

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAR 19 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

RS SONGBIRD, LLC, a limited liability )  
company; RICHARD DARATONY and )  
STEFANIE DARATONY, husband and wife, )  
Appellants, )

v. )

SONGBIRD 5 LENDER, LLC, a limited )  
liability company, )  
Appellee, )

---

RS SONGBIRD, LLC, a limited liability )  
company, )  
Appellant, )

v. )

FIDELITY NATIONAL TITLE AGENCY, )  
INC., a corporation; TICOR TITLE AGENCY )  
OF ARIZONA, INC., a corporation; )  
HUMARA GROUP INCORPORATED, a )  
corporation; CHUWENG FAMILY )  
HOLDINGS, LLC, a corporation; )  
SONGBIRD 5 LENDER, LLC, a limited )  
liability company, )  
Appellees. )

---

ANDRADA MARKETING, LLC, a limited )  
liability company, )  
Appellant, )

2 CA-CV 2011-0059

2 CA-CV 2011-0111

(Consolidated)

DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 28, Rules of Civil

Appellate Procedure

v. )  
)  
FIDELITY NATIONAL TITLE AGENCY, )  
INC.; HUMARA GROUP INCORPORATED;) )  
CHUWENG FAMILY HOLDINGS, LLC, )  
)  
Appellees. )

---

ANDRADA FINANCING, LLC, a limited )  
liability company, )  
)  
Appellant, )

v. )  
)  
FIDELITY NATIONAL TITLE AGENCY, )  
INC.; HUMARA GROUP INCORPORATED;) )  
CHUWENG FAMILY HOLDINGS, LLC, )  
)  
Appellees. )

---

HUMARA GROUP INCORPORATED, )  
CHUWENG FAMILY HOLDINGS, LLC, )  
)  
Appellees, )

v. )  
)  
RICHARD DARATONY and )  
STEFANIE DARATONY, husband and wife; )  
ANDRADA FINANCING, LLC, )  
)  
Appellants. )

---

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. C20090464, C20090480, C20090482, and C20092613

Honorable Richard Gordon, Judge  
Honorable Michael O. Miller, Judge  
Honorable Scott Rash, Judge

AFFIRMED

---

Goldstein, Horner & Horner  
By H. Lee Horner, Jr.

Cortaro  
Attorneys for Appellants

Lewis and Roca LLP  
By Robert H. McKirgan, Kimberly A. Demarchi,  
and William G. Voit

Phoenix  
Attorneys for Appellee  
Songbird 5 Lender, LLC

Gust Rosenfeld, P.L.C.  
By Mark L. Collins and Robert M. Savage

Tucson  
Attorneys for Appellees  
Fidelity National Title Agency, Inc.,  
Ticor Title Agency of Arizona, Inc.,  
Humara Group Incorporated,  
ChuWeng Family Holdings, LLC

---

K E L L Y, Judge.

¶1 Appellants Richard and Stefanie Daratony, and their wholly-owned limited liability companies (“LLC”) Andrada Financing (“Financing”), Andrada Marketing (“Marketing”), and RS Songbird, appeal from two grants of summary judgment and a post-trial judgment against them. The Daratonys also appeal the denial of their request for attorney fees. Appellants raise numerous claims of error. For the following reasons, we affirm.

## Background

¶2 “We view the facts and the inferences to be drawn from those facts in the light most favorable to the party against whom [summary] judgment was entered.” *Mousa v. Saba*, 222 Ariz. 581, ¶ 15, 218 P.3d 1038, 1042 (App. 2009). But for claims resolved at trial, we view the facts in the light most favorable to upholding the ruling of the trier of fact. *See Styles v. Ceranski*, 185 Ariz. 448, 450, 916 P.2d 1164, 1166 (App. 1996). The Daratonys owned several companies including Financing, Marketing and RS Songbird, which they used in their real estate development business. These consolidated appeals arise out of two loan transactions between the Daratonys and their companies, and two sets of appellees—Songbird 5, LLC, in one of the transactions, and Fidelity National Title Agency, Inc. (“Fidelity”), Ticor Title Agency of Arizona, Inc. (“Ticor”), Humara Group Incorporated, and Chuweng Family Holdings, LLC, in the other.

### Songbird Loan

¶3 In February 2007, Songbird 5 entered into a loan agreement with RS Songbird whereby Songbird 5 loaned \$2,200,000 to RS Songbird to develop real estate. The loan was secured by the property and personally guaranteed by the Daratonys. Songbird 5 and RS Songbird subsequently entered into a loan modification agreement, which provided that the remainder<sup>1</sup> of the loan proceeds would be distributed in five separate “draws” dependent upon RS Songbird’s progress in developing the properties.

---

<sup>1</sup>At the time of the loan modification agreement, \$185,796 remained to be disbursed.

The agreement provided that Safe Harbor Funding, LLC (“Safe Harbor”), would inspect the properties and verify performance of the required work before the funds would be disbursed. RS Songbird defaulted under the agreement, and Songbird 5 sold the property at a trustee’s sale for \$1,000,000. At the time of the trustee’s sale the balance due under the loan was more than two million dollars. RS Songbird filed a complaint against Songbird 5, arguing that it breached the contract by failing to disburse the remaining draws. Songbird 5 counterclaimed against RS Songbird for breach of contract and for a deficiency judgment. Songbird 5 later filed a cross-claim against the Daratonys personally for breach of guaranty.

¶4 The trial court granted summary judgment for Songbird 5 on the breach of contract claim. Finding that the cross-claim on the personal guaranty was time-barred, the court granted summary judgment for the Daratonys. They then sought attorney fees for their defense of the cross-claim, but the court denied the request. RS Songbird timely appealed the grant of summary judgment in favor of Songbird 5 and the Daratonys timely appealed the denial of their request for attorney fees.

#### Humara Loan

¶5 In June 2007, Financing entered into a loan agreement with Humara Group Incorporated, and Chuweng Family Holdings, LLC (collectively “Humara”). This \$815,000 loan was secured by several parcels of land. Financing later defaulted on the loan, and at a trustee’s sale, Humara acquired several of the parcels that had been used as collateral for the loan.

¶6 In a series of lawsuits, the Daratonys' companies sued Ticor for fraud and breach of fiduciary duty, Fidelity for aiding and abetting Ticor in both the fraud and the breach, and Humara for fraudulent inducement and wrongful disclosure. Seeking a deficiency judgment, Humara countersued Financing and the Daratonys, as personal guarantors. These lawsuits later were consolidated. The trial court granted partial summary judgment in favor of Humara on the fraudulent inducement claim. Following a bench trial, the court found in favor of the defendants on all remaining claims and awarded them attorney fees. Appellants timely appealed these rulings.

## **Discussion**

### **Summary Judgments**

¶7 RS Songbird and Financing challenge both of the trial court's rulings granting summary judgment against them. We review de novo a grant of summary judgment. *Valder Law Offices v. Keenan Law Firm*, 212 Ariz. 244, ¶ 14, 129 P.3d 966, 971 (App. 2006). In reviewing the court's decision, we determine whether there is a "genuine issue as to any material fact and [whether] the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). Summary judgment is appropriate if the moving party demonstrates that "no evidence exist[s] to support an essential element of the claim." *Orme Sch. v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990). And, "[i]f the party with the burden of proof on the claim or defense cannot respond to the motion by showing that there is evidence creating a genuine issue of fact on the element in question, then the motion for summary judgment should be granted."

*Id.*; *see also* Ariz. R. Civ. P. 56(e) (adverse party’s response “must set forth specific facts showing that there is a genuine issue for trial”).

### Breach of Contract

¶8 Arguing there were disputed facts, RS Songbird asserts the trial court erred in granting summary judgment in favor of Songbird 5 on the breach of contract claim. The court’s ruling stated the “undisputed record” showed that RS Songbird did not fully complete the construction required by the loan modification agreement and therefore Songbird 5 was not obligated to disburse the funds associated with a draw. RS Songbird does not contest that the loan modification agreement required full performance, nor does it dispute that it did not fully perform as required by the agreement. Instead, it asserts the court did not consider its argument that it had formed an oral agreement with Safe Harbor to revise its contractual obligations, and that summary judgment therefore was improper.

¶9 Contrary to RS Songbird’s claim, the trial court did consider its argument that it had reached an oral agreement with Safe Harbor. But, the court concluded that any factual dispute as to this issue was not material because the “Modification Agreement unambiguously forbids any informal side agreement and . . . RS Songbird—without dispute—knew any such deal was strictly prohibited.”<sup>2</sup>

---

<sup>2</sup>RS Songbird claims, without citation to authority, that the trial court applied the parol evidence rule “as justification to preclude [evidence regarding] formation of a subsequent oral modification of the agreement.” RS Songbird has not developed this argument, and it is therefore waived. *See* Ariz. R. Civ. App. P. 13(a)(6) (“An argument . . . shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record

¶10 The trial court’s conclusion is supported by the record. The integration clause on the signature page of the loan modification agreement provided that the agreement “may not be changed, modified, or rescinded except in writing, signed by all the parties, and any attempt at oral modification . . . shall be void and of no effect.” As the court found, the clause is clear and unambiguous. And, Richard Daratony acknowledged he had read the clause at the time he signed the document on behalf of RS Songbird and understood that the agreement “could not be changed, except in writing, signed by the parties.” Because the parties clearly intended to prohibit oral modifications of the agreement, the court correctly concluded that the disputed facts regarding an oral agreement were not material and therefore would not prevent a grant of summary judgment.<sup>3</sup> See Ariz. R. Civ. P. 56(c)(1); *Orme Sch.*, 166 Ariz. at 310, 802 P.2d at 1009.

¶11 RS Songbird next asserts the trial court erred in granting summary judgment because there were facts in dispute as to whether Songbird 5 was “estopped

---

relied on.”); *Polanco v. Indus. Comm’n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393-94 n.2 (App. 2007) (appellant’s failure to develop and support argument waives issue on appeal). And, even assuming waiver did not apply, there is no indication the court applied the parol evidence rule, nor that it precluded any evidence.

<sup>3</sup>RS Songbird also asserts the trial court erred in holding that a contract containing a prohibition against oral modification cannot be modified orally as a matter of law. But, no such holding is present in the court’s ruling. Rather, as discussed, the court concluded that, by the plain language of this particular agreement, the parties intended to prohibit oral amendments. And, although RS Songbird asserts that a party “may make oral modifications [to a contract] anyway as a matter of law,” neither of the cases it cites in support involved a contract with a clause prohibiting oral modification. See *Coronado Co. v. Jacome’s Dep’t Store, Inc.*, 129 Ariz. 137, 629 P.2d 553 (App. 1981); *O’Malley Inv. and Realty Co. v. Trimble*, 5 Ariz. App. 10, 422 P.2d 740 (1967).

from raising the ‘writings only’ defense.” But as the court correctly noted, RS Songbird did not specifically plead its estoppel argument, as required. *See Contempo Constr. Co. v. Mountain States Tel. & Tel. Co.*, 153 Ariz. 279, 282, 736 P.2d 13, 16 (App. 1987) (“The general rule is that estoppel must be specifically pleaded or else it is waived.”). Rather, RS Songbird first raised the argument in a motion filed over a year after the amended complaint. The court found it came “far too late” in the proceedings to be fairly considered. Because the estoppel argument was not timely presented to the court, it is waived on appeal. *See Cont’l Lighting & Contracting, Inc. v. Premier Grading & Utils., LLC*, 227 Ariz. 382, ¶ 12, 258 P.3d 200, 204 (App. 2011) (argument waived on appeal unless timely presented to trial court in manner allowing issue to be addressed on merits). Consequently, the court did not err in granting summary judgment on the breach of contract claim.<sup>4</sup>

### Fraudulent Inducement

¶12 Financing argues the trial court erred in granting summary judgment in favor of Humara on the fraudulent inducement claim,<sup>5</sup> asserting “[t]here is no evidence in

---

<sup>4</sup>RS Songbird also asserts summary judgment was inappropriate because it had “full[y] perform[ed] . . . the orally modified agreement.” But, because RS Songbird did not present this argument to the trial court, it is waived. *See City of Tempe v. Fleming*, 168 Ariz. 454, 456, 815 P.2d 1, 3 (App. 1991) (“arguments not made at the trial court cannot be asserted on appeal”); *Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) (requiring party to make specific objection in trial court gives court opportunity to rule before appellant claims error in this court).

<sup>5</sup>Humara sought summary judgment on Financing’s fraudulent inducement and wrongful foreclosure claims. Although Financing does not specify, we assume its

the record supporting . . . the court’s summary finding that [Humara] was entitled to [a particular] property as collateral for the \$815[,000] loan.” But, the court made no such finding in its ruling. Indeed, it declined to grant summary judgment on the wrongful foreclosure claim, specifically noting there were genuine issues of material fact as to whether the property was intended to be collateral for the loan. Financing does not otherwise challenge the court’s grant of summary judgment, nor does it explain how its assertion regarding collateral for the loan is relevant to the fraudulent inducement claim.<sup>6</sup> Therefore, the argument is waived. *See Polanco v. Indus. Comm’n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393-94 n.2 (App. 2007).

### **Trial Claims**

¶13 Appellants argue “fiduciary misconduct damages should have been awarded against Fidelity, the escrow agent.” They assert Fidelity breached its fiduciary duty by not informing the parties that each had different ideas about the loan that was to be made. But appellants do not explain how the trial court erred in its rulings,<sup>7</sup> and,

---

argument on appeal pertains to the fraudulent inducement claim—the only claim for which the court granted summary judgment against it.

<sup>6</sup>The trial court granted summary judgment on the basis that, even assuming Humara had made an oral promise to loan additional funds, Financing could not demonstrate it was entitled to rely on such a promise. *See Dawson v. Withycombe*, 216 Ariz. 84, ¶ 34, 163 P.3d 1034, 1048 (App. 2007) (“Mere reliance is not enough to support a claim for fraud”; claimant must also show that it “had the right to rely upon the representations.”).

<sup>7</sup>In passing, appellants assert the trial court erred by “disagree[ing] with the notion that an escrow agent in Arizona has a fiduciary duty to the parties to the escrow, notwithstanding” our supreme court’s decision in *Burkons v. Ticor Title Insurance of*

because they have not included sufficient citation to the record or legal authority to support their assertions, they have failed to properly develop and support their arguments. Therefore, these arguments are waived. *See* Ariz. R. Civ. App. P. 13(a)(6); *Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393-94 n.2.

### **Attorney Fees**

¶14 The Daratonys argue they were the prevailing party as to Songbird 5’s cross-claim against them on the personal guaranty and therefore the trial court erred by not awarding them attorney fees pursuant to A.R.S. § 12-341.01(A).<sup>8</sup> We review the court’s decision to deny attorney fees under § 12-341.01(A) for an abuse of discretion. *Rowland v. Great States Ins. Co.*, 199 Ariz. 577, ¶ 31, 20 P.3d 1158, 1168 (App. 2001). We will not disturb the court’s ruling if it is supported by any reasonable basis, and we view the record in the light most favorable to sustaining the ruling. *Id.*

¶15 Section 12-341.01(A) provides that in a “contested action arising out of a contract . . . the court may award the successful party reasonable attorney fees.” “The

---

*California*, 168 Ariz. 345, 353, 813 P.2d 710, 718 (1991). But, as appellees note, appellants’ interpretation of the court’s statement is taken out of context. The court recognized, and appellees concede, that the escrow agent owes a fiduciary duty to all parties to the escrow.

<sup>8</sup>Songbird 5 argues the request for attorney fees was not submitted to the trial court within the time required by Rule 54(g)(2), Ariz. R. Civ. P. Because Songbird 5 did not raise this argument below it is waived. *See City of Tempe*, 168 Ariz. at 456, 815 P.2d at 3. Moreover, Rule 54(g)(2) is not jurisdictional, and the court has discretion to address an untimely fee application. *See Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, ¶ 60, 224 P.3d 960, 976 (App. 2010) (Rule “54(g)(2) gives the trial court discretion to extend the time for requesting attorneys’ fees, and the party seeking the fees need not request an extension prior to untimely filing its claim.”).

trial court possesses discretion to determine who is the successful party in multiple-party litigation and in cases where there are multiple-parties as well as multiple-claims.” *Schwartz v. Farmers Ins. Co. of Ariz.*, 166 Ariz. 33, 38, 800 P.2d 20, 25 (App. 1990). In order to determine which party is the successful party for this purpose, “[t]he trial court may rightfully utilize a ‘percentage of success factor’ or a ‘totality of the litigation’ test.” *Id.* We will not disturb a trial court’s exercise of discretion in awarding attorney fees if there is any reasonable basis for its ruling. *Id.*

¶16 Granting Songbird 5’s request for attorney fees, the trial court stated the following: “Considering all aspects of the litigation, the Court in its discretion finds that Lender is the prevailing party under A.R.S. § 12-341.01(A).” The court added that in its discretion, it determined “an award of attorneys’ fees to the Daratonys was not warranted.” Based on its finding that it had “[c]onsider[ed] all aspects of the litigation” in determining Songbird 5 was the prevailing party, we infer the court utilized a ‘totality of the litigation test’ in concluding Songbird 5 was the successful party for purposes of § 12-341.01(A).<sup>9</sup>

¶17 The Daratonys argue the trial court erred by denying their request for fees because “the legal effect was to make [them] personally liable for [RS Songbird]’s attorneys fees” and impermissibly make them “liable for the debts of the LLC.” Because

---

<sup>9</sup>Among the circumstances the trial court apparently considered in determining that Songbird 5 was the successful party was the fact that the Daratonys owned one-hundred percent of RS Songbird. In addition, RS Songbird and the Daratonys were represented by the same attorney below, suggesting they shared a common interest in the litigation.

RS Songbird is a separate legal entity, we agree the Daratonys are not responsible for the debts of the LLC. The Daratonys suggest the court essentially made them liable for Songbird 5's fees because it applied the fees they had incurred to defend the cross-claim as an offset against the fees it awarded to Songbird 5. They are mistaken. The court reduced the fees it awarded to Songbird 5 by the amount of fees Songbird 5 had incurred in connection with its cross-claim against the Daratonys—not the Daratonys' fees in defending that action. It did so because Songbird 5 was unsuccessful in its cross-claim on the Daratonys' personal guaranty. Had the court intended to use a fee award to the Daratonys to reduce its fee award to Songbird 5, it first would have been required to award fees to the Daratonys, which it declined to do.<sup>10</sup>

¶18 We conclude the trial court reasonably applied the “totality of the litigation” test under the circumstances of this case. *See id.* The court therefore did not abuse its discretion in determining that Songbird 5 was the successful party in this lawsuit.

¶19 Songbird 5 requests an award of attorney fees on appeal pursuant to § 12-341.01(A). Because Songbird 5 is a successful party on appeal, in our discretion we grant reasonable attorney fees contingent on Songbird 5's compliance with Rule 21, Ariz. R. Civ. App. P.

---

<sup>10</sup>Although the Daratonys now claim the trial court should have considered their cross-claim independently in determining the successful party, they argued below that the court should consider the claim and cross-claim together and find Songbird 5 was not the successful party.

**Disposition**

¶20 The trial court's rulings are affirmed.

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge