

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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GREGORY BEST,  
*Plaintiff/Appellant,*

*v.*

CITY OF PHOENIX,  
*Defendant/Appellee.*

No. 2 CA-CV 2014-0153  
Filed March 20, 2015

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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NOT FOR PUBLICATION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).

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Appeal from the Superior Court in Maricopa County  
No. CV2012-011437  
The Honorable Douglas Gerlach, Judge

**AFFIRMED**

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COUNSEL

Gregory Best, Phoenix  
*In Propria Persona*

Berke Law Firm, PLLC, Phoenix  
By Lori V. Berke and Jody C. Corbett  
*Counsel for Defendant/Appellee*

BEST v. CITY OF PHOENIX  
Decision of the Court

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**MEMORANDUM DECISION**

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

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ESPINOSA, Judge:

¶1 Gregory Best appeals from the trial court's judgment entered in favor of the City of Phoenix (the City) after granting its motion to dismiss. We conclude the trial court properly granted the City's motion because Best's complaint failed to state a claim upon which relief could be granted, and we therefore affirm.

**Factual and Procedural Background**

¶2 In 2006, the state filed a lawsuit against Best for alleged violations of the Arizona Consumer Fraud Act and the Arizona Racketeering Act,<sup>1</sup> arising out of several real estate transactions during 2003 and 2004. In June 2010, Best and the state agreed to settle the lawsuit pursuant to a stipulated judgment, which included a provision that it was "not intended to have any affect [sic] on any litigation or dispute other than th[at] case."

¶3 In 2011, Best filed a lawsuit against the state, the City, and others for wrongful institution of the 2006 lawsuit. In his complaint, Best claimed the 2006 lawsuit "terminated in [his] favor." The defendants in that action filed a joint motion to dismiss for failure to state a claim, arguing Best could not succeed on his claim for wrongful institution of civil proceedings because it required him to prove he was successful in a previous lawsuit, and the 2006 lawsuit was "terminated because the parties agreed to a Stipulated Judgment." A copy of that judgment was attached to the motion. In response, Best argued the stipulated judgment was a termination in his favor. After reviewing the terms of that judgment, the trial court concluded that the 2006 lawsuit did not terminate in Best's favor

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<sup>1</sup>The City was not a party to the 2006 lawsuit.

BEST v. CITY OF PHOENIX  
Decision of the Court

and, therefore, his complaint failed to state a claim upon which relief could be granted. Best appealed and this court affirmed the dismissal of his claim. *Best v. State ex rel. Horne*, No. 1 CA-CV 12-0145 (memorandum decision filed Apr. 16, 2013).

¶4 In August 2012, Best filed this civil action against the City and other defendants<sup>2</sup> for tortious interference with a contract, aiding and abetting tortious conduct, breach of contract, and fraud. Best's claims all arose out of the City's alleged improper use of the stipulated judgment in seeking dismissal of the 2011 lawsuit. In lieu of an answer, the City filed a motion to dismiss pursuant to Rule 12(b)(6), Ariz. R. Civ. P., arguing that Best's claims were barred by judicial privilege and *res judicata*, and that his complaint otherwise failed to state a claim upon which relief could be granted. With its motion, the City attached a copy of the stipulated judgment and copies of the pertinent motions and rulings from the 2011 lawsuit.

¶5 After oral argument, the trial court granted the City's motion. In its under advisement ruling, the court found: (1) Best's complaint failed to allege "a causal connection between the purportedly improper 'use' of the stipulated judgment and a compensable injury"; (2) Best, not the City, "put the stipulated judgment in issue in the 2011 lawsuit," and the City "had an unqualified right to prove that allegation false by asking the Court to analyze the outcome . . . by looking at the stipulated judgment"; (3) by "no reasonable interpretation" of the stipulated judgment's terms "[wa]s a party precluded from asking a court to look at [it] in another case"; and (4) Best was barred as a matter of law from pursuing his "misuse argument" because he had failed to argue in the 2011 lawsuit that "use of the stipulated judgment . . . was improper." The court also imposed attorney fees against Best pursuant to Rule 11(a), Ariz. R. Civ. P., as a sanction for filing the lawsuit, which the court characterized as "baseless litigation." Best

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<sup>2</sup>The complaint also named the state, its attorneys, and several of its employees and the City's attorneys, none of whom are subject to this appeal.

BEST v. CITY OF PHOENIX  
Decision of the Court

timely appealed,<sup>3</sup> and we have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

**Discussion**

¶6 Best argues the trial court erred in granting the City's motion to dismiss because his "complaint spelled out clear causes of action which if proven would entitle [him] to relief." He also asserts the court "erred by failing to recognize and enforce the stipulated judgment,"<sup>4</sup> and "by dismissing [the City] based on . . . personal speculation of how [he] could prevail in a non[-]adjudicated separate case."

¶7 In deciding a motion to dismiss for failure to state a claim, a court must determine whether the complaint, construed in the light most favorable to the plaintiff, adequately sets forth a valid claim. *Aldabbagh v. Ariz. Dep't of Liquor Licenses & Control*, 162 Ariz. 415, 417-18, 783 P.2d 1207, 1209-10 (App. 1989). If "matters outside the pleading" are presented, the motion must be treated as one for

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<sup>3</sup>Though Best filed his notice of appeal prematurely before the trial court entered its final judgment, the appeal is nevertheless valid because the court had resolved all substantive issues before the notice was filed. *See Craig v. Craig*, 227 Ariz. 105, ¶ 13, 253 P.3d 624, 626 (2011) (notice of appeal filed in absence of final judgment not ineffective if no decision of court could change and only remaining task is ministerial). Here, the court stated it had "resolved all substantive issues prior to [Best] filing the notice," "the December 9, 2013[,] judgment merely reiterated the court's previous rulings," and the "motion to stay did not affect any of the underlying orders."

<sup>4</sup>Best fails to develop his argument that the trial court "fail[ed] to recognize and enforce the stipulated judgment." *Cf. Ritchie v. Krasner*, 221 Ariz. 288, 305, 211 P.3d 1272, 1289 (App. 2009) (opening briefs must present and address significant arguments, supported by authority setting forth appellant's position). We therefore deem the argument waived and do not address it. *See Ariz. R. Civ. App. P. 13(a)(6)* (each contention on appeal shall include citations to authorities, statutes, and parts of record relied on).

BEST v. CITY OF PHOENIX  
Decision of the Court

summary judgment, Ariz. R. Civ. P. 12(b), except a complaint's exhibits, public records regarding matters in a complaint, and documents central to plaintiff's claim are not "outside the pleading," and courts may consider such documents without converting a Rule 12(b)(6) motion into one for summary judgment. See *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, ¶ 7, 246 P.3d 938, 940 (App. 2010) (document attached to Rule 12(b) motion that is central to plaintiff's claim does not convert it to summary judgment motion); *Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, ¶ 13, 226 P.3d 1046, 1050 (App. 2010) (Rule 12(b)(6) motion that presents public record document need not be treated as motion for summary judgment).

¶8 We review de novo a trial court's dismissal of a complaint for failure to state a claim. See *Coleman v. City of Mesa*, 230 Ariz. 352, ¶ 7, 284 P.3d 863, 866 (2012). "In doing so, we look only to the complaint, assuming the truth of all well-pled factual allegations and indulging all reasonable inferences" in the plaintiff's favor.<sup>5</sup> See *Sw. Non-Profit Hous. Corp. v. Nowak*, 234 Ariz. 387, ¶ 10, 322 P.3d 204, 207 (App. 2014). But we will uphold a dismissal when it is certain the plaintiff could not prove any set of facts entitling him to relief. *Wallace v. Casa Grande Union High Sch. Dist. No. 82 Bd. of Governors*, 184 Ariz. 419, 424, 909 P.2d 486, 491 (App. 1995).

¶9 Best's complaint alleged generally that the City "induced and/or cooperated with the state to intentionally breach the Stipulated Judgment," with the "goal . . . to use that breach to prevent [him from] proceed[ing] in [his 2011 lawsuit], directly contradicting the [judgment]'s terms." Best also alleged he "ha[d] suffered as a result of the state and city breaking the [stipulated judgment]." Central to each of Best's claims against the City is the alleged breach of the stipulated judgment's terms. Therefore, if the act of presenting it to the court in the 2011 lawsuit did not breach its terms, Best's complaint necessarily fails because it alleged no other

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<sup>5</sup>In our review, we also consider the language within the stipulated judgment, as it is intrinsic to Best's complaint. See *Belen Loan Investors, LLC v. Bradley*, 231 Ariz. 448, n.8, 296 P.3d 984, 991 n.8 (App. 2012).

BEST v. CITY OF PHOENIX  
Decision of the Court

wrongdoing. In essence, without the breach, each of Best's claims lacks its foundational premise.<sup>6</sup>

¶10 Best argues the stipulated judgment "provide[s] it would not be used to affect any other case," and by "join[ing] and permitt[ing] the City to use it to affect [the 2011 lawsuit]," the state breached the contract. He also asserts that the judgment "stated it was not to be used as evidence," and the "State and City's Joint Motion to Dismiss . . . [wa]s an intentional breach of the [stipulated judgment]'s specified provisions and documented intentions." The portions of the stipulated judgment Best relies upon read as follows:

4. The State of Arizona and Best agree that this Stipulated Judgment does not constitute an adjudication, evidence, or an admission by either party regarding any issue of fact or law with respect to the State of Arizona's claims or Best's defenses to the Second Amended Complaint.

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6. This Stipulated Judgment is entered as a result of a compromise and settlement agreement between the parties. Except with respect to the contracts and properties as provided in paragraph 1 of the Court's

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<sup>6</sup>Count one of the complaint alleged the City committed "tortious interference" by filing the joint motion to dismiss in the 2011 lawsuit "with knowledge of the [stipulated judgment]" "in a manner to induce the state to breach [it]." "Counts 2, 3, [and] 4" were merged into one section alleging "the Defendants . . . breach[ed] the Contract" and the state aided and abetted the City's "tortious interference scheme" by filing the motion to dismiss, which "constitute[d] a fraud against [Best]." It is unclear from the complaint whether Best intended to assert counts two, three, and four against the City, but in reviewing its sufficiency we assume he did.

BEST v. CITY OF PHOENIX  
Decision of the Court

Order, there are no intended third-party beneficiaries of this Stipulated Judgment, and it is not intended to have any affect [sic] on any litigation or dispute other than this case.<sup>7</sup>

¶11 The stipulated judgment also contains the following orders:

1. Terminating all contracts and all enforcement rights to the contracts, titled as “Exclusive Purchase Option Contract,” previously recorded by Gregory Best, which are options to purchase the properties listed in the Attached Appendix One.<sup>8</sup>

2. Nothing in this Order shall prevent . . . Best from proceeding with litigation in the cases set forth in the attached Appendix Two regarding enforcement of the Exclusive Purchase Option Contracts referenced therein.<sup>9</sup>

¶12 The trial court employed general contract interpretation principles in construing the stipulated judgment.<sup>10</sup> *See In re Gen.*

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<sup>7</sup>We refer to this portion of the stipulated judgment as “clause six.”

<sup>8</sup>Appendix One listed seven properties for which Best previously had purchase option contracts.

<sup>9</sup>Appendix Two listed seven separate lawsuits Best had initiated against various defendants.

<sup>10</sup>The trial court properly concluded that summary judgment treatment was unnecessary because the stipulated judgment was central to Best’s claim, *see ELM Ret. Ctr.*, 226 Ariz. 287, ¶ 7, 246 P.3d at 940, and the previous pleadings and motions were matters of

BEST v. CITY OF PHOENIX  
Decision of the Court

*Adjudication of All Rights to Use Water In Gila River Sys. & Source*, 212 Ariz. 64, n.12, 127 P.3d 882, 890 n.12 (2006) (stipulated judgments construed as contracts). In doing so, it determined that the success or failure of Best's complaint "turn[ed] on the [plain meaning] of the word '[e]ffect.'"<sup>11</sup> See *ELM Ret. Ctr.*, 226 Ariz. 287, ¶ 15, 246 P.3d at 941-42 (courts look to plain meaning of words in contract to determine parties' intent); cf. *Chandler Med. Bldg. Partners v. Chandler Dental Grp.*, 175 Ariz. 273, 277, 855 P.2d 787, 791 (App. 1993) (when contract terms are plain and unambiguous, interpretation is question of law for court). After reviewing the stipulated judgment, the court concluded:

[b]y no reasonable interpretation of t[he] word ["effect"] is a party precluded from asking a court to look at the stipulated judgment in another case, and that is even more true when, as here, Best's claim in the 2011 lawsuit could not have succeeded without looking at and interpreting that judgment. Thus, the Complaint fails to allege that the [City] did anything impermissible.

¶13 Viewing the stipulated judgment as a whole, and considering the plain language of its provisions, see *ELM Ret. Ctr.*, 226 Ariz. 287, ¶ 15, 246 P.3d at 941-42, we agree that it does not preclude submission of the judgment as evidence in a separate lawsuit. When the stipulated judgment was entered, Best was

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public record, see *Strategic Dev. & Constr.*, 224 Ariz. 60, ¶ 13, 226 P.3d at 1050.

<sup>11</sup>In its ruling, the court assumed that the use of the word "affect" in clause six was a typographical error. "Given the manner in which the relevant sentence was constructed in the stipulated judgment," the court determined "what was meant was 'effect,' as in X having no effect on Y." The court concluded the "distinction between affect and effect, however, ha[d] no effect on, and d[id] not affect, the outcome here," and we agree.

BEST v. CITY OF PHOENIX  
Decision of the Court

involved in multiple lawsuits with various defendants, seeking to enforce purchase option contracts, and there were several other contracts that Best had yet to litigate. The stipulated judgment specifically “[t]erminat[ed],” and thus “affect[ed],” his right to enforce the contracts listed in Appendix One. The orders contained within the stipulated judgment expressly provided, however, that it did not prevent him from proceeding with cases set forth in Appendix Two. Thus, the reasonable interpretation of clause six, in light of the related orders, is that the stipulated judgment was not intended to affect Best’s ability to proceed with enforcement of any other contract, with the exception of those listed in the stipulated judgment or Appendix One. *See Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, ¶ 9, 218 P.3d 1045, 1050 (App. 2009) (we consider plain meaning of words in context of contract as a whole). But under no reasonable interpretation of that clause can it be concluded that it barred the City, or anyone for that matter, from offering the stipulated judgment in defense of separate litigation brought by Best involving that judgment. *See Chandler Med. Bldg. Partners*, 175 Ariz. at 277, 855 P.2d at 791 (courts apply standard of reasonableness in contract interpretation).

¶14 Nor does the stipulated judgment contain a prohibition against its use “as evidence” in future litigation. Instead, it states that it “does not constitute an adjudication, evidence, or an admission by either party regarding any issue of fact or law with respect to the State[’s] . . . claims or Best’s defenses to the [2006 lawsuit].” Plainly, the stipulated judgment was a compromise and settlement between the parties and, as such, was neutral as to the efficacy of the underlying claims or defenses. We therefore conclude that none of the defendants in the 2011 lawsuit breached the terms of the stipulated judgment by attaching it to their joint motion to dismiss.<sup>12</sup>

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<sup>12</sup>For the sake of clarity, we note that Best’s claim against the City for breach of contract necessarily fails because his complaint does not allege facts that establish the City was a party to the stipulated judgment, *cf. Goodman v. Physical Res. Eng’g, Inc.*, 229 Ariz. 25, ¶ 7, 270 P.3d 852, 855 (App. 2011) (to prevail on breach of

BEST v. CITY OF PHOENIX  
Decision of the Court

¶15 Because no breach of the stipulated judgment occurred in this matter, and in light of the fact that the alleged breach was central to Best’s contract and tort claims, we conclude the trial court did not err in finding that Best failed to state a claim upon which relief could be granted.<sup>13</sup>

**Attorney Fees on Appeal**

¶16 The City requests its attorney fees and costs on appeal<sup>14</sup> pursuant to Rule 25, Ariz. R. Civ. App. P., arguing that “Best’s lawsuit against [it] was frivolous and his appeal of the dismissal of the lawsuit is likewise frivolous.” “The line between an appeal which has no merit and one which is frivolous is very fine, and we exercise our power to punish sparingly.” *Hoffman v. Greenberg*, 159 Ariz. 377, 380, 767 P.2d 725, 728 (App. 1988). Although we cannot agree with Best that his “complaint spelled out clear causes of action which if proven would entitle [him] to relief,” we cannot say it was totally baseless; we therefore decline to award the City its attorney fees. The City is, however, entitled to an award of costs incurred on appeal upon its compliance with Rule 21, Ariz. R. Civ. App. P. See A.R.S. § 12-341 (successful party to civil action shall recover all costs

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contract claim, plaintiff must prove contract with defendant, defendant breached the contract, and plaintiff suffered damages as a result), or that the City was otherwise privy to the judgment, see *Samsel v. Allstate Ins. Co.*, 199 Ariz. 480, ¶ 14, 19 P.3d 621, 625 (App. 2001) (“Generally, privity of contract must exist before one may seek to enforce or defeat the contract.”), *vacated on other grounds by Samsel v. Allstate Ins. Co.*, 204 Ariz. 1, 59 P.3d 281 (2002).

<sup>13</sup>Because we affirm the dismissal of Best’s complaint on this basis, we need not address the complaint’s remaining deficiencies. Nor do we consider Best’s argument that the court “erred by dismissing [the City] based on . . . personal speculation of how [he] could prevail in a . . . separate case,” as that argument challenges a separate basis for the court’s ruling, which we need not reach.

<sup>14</sup>Best also requests costs in his reply brief but is not entitled to such an award because he is not the successful party on appeal. See A.R.S. § 12-341.

BEST v. CITY OF PHOENIX  
Decision of the Court

expended or incurred); *Skylar v. Town of Fountain Hills*, 220 Ariz. 449, ¶ 23, 207 P.3d 702, 708 (App. 2008).

**Disposition**

¶17 For the foregoing reasons, the trial court's judgment dismissing Best's lawsuit against the City is affirmed.