IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

HAYDEN R. FLEMING, et al., *Plaintiffs/Appellants/Cross-Appellees*,

v.

GLEN TANNER, *Defendant/Appellee/Cross-Appellan*t,

JESSICA TANNER, *Defendant/Appellee*.

No. 1 CA-CV 17-0647
FILED 12-10-2019

Appeal from the Superior Court in Maricopa County
No. CV2015-007971
The Honorable Lori Horn Bustamante, Judge

AFFIRMED IN PART, VACATED IN PART

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OPINION

Judge Kent E. Cattani delivered the opinion of the Court, in which Acting Presiding Judge Paul J. McMurdie and Judge Samuel A. Thumma joined.

C A T T A N I, Judge:

¶1 This case involves a disagreement over an $800,000 loan by Hayden R. and LaDonna M. Fleming to their daughter Jessica Tanner and her then-husband, Glen Tanner.[1] The Flemings settled their dispute with their daughter but pursued this breach of contract case against Glen. The Flemings sought damages of $50,000 in principal and $184,721.92 in accumulated interest, plus attorney's fees and costs.

¶2 Following a bench trial, the superior court awarded the Flemings $50,000, but denied their claim for interest and their request for attorney's fees. The Flemings appeal from that ruling. Glen cross-appeals, challenging the $50,000 award as well as the superior court's rejection of his statute of limitations defense and his counterclaim seeking an offset for the amount Jessica paid on the loan. We conclude that the superior court correctly denied the Flemings' claim for interest because the original oral agreement between the Flemings and the Tanners contemplated no interest at all. As to Glen's cross-appeal, we vacate the award of $50,000 payable by Glen to the Flemings because Jessica already paid enough to satisfy the debt in full. We affirm in all other respects.

FACTS AND PROCEDURAL BACKGROUND

¶3 In May 2007, the Flemings agreed to loan the Tanners $800,000 to assist them with the purchase of a home in Maricopa County. The agreement was not in writing, and there was no discussion of interest on the loan or a specified repayment schedule. The Tanners agreed to repay the loan at some point in the future, and the parties agreed that the loan would be due and payable upon demand by the Flemings.

¶4 The Tanners made three payments to the Flemings totaling $340,000 between November 2008 and May 2011, sometimes in response to

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[1] For ease of reference and to avoid confusion, we refer to Glen Tanner and Jessica Tanner by their first names.

the Flemings' request for partial repayment. In May 2009, Glen transferred title to another property (the "Terravita House") to the Flemings, subject to a deed of trust and $360,000 promissory note. When the Flemings sold the Terravita House in 2013, Glen released the deed of trust and the Flemings credited a $360,000 payment on the loan. All told, the Flemings credited the Tanners with having paid a total of $700,000.

¶5 In July 2015, the Flemings sued both Glen and Jessica (who by then were divorced), seeking the remaining principal balance of $100,000 and 10% interest for the life of the loan.[2] In June 2016, the Flemings and Jessica entered a written settlement agreement, with Jessica agreeing to pay, as relevant here, what they characterized as $50,000.00 in principal and $110,567.76 in interest on the loan. The Flemings and Jessica subsequently signed a written addendum, amending their settlement agreement to provide that if the court were to conclude that interest was not awardable on the loan, the Flemings would refund the interest portion of the settlement amount.

¶6 Glen filed an answer asserting that the Flemings' suit was barred by the statute of limitations. He also included a cross-claim against Jessica seeking indemnity for her half of the loan and a counterclaim against the Flemings related to the promissory note on the Terravita House. After granting the Flemings' motion for summary judgment on Glen's counterclaim, the superior court conducted a two-day bench trial, addressing the Flemings' claim for breach of contract and interest on the loan, Glen's statute of limitations defense, and Glen's cross-claim against Jessica. The superior court found that the loan was payable on demand and that demand was made in April 2015, that Glen breached by failing to repay the loan following the demand, that Glen was not entitled to any credit for principal paid by Jessica, and that the Flemings were entitled to $50,000—the amount of unpaid principal. The court also ruled that Glen was not entitled to relief on his cross-claim against Jessica. The court declined to award interest to the Flemings, concluding that the parties had not agreed that the loan would bear interest. Additionally, the court declined to award the Flemings attorney's fees.

¶7 The Flemings moved for a new trial regarding the denial of their claim for interest and the denial of their request for attorney's fees under A.R.S. § 12-341.01. The court clarified that the Flemings were awarded taxable costs, but otherwise denied the Flemings' motions. In

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[2] The Flemings also brought a claim against Glen regarding a different loan, but the parties settled that dispute.

September 2017, the court entered final judgment in favor of the Flemings for $50,000 and in favor of Jessica on Glen's cross-claim.

¶8 The Flemings timely appealed, and Glen timely cross-appealed. We have jurisdiction under A.R.S. § 12-2101(A)(1), (5)(a).

DISCUSSION

¶9 Both sides challenge multiple facets of the superior court's judgment.[3] First, Glen argues the court erred by rejecting his statute of limitations defense. Second, both sides dispute the court's conclusion as to the amount Glen owed on the loan: the Flemings assert that the court wrongfully failed to include interest in addition to the $50,000 principal amount, while Glen asserts that the court erroneously declined to credit him for interest on the Terravita House promissory note and for Jessica's overpayment of her share of the debt. Third, the Flemings challenge the court's denial of their request for attorney's fees. And finally, the Flemings contend the court erred by denying their motions for new trial. We address each contention in turn.

I. Statute of Limitations.

¶10 Glen argues that the superior court erred by rejecting his claim that the Flemings' lawsuit was barred by the three-year statute of limitations under A.R.S. § 12-543(1). Relying on *In re Estate of Musgrove*, 144 Ariz. 168, 171 (App. 1985), Glen asserts that because the oral loan was payable on demand, the three-year statute of limitations commenced when the loan was made in May 2007, meaning the Flemings' July 2015 complaint was time barred.

¶11 In *Musgrove*, this court applied the standard rule for accrual of a cause of action on a true demand obligation—"the statute of limitations commences to run at once"—to accrual of a cause of action on an oral loan that is silent about the time for repayment, holding that the statute of limitations commences when the oral agreement is made. *Id.* But the court further noted that the immediate-accrual rule "would, of course, not be applicable where the parties expressly contract that demand is a condition precedent." *Id.*

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[3] Preliminarily, the Flemings argue that Glen's cross-appeal is deficient because his brief failed to include a specific statement of issues as required by ARCAP 13(g). But Glen's brief clearly delineated and outlined his claims of error, so we decline to disregard his cross-appeal.

¶12 The Arizona Supreme Court has held that, if the terms of the agreement or the surrounding circumstances disclose the parties' intention that the obligation would *not* become due and payable immediately, actual demand (or satisfaction of some other express condition precedent) is required to mature the obligation and trigger the statute of limitation. *Peterson v. Valley Nat'l Bank of Phx.*, 102 Ariz. 434, 439 (1967). And here, undisputed evidence showed that the parties to this intrafamilial loan agreed that the Tanners "would repay the [loan] over time, or if not sooner paid, upon [Hayden Fleming's] demand." Moreover, the Tanners in fact made significant payments "over time," repaying $700,000 (87.5% of the principal) over the next six years. Given these undisputed terms and in light of the parties' subsequent course of conduct, the superior court did not abuse its discretion by concluding that the parties did not intend the loan to be due and payable immediately when made and instead contemplated a future demand for payment to trigger the legal obligation. *See Town of Marana v. Pima County*, 230 Ariz. 142, 152, ¶ 46 (App. 2012) (noting the deference owed to the superior court's factual findings after a bench trial); *see also Peterson*, 102 Ariz. at 439. The Flemings made such a demand for complete payment in April 2015, and they brought suit just a few months later, well within the three-year limitations period for an action on an oral debt. *See* A.R.S. § 12-543(1). Accordingly, we uphold the superior court's rejection of Glen's statute of limitations defense.

II. Amount Owed on the Loan.

A. Interest.

1. As an Implied Term of the Loan Agreement.

¶13 The Flemings argue that the superior court erred by failing to award interest on the loan. They assert in particular that the court failed to correctly interpret A.R.S. § 44-1201(A) in analyzing whether interest should accrue on the oral loan. We review this question of law de novo, but we defer to the superior court's findings of fact unless clearly erroneous. *Enter. Leasing Co. of Phx. v. Ehmke*, 197 Ariz. 144, 148, ¶ 11 (App. 1999); *see also Hall v. Elected Officials' Ret. Plan*, 241 Ariz. 33, 46, ¶ 38 (2016).

¶14 Section 44-1201(A) establishes a default 10% interest rate on "any loan, indebtedness or other obligation":

> Interest on any loan, indebtedness or other obligation shall be at the rate of ten per cent per annum, unless a different rate is contracted for in writing, in which event any rate of interest may be agreed to. . . .

¶15 The superior court found that the parties never agreed to an interest rate, and the court thus declined to revise the parties' oral contract to include unbargained-for interest. The court concluded that § 44-1201(A) only applies to agreements that contemplate interest but do not reference a specific *rate* of interest.

¶16 The Flemings argue that "any loan" in § 44-1201(A) means *all* loans, and the statute thus mandates a 10% yearly interest rate regardless whether the parties discussed interest at all. But the Flemings do not dispute that they and the Tanners did not discuss accrual of interest at the time of the agreement, and in accepting payments on the loan, they never demanded interest or otherwise suggested that any interest was required under the terms of the oral agreement. Because the parties apparently did not contemplate that any interest would be paid, imposing interest would in effect rewrite the parties' agreement, which the court is not authorized to do. *Isaak v. Mass. Indem. Life Ins.*, 127 Ariz. 581, 584 (1981) ("It is not within the power of this court to 'revise, modify, alter, extend, or remake' a contract to include terms not agreed upon by the parties.") (citations omitted). Moreover, to conclude otherwise would—as the superior court noted—essentially mean that parties are prohibited from entering into oral interest-free loan agreements because they would need a written agreement to establish a rate different than 10%. We decline to construe § 44-1201 as operating to impose interest when the parties have chosen not to require it, and we thus affirm the superior court's denial of interest on the loan itself.

2. Statutory Prejudgment Interest After Demand.

¶17 "[P]rejudgment interest on a liquidated claim is a matter of right." *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 508 (1996); *Fleming v. Pima County*, 141 Ariz. 149, 155 (1984). Glen acknowledges that this rule applies even to an otherwise interest-free loan after demand for payment is made. *See Gemstar*, 185 Ariz. at 509 ("In cases involving unconditional money debts, prejudgment interest accrues from the date the plaintiff makes a demand."); *see also Palmcroft Dev. Co. v. City of Phoenix*, 46 Ariz. 400, 400–01 (1935) (authorizing prejudgment interest at the statutorily defined rate after demand and nonpayment "as damages for the withholding of the money from the creditor after it is due"); *Imperial Litho/Graphics v. M.J. Enters.*, 152 Ariz. 68, 74 (App. 1986) (imposing prejudgment interest at the statutory rate after failure to pay an interest-free debt when due).

¶18 Glen argues that because he disputed the amount owing on the loan, the Flemings' April 2015 claim was not liquidated. But the amount of a claim need not be undisputed for the claim to be liquidated. Instead,

"[a] claim is liquidated if the evidence furnishes data which, *if believed*, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion." *Schade v. Diethrich*, 158 Ariz. 1, 14 (1988) (emphasis added and citations omitted). Accordingly, "mere differences of opinion as to the amount due under a contract" or disputes as to the accuracy or import of underlying facts do not render a claim unliquidated as long as the information provided, *if believed*, permits calculation. *Trus Joist Corp. v. Safeco Ins. Co. of Am.*, 153 Ariz. 95, 109 (App. 1986).

¶19 Glen's dispute regarding offsets notwithstanding, the evidence provided a basis to calculate with certainty the $100,000 that remained owing on the loan. Thus, the claim was liquidated and, although the Flemings were not entitled to interest over the full life of the loan, they were entitled to statutory prejudgment interest from the April 2015 demand until, as described below, the obligation was satisfied in full by Jessica's June 2016 payment. At the statutory rate of 10% per annum, *see* A.R.S. § 44-1201(A), (F), the Flemings were entitled to approximately $11,666.67 in prejudgment interest for the period between demand and payment. As noted below, however, Jessica's June 2016 payment of $160,565.76 still satisfied the obligation in full.

B. Offset for Interest on the Terravita House Promissory Note.

¶20 When Glen transferred title to the Terravita House to the Flemings in 2009, he received a deed of trust with a promissory note in the amount of $360,000, with a specified interest rate of 5%. Structuring the transaction in this manner (as opposed to simply signing over title of the property to the Flemings) was apparently intended to allow Glen to take advantage of favorable tax treatment associated with the sale of a primary residence. When the Flemings sold the Terravita House in 2013, Glen released the deed of trust without making any claim to interest owed on the promissory note.

¶21 Glen argues that the superior court erred by crediting only the $360,000 face value of the note, without 5% interest, as payment on the loan. But he does not dispute that he signed a release renouncing any rights under the deed of trust and acknowledging that the promissory note had been paid in full. That acknowledgment comports with A.R.S. § 47-3604(A)(2), which allows a person to discharge another party's obligation to pay an instrument by renouncing the rights against the party in a signed writing. Thus, any obligation under the promissory note was discharged when Glen signed the release, and the superior court did not err by granting the Flemings summary judgment on this issue.

C. Offset for Jessica's Payment.

¶22 Glen argues that his debt to the Flemings was extinguished because Jessica paid the Flemings $160,565.76, which was more than the $100,000 (plus approximately $11,666.67 in prejudgment interest) that remained owing on the debt.

¶23 Generally, debts incurred during a marriage (like the loan at issue here) are presumed to be community obligations that are intended to benefit the marital community. *Schlaefer v. Fin. Mgmt. Serv., Inc.*, 196 Ariz. 336, 339, ¶ 10 (App. 2000). Community debts not allocated by a divorce decree are apportioned equally between the former spouses. *Fischer v. Sommer*, 160 Ariz. 530, 531 (App. 1989). This allocation, however, only determines the obligations of the spouses with respect to one another; the spouses' creditors are not bound by the allocation. *Id.*; *see also Cmty. Guardian Bank v. Hamlin*, 182 Ariz. 627, 631 (App. 1995). Thus, in relation to third-party creditors, both spouses remain jointly liable for community obligations even after divorce. *Hamlin*, 182 Ariz. at 631. A creditor can seek payment of the entire community debt from either spouse. *Samaritan Health Sys. v. Caldwell*, 191 Ariz. 479, 482, ¶ 8 (App. 1998). If one spouse pays the entire obligation, she may seek contribution from the other spouse for the appropriate portion of the amount paid. *Fischer*, 160 Ariz. at 531.

¶24 Here, Glen contends that because Jessica's payment of $160,565.76 to the Flemings exceeded the balance owed on the loan, he could not be required to pay the Flemings an additional $50,000. The Flemings counter that Glen and Jessica's dissolution decree divided the formerly joint debt, meaning that Jessica's payment only defrayed her $50,000 share of the principal (plus interest on that share), leaving Glen's obligation intact. The Flemings further suggest that no more than $50,000 in principal can be credited as payment on the loan because, in the event the court determined no interest was owed, the Flemings agreed in the addendum to the settlement agreement to refund any overpayment to Jessica.

¶25 Because Jessica and Glen acquired the debt during their marriage, it is a community debt for which each of them remained jointly liable as against third-party creditors, regardless of allocation in the dissolution decree. *See Schlaefer*, 196 Ariz. at 339, ¶ 10; *Hamlin*, 182 Ariz. at 631. Thus, because the remaining debt on the loan was $100,000 (plus approximately $11,666.67 in prejudgment interest), Jessica's settlement payment of $160,565.76 more than satisfied the obligation. The Flemings, as creditors, apparently intended the debt to be split evenly between Jessica

and Glen. Given that Glen was not a party to the agreement that clarified this intention, the Flemings' expectation does not change the fact that Jessica paid the entirety of the obligation. Accordingly, although Jessica may have a contribution claim against Glen for his share of the community obligation, *see Hamlin*, 182 Ariz. at 631, the Flemings have already been made whole and thus do not have a claim against Glen. Therefore, we reverse the superior court's contrary ruling and vacate the portion of the judgment directing Glen to pay the Flemings $50,000.

III. Attorney's Fees.

¶26 The Flemings challenge the superior court's denial of their request for attorney's fees under A.R.S. § 12-341.01. We review this ruling for an abuse of discretion. *See Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 571 (1985).

¶27 Section 12-341.01 authorizes a discretionary award of attorney's fees to the successful party in an action arising out of contract. But here, the Flemings did not prevail on all of their claims in the first instance, and we have now vacated the $50,000 judgment in their favor. Accordingly, they have not established a basis for reversing the superior court's denial of their fee request. *See id.* at 570.

IV. Motions for New Trial.

¶28 The Flemings also argue that the superior court abused its discretion by denying their motions for new trial on the issues of interest and attorney's fees. We review the denial of a motion for new trial for an abuse of discretion. *First Fin. Bank v. Claassen*, 238 Ariz. 160, 162, ¶ 8 (App. 2015). Because we have affirmed the superior court's rulings denying interest and attorney's fees, we likewise conclude that the court did not abuse its discretion by denying the Flemings' request for a new trial on those same bases.

V. Attorney's Fees on Appeal.

¶29 Both parties request an award of attorney's fees on appeal pursuant to A.R.S. § 12-341.01. Because neither party has entirely prevailed, and in an exercise of our discretion, we deny both parties' requests for attorney's fees. Glen is entitled to his costs on appeal under A.R.S. § 12-342 upon compliance with ARCAP 21.

CONCLUSION

¶30 Based on the foregoing, we vacate the portion of the superior court's judgment awarding the Flemings $50,000 from Glen. We affirm in all other respects.

AMY M. WOOD • Clerk of the Court
FILED: AA