the corporation for amounts it pays to settle claims arising out of the officer's unauthorized acts. A settling party is generally permitted to seek indemnification from a liable third party. *See, e.g.*, *Citizens Utils. Co.*, 174 Ariz. at 228, 848 P.2d at 313. That the responsible third party is also an officer of the settling corporation should not change the analysis. "[I]t is the duty of the agent, in all of his or her acts and contracts, to keep within the limits of his or her authority, and the agent must, in general, indemnify his or her principal against the consequences of not doing so." 8 *William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations* § 1021 (perm. ed., rev. vol. 1994); *see also Kadish v. Phx.-Scotts. Sports Co.*, 11 Ariz. App. 575, 578, 466 P.2d 794, 797 (1970) (officers and directors, not corporation, responsible for losses from unauthorized acts). If, as a matter of

[2]Assuming Green made an independent, unauthorized promise, his apparent authority to do so is a question to be decided by a finder of fact, not this court. *See Reed v. Gershweir*, 160 Ariz. 203, 205, 772 P.2d 26, 28 (App. 1989) (existence of apparent agency a question of third party's reliance on acts of principal and ostensible agent).

law, the settling corporation could have incurred actual liability as a result of its officer's unauthorized act, indemnification is appropriate if the corporation, in good faith, settles a lawsuit arising from the officer's actions. *See Citizens Utils. Co.*, 174 Ariz. at 228, 848 P.2d at 313 (approving judgment that included indemnity for any amount obtained in good-faith settlement of lawsuit between utility company and third party); *cf. Henderson Realty v. Mesa Paving Co., Inc.*, 27 Ariz. App. 299, 554 P.2d 895 (1976) (because prevailing corporate defendant found not liable in tort action, no indemnitor-indemnitee relationship formed, and defendant could not seek indemnity for attorney fees from losing codefendant).

¶11 Having determined that a corporate officer may be liable to a corporation for money expended settling a lawsuit arising from the officer's unauthorized promise, the question then becomes whether, under the circumstances of the present case, the trial court was correct in determining Green's liability was a legal impossibility. Arguing that summary judgment was inappropriate, LFI asserts that the trial court erred both in its interpretation of the facts and in its conclusions of law. We agree on both counts.

Issue of Material Fact

¶12 LFI contends the trial court improperly made a factual determination, concluding that "any promise [Green] made to Rowlette was in confirmation of Lisa Frank's original promise to Rowlette." In her deposition, Rowlette stated that both Frank and Green had made these promises, and her deposition testimony generally supports Green's contention that Lisa Frank had made the first promise and that both Green and Frank

subsequently repeated and confirmed it. However, in Frank's deposition, she denied having made, either personally or on behalf of LFI, any promises to Rowlette.[3] Viewed in the light most favorable to LFI, *see Ratliff*, 219 Ariz. 441, ¶ 2, 199 P.3d at 697, this creates a disputed issue of material fact concerning whether Frank, on behalf of LFI, made the initial promise.

¶13 As previously noted, the identity of the initial promisor is crucial to determining whether Green would be liable to LFI. LFI does not dispute the trial court's finding that if Green merely confirmed Frank's promise on behalf of LFI, he could not be liable to the corporation. But in light of testimony controverting Rowlette's statement that Frank made the initial promise, the trial court erred in concluding that Green had not made any independent promises and that any statements he made were merely in confirmation of Frank's promises. *See Andrews v. Blake*, 205 Ariz. 236, ¶ 13, 69 P.3d 7, 11 (2003) (facts construed in the light most favorable to party opposing summary judgment).

Application of Law

¶14 LFI further argues the trial court erred when it concluded that, even if Green had made an independent, unauthorized[4] promise to Rowlette, he could not be liable to LFI

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[3]To the extent Green argues LFI's assertion of a disputed issue of material fact is premised on "bare" denials, he is mistaken. *See GM Dev. Corp.*, 165 Ariz. at 5-6, 795 P.2d at 831-32 (deposition testimony in record may be considered in support of or opposition to summary judgment). Frank denied having made the alleged promises in her sworn deposition testimony. Such testimony, made under oath, can properly defeat summary judgment. *See* Ariz. R. Civ. P. 56(e). Notably, it is the same type of evidence on which Green relied in support of his motion for summary judgment.

[4]Whether Green, by virtue of his position in the corporation, had the actual authority to make promises to Rowlette is a question of fact not decided by the trial court and not

because of the corporation's practice of annually ratifying the actions of its officers and directors. Although the court correctly concluded that a corporation may ratify and adopt the unauthorized acts of a corporate officer, the court neglected the caveat that, for a ratification to be effective, the corporation must be aware of the acts it ratifies. *See Phoenix W. Holding Corp. v. Gleeson*, 18 Ariz. App. 60, 66, 500 P.2d 320, 326 (1972) (knowledge of material facts necessary element of ratification); *Murdock-Bryant Constr., Inc. v. Pearson*, 146 Ariz. 57, 64, 703 P.2d 1206, 1213 (App. 1984) ("Ratification requires that a principal have full and actual knowledge of all material facts at the time he, by subsequent act or conduct, binds himself to a previously unauthorized act of an agent."), *disapproved on other grounds*, 146 Ariz. 48, 703 P.2d 1197 (1985).

¶15 Assuming for the purposes of this appeal that Green made an independent, unauthorized promise to Rowlette, *see Andrews*, 205 Ariz. 236, ¶ 13, 69 P.3d at 11, the trial court did not have before it sufficient evidence of LFI's knowledge of the promise to enter summary judgment in Green's favor. Indeed, no evidence was presented establishing LFI's knowledge of the acts it had allegedly ratified. Moreover, to the extent there is any evidence

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before us today. *See Phoenix W. Holding Corp. v. Gleeson*, 18 Ariz. App. 60, 66, 500 P.2d 320, 326 (1972) (actual authority fact question determined by looking at acts of principal, not title of officer). Accordingly, because there was no decision below regarding Green's actual authority and because the issue will not necessarily recur on remand, we need not consider LFI's arguments regarding the legal effect of any promise Green made if he did have the actual authority to make promises of compensation. *See Progressive Specialty Ins. Co. v. Farmers Ins. Co. of Ariz.*, 143 Ariz. 547, 548, 694 P.2d 835, 836 (App. 1985) (court of appeals does not issue advisory opinions).

in the record pertinent to the issue, it shows LFI was not aware of such promises, as Frank testified she had no knowledge of the promises allegedly made by Green. Because corporate ratification is impossible without knowledge of a promise, *see Phoenix W. Holding Corp.*, 18 Ariz. App. at 66, 500 P.2d at 326, the trial court could not conclude that LFI's practice of issuing blanket ratifications shielded Green from potential liability.

Sufficiency of the Pleadings

¶16 In his answer to LFI's appeal, Green makes much of the fact that, in its pleadings, LFI asserted Green would be required to indemnify LFI if it were "found to be financially responsible" for the alleged promises made to Rowlette. He argues that, because LFI and Rowlette reached a settlement agreement, there was no finding of liability. Thus, he claims, under the law and according to LFI's own pleadings, he is exonerated from any obligation to indemnify the corporation. We disagree. Conditioning Green's potential obligation to indemnify LFI on LFI's use of the phrase "found to be financially responsible" in its complaint would merely exalt form over substance. Pleadings are to be construed liberally and are intended to give parties fair notice of the claims against them, not to shield them from liability based on a narrow reading of the allegations. *See Rowland v. Kellogg Brown & Root, Inc.*, 210 Ariz. 530, ¶¶ 11-12, 115 P.3d 124, 127 (App. 2005) (technically insufficient pleading not fatal for purposes of statute of limitations); *Hollar v. Wright*, 115 Ariz. 606, 608, 566 P.2d 1352, 1354 (App. 1977) (pleadings on crossclaims should be viewed liberally and "construed in the interest of justice"). Here, Green was on notice of

LFI's allegation that he had made unauthorized promises to Rowlette and its claim that he would be financially responsible for any loss it incurred as a result of his actions.

Disposition

¶17 Because the trial court erred in entering summary judgment in favor of Green, there being evidence and circumstances under which Green could potentially be required to indemnify LFI, we reverse the summary judgment and remand the case for further proceedings consistent with this decision. Although Green has requested attorney fees, he is not the prevailing party and thus is not entitled to them. *See* A.R.S. § 12-341.01(A); Ariz. R. Civ. App. P. 21.

PHILIP G. ESPINOSA, Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge