DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA
FILED
NOV 27 2007
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By

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MICHAEL J. and KATHI JESSE, husband and wife, Plaintiffs/Counter-Defendants/ Appellees/Cross-Appellants, v. JOHN and PATRICIA SANDERS, husband and wife, Defendants/Counter-Claimants/ Appellants/Cross-Appellees.	1 CA-CV 06-0433 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2004-092749

The Honorable Helene F. Abrams, Judge

AFFIRMED IN PART; REVERSED IN PART

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I R V I N E, Presiding Judge

¶1 This case arises from the failed purchase and sale of three parcels of real property. Appellants/Cross-Appellees John

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and Patricia Sanders, Defendants and Counterclaimants in the trial court, appeal from the amount of damages and attorneys' fees awarded to them by the trial court, which found in their favor after a bench trial. The Sanders also appeal from the court's decision granting summary judgment to Michael and Kathi Jesse on the Sanders' claim that the Jesses wrongfully recorded notices of lis pendens on the three properties. Appellees/Cross-Appellants Michael and Kathi Jesse cross-appeal, arguing that the trial court erred in finding that they and not the Sanders had breached their contract. For the following reasons, we find that the court erred in failing to award the Sanders certain liquidated damages but otherwise affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On or about August 1, 2004, Kathi Jesse ("Jesse") and the Sanders executed three separate residential resale real estate purchase contracts for three properties at 1818, 1823, and 1926 N. Spring Street, whereby the Sanders agreed to sell and Jesse agreed to buy the properties. Each contract required Jesse to deposit $2000 in earnest money into escrow, which she did. All three sales were to close on September 30, 2004. The contracts provided that if Jesse could not qualify for a loan after a diligent and good faith effort, her earnest money would be returned. The failure to have funds necessary to obtain the loan and to close the transaction, however, would be considered a material breach of the

contract. Old Republic Title Agency was named escrow agent for the three sales. For the purpose of a tax-deferred exchange pursuant to Section 1031 of the Internal Revenue Code, the Sanders transferred their interest in the transaction to Asset Preservation, Inc. Jesse was unable to obtain financing before the closing date.

¶3 On the morning of October 14, the Sanders and Kathi Jesse executed Addendum 2 for each of the contracts on the properties. Addendum 2 extended the close of escrow to October 25. In consideration of the extension, Jesse agreed to place an additional $24,500 for each property into escrow within twenty-four hours of signing the addendum and to remove all contingencies, including the loan contingency. Jesse agreed that the additional funds and the $2000 earnest money would be non-refundable and the property of the Sanders if the Jesses failed to close by October 25. The addendum also provided that Jesse agreed to pay for any additional expense incurred by re-drafting documents because of the delay in closing. Addendum 2 also stated that Michael Jesse was to be added to the title of the property, that funds deposited into escrow would be considered as having been deposited by Michael and Kathi Jesse, and that Michael, by signing the addendum declared that he read, understood, and approved the original underlying contract. Michael did not sign the addenda at the time only because he was not available.

¶4 On October 15, Michael and Kathi Jesse obtained approval for funding for the 1818 Property from IMPAC Funding Corporation. The loan documents listed a disbursement date of October 29 and required, among other things, that the Jesses obtain hazard insurance prior to disbursement of the funds. That same day, Michael Jesse wired $24,500 to Old Republic Title for the 1818 Property only. In an e-mail to the Jesses' real estate agent, Kathi explained that although she wanted all three properties and intended to go forward with all three, she would be foolish to put an additional $54,000 into escrow because she did not know if the loan would close on time. She wrote that the only property for which she had and would deposit money was the property IMPAC was going to finance - the 1818 Property.

¶5 On October 18, both the Sanders and their broker sent letters to Old Republic Title cancelling the escrows and requesting that the earnest money be delivered to the Sanders. On October 20, the Jesses sent Old Republic Title a letter objecting to the Sanders' directions cancelling the escrows and directing the escrow agent to proceed with the transaction with a closing date of October 25 and to deal in the future with their attorney.

¶6 On October 21, Old Republic Title Agency faxed an Estimated Amended Settlement Statement or HUD-1 form for the 1818 Property to the Sanders' broker and the Jesses' agent, listing a settlement and closing date of October 29. By letter dated October

22 and copied to Old Republic Title, the Sanders' broker withdrew the notice of cancellation by advising the Jesses' counsel that the Jesses needed to close escrow under the contract by 5:00 p.m. on October 25 or needed to execute supplemental escrow instructions for an extension of time. The supplemental escrow instructions provided that close of escrow for the 1818 Property would be extended to on or before October 29, only on certain conditions, including the condition that the Sanders and Jesses execute mutual cancellation instructions for the 1823 and 1926 Properties.

¶7 On October 22, Michael signed Addendum 2 and the original contract for the 1818 Property only.

¶8 On October 24, John Sanders responded by e-mail to a fax from Old Republic Title listing additional charges and closing costs. Sanders noted that pursuant to Addendum 2, the Jesses were responsible for any additional charges because of the delay in closing escrow. Sanders also reiterated that closing was to occur on October 25 unless the Jesses executed the supplemental escrow instructions to extend the closing date.

¶9 On October 25, Michael and Kathi Jesse filed this action against the Sanders and Old Republic Title Agency. Within a few days, they also recorded notices of lis pendens on the three properties. The complaint asserted a claim for all three properties, alleging that the Sanders interfered with the Jesses' ability to perform under the purchase contracts. The complaint

sought specific performance in the form of an order directing the Sanders to perform as required under the purchase contracts of all three properties plus damages caused by the Sanders' failure to perform as required. The Jesses also asserted claims for breach of contract and declaratory judgment.

¶10 By letter dated October 28, Old Republic Title advised the Jesses' counsel of outstanding items still required before closing, including written clarification regarding the additional costs, the delivery of closing funds, the resolution of outstanding issues with the lender so that the lender would fund the loan, instructions to close escrow, and dismissal of the lis pendens.

¶11 On October 29, the Sanders agreed to close escrow provided that, among other things, the parties execute mutual cancellations of the escrows for the 1823 and 1926 properties. The Jesses rejected the proposal.

¶12 On November 1, the Jesses represented they were still prepared to close on the 1818 Property but were disputing what they claimed were extra charges allocated to them. By November 3, Old Republic Title had returned the funds to the lender. On November 3, the Sanders advised the Jesses' counsel that they believed Kathi Jesse had misrepresented her situation with respect to her ability to obtain financing. The Jesses filed a first amended complaint in January 2005, adding claims for defamation, tortious interference with existing contracts, and interference with prospective business

advantage. Because the court's ruling was based on the amended complaint, we refer to it as "the complaint" from this point forward.

¶13 The Sanders answered the complaint and asserted counterclaims for fraud, negligent misrepresentation, consumer fraud, breach of contract, and recording an invalid lis pendens under Arizona Revised Statutes ("A.R.S.") section 33-420.

¶14 The Jesses filed a motion for partial summary judgment on the Sanders' tort counterclaims and their counterclaim for improper filing of notices of lis pendens. The Sanders moved for partial summary judgment on the Jesses' claims for specific performance, breach of contract, declaratory judgment, and on the Sanders' counterclaims for breach of contract and improper filing of notices of lis pendens. The court granted the Jesses' motion for partial summary judgment with respect to the filing of the lis pendens and denied the Sanders' related motion, finding that the filing of the lis pendens was not groundless. The court denied the other motions for partial summary judgment.

¶15 After a five-day trial, the court issued its minute-entry ruling. The court found that the Jesses had not proved that the Sanders had breached the agreement by not completing certain documents. The court stated:

> [T]he items that needed to be completed by the sellers could have been done before closing or on the day of the closing. As to the settlement statement (HUD 1), this could have been signed at the closing. As to the signing

> by Asset Preservation, Exhibit 159, indicates that the sellers signed the document entitled "Exchange Agreement and Supplemental Closing Instructions", and, on page 2, that the responsibility for obtaining API's signature on sellers statements/closing documents prior to closing was on the Closing Agent. This too could have been done on the day of the closing.

The court further found that the Sanders had proved their counterclaim of breach of contract against the Jesses. The court found:

> [O]n 10/13/2004, . . . it was confirmed that plaintiffs had formal loan approval and the intent was to close on 10/25/2004. The following day, Addendum #2 was signed by Mrs. Jesse and the Sanders indicating that "buyer" would place an additional $24,500 per property in escrow as consideration for an October 25, 2004 closing date. Mr. Jesse wired $24,500 on the 15th of October for the 1818 North Spring property. Plaintiffs did not wire any additional funds for the 1823 North Spring or the 1926 North Spring properties. In addition, Mr. Jesse only signed Addendum #2 as to 1818 North Spring. Plaintiffs were "out of contract" and in breach of contract as to the two properties for which they sent no additional funds.
>
> Plaintiffs further breached the contract by failing to close on October 25, 2004 and by failing to finalize any other addenda to close at a later date. In addition, plaintiffs did not have an insurance policy in place on October 25, 2004 for the 1818 North Spring property and that was a further breach of the contract and closing conditions.

The court found that the parties had proved none of their other claims.

¶16 In determining damages, the court considered whether Addendum 2 required the Jesses to pay an additional $24,500 for the 1823 and 1926 properties as liquidated damages. The court concluded that "[b]ecause Mr. Jesse did not sign these contracts and because the parties knew he needed to do that for the contract to be valid, the court finds that the liquidated damages are $2,000 per property." As for the 1818 Property, the court found that Addendum 2 clearly provided that those funds were non-refundable and were the property of the Sanders. The court fixed liquidated damages at $30,500.

¶17 The court denied the Sanders' motion for reconsideration, which argued that the court erred in finding that the notices of lis pendens were not groundless and that Addendum 2 for the 1823 and 1926 properties were invalid because Michael Jesse had not signed them.

¶18 Both parties sought an award of attorneys' fees and non-taxable costs. The court awarded the Sanders $21,866.63 of their requested $109,333.13 in attorneys' fees and denied the Jesses' request for an award of fees.

¶19 The Sanders filed a notice of appeal with regard to the court's ruling on their claim that the Jesses improperly filed notices of lis pendens on the properties as well as on the amounts the court awarded in liquidated damages and attorneys' fees. The Jesses filed a notice of cross-appeal regarding the court's

findings that they and not the Sanders had breached the contracts. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

¶20 The Sanders have moved to dismiss the Jesses' cross-appeal on the grounds that it is moot. A case becomes moot "when an event occurs, pending an appeal, which renders the relief sought either impossible or without practical effect on the parties to the action." *Sandblom v. Corbin*, 125 Ariz. 178, 182, 608 P.2d 317, 321 (App. 1980).

¶21 The Sanders advise this Court that the properties at issue have been sold to third parties with whom the Sanders had entered into a backup sale agreement. The backup buyers sued the Sanders to enforce the agreement and, in that separate lawsuit, the court ordered the Sanders to sell the properties to those buyers. The Sanders argue that, because they no longer own the property, this Court cannot grant the relief of specific performance that the Jesses seek and the matter is therefore moot. They further argue that no evidence of damages was admitted in the trial court to provide a basis for this Court to award damages as an alternative. The Jesses argue that they sought not only specific performance but also damages, additionally and in the alternative. They also argue that the subsequent buyer took the properties subject to the lis pendens.

¶22 A lis pendens "provides notice to anyone interested in a piece of real property of pending litigation involving the property and . . . prevents third persons from acquiring interests in the property during the pendency of the litigation that would prevent the court from granting suitable and effective relief." *Hatch Cos. Contracting, Inc. v. Ariz. Bank*, 170 Ariz. 553, 556, 826 P.2d 1179, 1182 (App. 1991). A person who purchases property involved in pending litigation subject to a lis pendens "stands in the same position as his vendor and is charged with notice of the rights of his vendor and takes the property subject to whatever valid judgment may be rendered in the litigation." *Mammoth Cave Prod. Credit Ass'n v. Gross*, 141 Ariz. 389, 391, 687 P.2d 397, 399 (App. 1984).

¶23 The Jesses filed the lis pendens on the properties on October 27, 2004, soon after filing this lawsuit. The subsequent buyers filed suit to enforce their backup agreement in June 2005. The lis pendens were therefore in place prior to the filing of the subsequent buyers' lawsuit. It is apparent that the subsequent buyers knew about the Jesse litigation because of their joinder in a motion by the Jesses to consolidate the two actions.

¶24 Due to the lis pendens, the subsequent buyers stand in the same position as the Sanders and they took the property subject to a determination of the Sanders' rights in this litigation. To find that the sale rendered the matter moot would be contrary to

the purposes of the lis pendens. We find that the cross-appeal is not moot.

The Jesses' Cross-appeal

¶25 Because the Jesses' cross-appeal challenges the court's overall finding that the Jesses and not the Sanders breached the agreements between the parties, we address the cross-appeal first.

¶26 On appeal from a trial to the court, "we are bound by the trial court's findings of fact, unless they are demonstrated to be clearly erroneous." *Sabino Town & Country Estates Ass'n v. Carr*, 186 Ariz. 146, 149, 920 P.2d 26, 29 (App. 1996). We are not bound by the trial court's conclusions of law. *Id.* "We view the evidence and reasonable inferences" drawn from that evidence "in the light most favorable to the prevailing party" and must affirm if any evidence supports the trial court's judgment. *Inch v. McPherson*, 176 Ariz. 132, 136, 859 P.2d 755, 759 (App. 1992). We do not reweigh the evidence. *Imperial Litho/Graphics v. M.J. Enters.*, 152 Ariz. 68, 72, 730 P.2d 245, 249 (App. 1986).

¶27 The Jesses argue that they did not breach the contracts but that the Sanders did. With respect to the 1818 Property, the Jesses make several arguments that the Sanders prevented the closing, none of which persuades us that the trial court's judgment was not supported by substantial evidence.

¶28 The Jesses contend that the Sanders breached the contract regarding the 1818 Property because they did not have their

exchange agent, Asset Preservation, Inc., approve and sign the estimated closing statement. Melissa L., the escrow agent at Old Republic Title, testified, however, that the escrow company had everything it needed from the sellers, that the escrow company had experience with Asset Preservation, Inc., and that Asset Preservation, Inc. would usually sign the necessary documents within a day. She also stated that had the escrow company received the funds from the buyer by September 30, the sale could have closed that day. The Jesses, however, did not deposit the required funds.

¶29 The Jesses also argue that by sending a cancellation notice on October 18, the Sanders stopped the title company from taking any action on the 1818 Property. Melissa L. testified that the title company's policy was that upon receipt of conflicting instructions, the company ceases action until it receives mutual instructions from the parties. She stated that in this case, however, she continued to process some documents she received pertaining to the transaction even after having received the conflicting statements from the parties to the contract. In addition, the Sanders withdrew the cancellation notice on October 22, insisting that the escrows close on October 25.

¶30 The Jesses further assert that on the eve of the October 25 closing date, the Sanders were adding new conditions and changing the closing costs allocations, thereby interfering with the close of escrow. The Sanders' October 24th e-mail to Old

Republic Title, however, merely reminded the escrow company that, under Addendum 2, the Jesses had agreed to pay any additional costs resulting from the delay in closing escrow. That e-mail accurately reflected the agreement in Addendum 2.

¶31 In addition, the evidence supports the court's finding that the Jesses were the party that breached because the Jesses had no funding available to close by the agreed closing date of October 25. The loan documents from IMPAC to Old Republic Title dated October 15, listed a disbursement date of October 29 - four days after the scheduled close of escrow. Consequently, as of October 15, it was clear that the Jesses would not have the funds to close on October 25. The Sanders offered to extend the closing date to October 29 with certain conditions, but the Jesses rejected that offer. We note that the Jesses' inability to fund the transaction was apparent prior to any claimed interference by the Sanders. The record supports the court's rejection of the Jesses' contention that the conduct of the Sanders prevented them from complying with the contracts.

¶32 The Jesses also argue that the trial court erred in finding that they had breached the contracts by not having insurance in place by the closing date of October 25. The contract provides, however, that "any fire, casualty, or other insurance desired by Buyer should be in place at the Close of Escrow." Insurance was also required by the Jesses' lender. The date for

the close of escrow was October 25; the insurance policy the Jesses obtained had an effective date of October 27. The record supports the trial court's decision.

¶33 With respect to the 1823 and 1926 properties, the Jesses contend that the Sanders' cancellation notice of October 18 interfered with their closing on those properties because the escrow company's policy was that it would stop further action until the parties provided mutual instructions. The Jesses contend that they were proceeding to close on all three properties and had loan approval on all three. Evidence at trial belies these statements. The October 18 cancellation notice was precipitated by the Jesses' failure to deposit the additional $24,500 on those two properties as required. Kathi Jesse herself testified that she chose not to deposit the additional earnest money for the 1823 and 1926 properties because she learned after signing Addendum 2 that she could not get funding for those properties in time to close by the agreed date. In addition, as already noted, the Sanders withdrew the cancellation notice. Consequently, the record indicates that the Jesses' inability to close by the October 25 date was the result of their inability to obtain funding, not any actions by the Sanders, and so supports the court's ruling.

¶34 Finally, the Jesses argue that they could not be in breach with respect to the 1823 and 1926 properties because Michael Jesse did not sign the addendum for either property. Without

Michael's signature, the Jesses contend, the contracts were not binding, because under Arizona community property law, the acquisition of real property requires the signature of both spouses. A.R.S. § 25-214(C)(1) (2007). Because Addendum 2 was not binding, they argue, the funding contingency was not removed, so their failure to close on the 1823 and 1926 properties because of lack of funding could not be a breach.

¶35 The Sanders argue that under Arizona law, the character of property or liability as separate or community is determined by the laws of the state in which the community is domiciled at the time the property is acquired. Consequently, they contend that, because the Jesses are domiciled in California, the laws of California apply. California law, the Sanders continue, does not require the signature of both spouses to bind the community when one spouse acquires property.

¶36 The Sanders cite several cases in support of their argument that the law of matrimonial domicile determines the character of the property or liability at issue. *Nationwide Res. Corp. v. Massabni*, 143 Ariz. 460, 463, 694 P.2d 290, 293 (App. 1984); *Woodward v. Woodward*, 117 Ariz. 148, 150, 571 P.2d 294, 296 (App. 1977); *Jizmejian v. Jizmejian*, 16 Ariz. App. 270, 272, 492 P.2d 1208, 1210 (1972). The rule espoused in these cases, however, deals with moveable or personal property rather than realty. *Nationwide*, 143 Ariz. at 463, 694 P.2d at 293 ("property right

. . . in the partnership is personal property and is governed by the law of the[] matrimonial domicile."); *Woodward*, 117 Ariz. at 150, 571 P.2d at 296 (court would look to domicile in determining status of retirement credits); *Jizmejian*, 16 Ariz. App. at 272, 492 P.2d at 1210 ("The rule is that property interests in moveables acquired by the spouses during a marriage are determined by the law of the matrimonial domicile at the time of acquisition.").

¶37 In this case, we think *Mott v. Eddins* is more instructive. 151 Ariz. 54, 725 P.2d 761 (App. 1986). In *Mott*, Mr. Eddins, who was domiciled with his wife in California, came to Arizona and signed a deposit receipt and agreement to purchase a house in Arizona owned by the Motts. 151 Ariz. at 55, 725 P.2d at 762. Mrs. Eddins did not sign the contract. Mr. Eddins refused to close the transaction, and the Motts brought an action for breach. The trial court held that California law applied and that the contract was enforceable. *Id.* This Court reversed. *Id.* at 57, 725 P.2d at 764.

¶38 This Court looked to the Restatement (Second) of Conflict of Laws § 189 (1971), which provides that the validity of a contract for the transfer of an interest in land and the rights created by the contract are determined by the law of the state in which the property is located in the absence of a choice of law provision by the parties. *Id.* at 55-56, 725 P.2d at 762-63. The Restatement also provides that the law of another state might apply

if that state has a more significant relationship to the transaction and the parties, as determined by applying certain factors, including relevant policies of the forum and other interested states, the protection of justified expectations, and the certainty, predictability, and uniformity of result. *Id.* at 56, 725 P.2d at 763; Restatement (Second) of Conflict of Laws § 6 (1971).

¶39 The court in *Mott* noted that the only connection to California in that case was that the Eddinses were domiciled there, although they were intending to move to Arizona. *Id.* at 56, 725 P.2d at 763. The Motts lived in Arizona, the contract was executed in Arizona, and it was to be performed in Arizona. *Id.* The court found that Arizona law applied and that the Eddinses' community could not be bound although Mr. Eddins was individually liable. *Id.* at 57, 725 P.2d at 764.

¶40 In this case, both couples live in California. However, the parties executed the contracts in Arizona and specifically included in those contracts a provision declaring that Arizona law would apply. We note that Michael did not sign the contracts on the 1823 and 1926 properties, but the Sanders, who are asserting that Arizona law does not apply, did sign them, thereby agreeing that it would. We cannot say on these facts that California has a more significant relationship with this transaction than does Arizona. We find therefore that Arizona law applies, and Michael

was required to sign the contracts to be bound for the purchase of the property under A.R.S. § 25-214(C)(1).

¶41 The Sanders argue that even if Michael did not sign the contracts, he ratified them and so he is bound by them. A non-signing spouse may be bound to a contract involving real property by ratifying the contract. *All-Way Leasing, Inc. v. Kelly*, 182 Ariz. 213, 216, 895 P.2d 125, 128 (App. 1994). Ratification is implied when a non-signing spouse voluntarily accepts the benefits of a contract. *Id.* Ratification must be applied cautiously, however, to cases under A.R.S. § 25-214(C). *Id.* The mere receipt of benefits by the community, however, does not itself establish ratification. *Id.* A non-signing spouse, however, can be bound by authorizing or consenting to a real estate transaction or by assisting in furthering the transaction. *Whiting v. Johnson*, 390 P.2d 985, 988-89 (Wash. 1964).[1]

¶42 Whether Michael ratified the contracts was not an issue in the trial court until the court found that his failure to sign Addendum 2 for the 1823 and 1926 properties resulted in the contracts being invalid. The Sanders, in their Motion for Reconsideration asserted that Michael had "affirmed" the contract

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[1] Because the community property laws of Arizona are most like those of Washington, decisions by the Washington courts are considered persuasive. *Geronimo Hotel & Lodge v. Putzi*, 151 Ariz. 477, 479, 728 P.2d 1227, 1229 (1986).

by bringing this lawsuit. The court denied the motion without explanation.

¶43 We find that Michael has affirmed or ratified the contract as a matter of law. At trial, Michael testified that Kathi handled their real estate investments and the necessary day-to-day operations, keeping him somewhat informed. He further testified that, on Kathi's instruction, he wired the $24,500 deposit to the escrow company and that at the time he did so he believed that the money was for all three escrows to keep the deal moving forward. By wiring the funds, Michael was assisting in furthering the transactions. In addition, on October 25, the date set for close of escrow, Michael and Kathi together filed this lawsuit seeking to enforce the very contracts they now assert are invalid. In the complaint, the Jesses alleged that "Plaintiffs and the Sanders Defendants entered into Three Residential Resale Real Estate Purchase Contracts, as subsequently amended," "As a result of the Purchase Contracts Plaintiffs claim an interest in the Real Property," and "The Purchase Contracts constitute contracts between Plaintiffs and the Sanders Defendants." The complaint also asserts that the "Plaintiffs" fully performed under the contracts except as hindered by the Sanders, and that the "Plaintiffs" are ready, able, and willing to perform as required by the Purchase Contracts . . . ." By the complaint, Michael is consenting to the contracts,

is actively seeking the benefits of the contracts, and is declaring his willingness to be bound by them.

¶44 Other than contending that they did not breach the contracts for the 1823 and 1926 properties because they were invalid for lack of Michael's signature, the Jesses do not challenge the trial court's finding that they were in breach on those contracts. Having concluded that the Jesses were bound by the contract, we affirm the trial court's ruling finding a breach.

The Sanders' Appeal

Liquidated Damages

¶45 In their appeal, the Sanders argue that the trial court erred in not awarding them an additional $24,500 in liquidated damages for each of the 1823 and 1926 properties because the court found that the contracts were not valid absent Michael's signature. We have determined that Michael has ratified those contracts and so address whether the Sanders are entitled to the additional $24,500 per property as liquidated damages.

¶46 The original contracts provided that the Jesses would deposit into escrow $2000 as earnest money and that "because it would be difficult to fix actual damages, in the event of Buyer's breach, the amount of the earnest money may be deemed a reasonable estimate of the damages; and Seller may, at Seller's option, accept the earnest money deposit, . . . as Seller's sole right to damages." Addendum 2 stated:

> In consideration of this extension buyer agrees to place the remainder of the down payment $24,500 in escrow within 24 hours of signing this addendum and remove all remaining contingencies, including loan contingency. Buyer agrees that the $24,500 plus the $2,000 earnest money is now non-refundable making the total of non-refundable funds $26,500. These funds will be the property of seller should buyer fail to close on October 25, 2004.

Addendum 2 reduced the price of the properties to $265,000 each; the funds to be deposited therefore represented ten percent of the purchase price.

¶47 The purpose of a contractual liquidated damages provision is to avoid litigation to determine the reasonable damage award in the event of a breach. *Roscoe-Gill v. Newman*, 188 Ariz. 483, 485, 937 P.2d 673, 675 (App. 1996); *Pima Sav. & Loan Ass'n v. Rampello*, 168 Ariz. 297, 299, 812 P.2d 1115, 1117 (App. 1991). The objective is compensatory, not punitive, and so liquidated damages cannot be established as a penalty for a breach. *Pima*, 168 Ariz. at 299, 812 P.2d at 1117. An agreement for damages made in advance of a breach is a penalty unless the amount fixed is a "reasonable forecast of just compensation for the harm" caused by a breach and the harm is very difficult to accurately estimate. *Id.* at 300, 812 P.2d at 1118. Whether a stipulation equates to liquidated damages or a penalty is a question of law. *Id.* Whether a stipulated amount for liquidated damages is reasonable and whether it would be difficult to estimate is determined based on the time the contract was executed. *Id.*

¶48 The Sanders argue that under the language of Addendum 2, the Jesses agreed that an additional $24,500 was nonrefundable if they did not close on the property. The Jesses argue that the stipulated liquidated damages on the 1823 and 1926 properties constituted penalties and not liquidated damages because the Sanders had a backup offer on all three properties for the same purchase price.[2]

¶49 The Sanders received another offer on the three properties on October 9, 2004. They made a counter offer on October 19, 2004, specifying that the sale was subject to the cancellation of the existing escrows with the Jesses. The counter-offer listed an acceptance date of October 20.

¶50 We have previously concluded that where a liquidated damage amount is not unreasonable on its face, it is not altered by the seller's ability to resell the property and reduce its damages after the buyer's breach unless the seller's retention of the amount would shock the conscience. *Id.* (citing *Leeber v. Deltona Corp.*, 546 A.2d 452, 456 (Me. 1988)). At the time Addendum 2 was executed on October 14, 2004, the Sanders had a backup offer but no backup contract in place. The Sanders did not make the counteroffer to the subsequent buyers until after they had entered

2 The Jesses do not otherwise contend that the stipulated liquidated damages amount was not reasonable. Kathi Jesse in fact testified that when she executed Addendum 2 she thought the terms were fair and reasonable.

into Addendum 2 with the Jesses and after the Jesses had failed to deposit the additional $24,500 per property. At the time the parties agreed to the liquidated damages, the Sanders could not have known whether the backup purchasers would even accept the counteroffer. We find that the Sanders' ability to secure a backup buyer after the Jesses had failed to comply with the terms of Addendum 2 does not transform the stipulated damages to a penalty.

¶51 The Jesses also argue that under the plain language of the original contract, the Sanders could accept the "earnest money deposit" as their sole right to damages, but because the Jesses did not deposit the additional $24,500 for the 1823 and 1926 properties, those funds are not an earnest money deposit and the Sanders are not entitled to it. The Sanders argue that the plain language of Addendum 2 establishes that the additional $24,500 was nonrefundable. A court gives effect to a contract as written where the terms are clear. *Shattuck v. Precision-Toyota, Inc.*, 115 Ariz. 586 588, 566 P.2d 1332, 1334 (1977).

¶52 Addendum 2 expresses the agreement of the parties specifically with respect to the disposition of the additional $24,500. Although the addendum states that the funds are to be placed in escrow within twenty-four hours of signing the document, it does not state that the funds become nonrefundable upon deposit, but expressly provides that the buyer agrees the funds are "now non-refundable." By this language the Jesses agreed that the funds

were nonrefundable when they executed the addendum. To obtain the extension of the closing date, the Jesses agreed that those funds would be the property of the Sanders if the Jesses did not close on the closing date, which they did not. We therefore find that the Sanders were entitled to the additional $24,500 for each of the 1823 and 1926 properties pursuant to the agreements executed by the parties.

Wrongful Filing of Lis Pendens

¶53 The Sanders also appeal from the trial court's decision granting summary judgment to the Jesses on the Sanders' counterclaim under A.R.S. § 33-420 that the Jesses improperly filed notices of lis pendens on the three properties.

¶54 In reviewing a motion for summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). We review the decision based on the evidence presented to the court at the time the motion was considered. *Payne v. M. Greenberg Constr.*, 130 Ariz. 338, 343, 636 P.2d 116, 121 (App. 1981).

¶55 A.R.S. § 33-420 provides:

> A person purporting to claim an interest in, or a lien or encumbrance against, real property, who causes a document asserting such claim to be recorded in the office of the county recorder, knowing or having reason to know that the document is forged, groundless, contains a material misstatement or false

> claim or is otherwise invalid is liable to the owner or beneficial title holder of the real property for the sum of not less than five thousand dollars, or for treble the actual damages caused by the recording, whichever is greater, and reasonable attorney fees and costs of the action.

A.R.S. § 33-420(A)(2007)[3]. The statute has been held applicable to the filing of lis pendens. *Richey v. W. Pac. Dev. Corp.*, 140 Ariz. 597, 601, 684 P.2d 169, 173 (App. 1984). A lis pendens provides constructive notice of a pending law suit. *Richey*, 140 Ariz. at 599, 684 P.2d at 171. By statute, a party to an action affecting title to real property may record a lis pendens. A.R.S. § 12-1191(A)(Supp. 2006)[4].

¶56 Arizona Revised Statutes § 33-420 is intended "to permit the expeditious removal of a lis pendens alleged to be groundless only where the claim that the underlying action is one affecting title to real property has no arguable basis or is not supported by any credible evidence." *Evergreen W., Inc. v. Boyd*, 167 Ariz. 614, 621, 810 P.2d 612, 619 (App. 1991). In considering whether a lis pendens has been improperly filed, a court should inquire into only whether some basis exists for concluding that the action affects the title to real property and should not "determine the merits unless such a determination is necessary to the decision." *TWE*

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[3] We cite the current version of the statute because no revisions material to this decision have since occurred.

[4] We cite the current version of the statute because no revisions material to this decision have since occurred.

Ret. Fund Trust v. Ream, 198 Ariz. 268, 274, ¶ 24, 8 P.3d 1182, 1188 (App. 2000); *Evergreen*, 167 Ariz. at 620, 810 P.2d at 618.

¶57 The Jesses filed a claim for specific performance, seeking an order directing the Sanders to perform under the contracts and sell the properties to the Jesses. The action on its face obviously affected title to property because if the Jesses prevailed, the title to the property would change hands.

¶58 The Sanders argue that the court should have looked behind the face of the complaint to find the lis pendens groundless because the underlying claim had no arguable basis. The Sanders rely heavily on *Chevron U.S.A., Inc. v. Schirmer*, 11 F.3d 1473 (9th Cir. 1993).

¶59 In *Chevron*, Chevron sued Schirmer for specific performance seeking conveyance of property under an option contract. *Id.* at 1476. Chevron also recorded a notice lis pendens. *Id.* Schirmer filed a counterclaim pursuant to A.R.S. § 33-420, arguing that the lis pendens was groundless. *Id.* at 1476-77. The court granted summary judgment against Chevron on its complaint and against Schirmer on the counterclaim. *Id.* at 1477.

¶60 On appeal, the Ninth Circuit affirmed the grant of summary judgment against Chevron, noting that Chevron's option contract had expired when Chevron sought to purchase the property, that option agreements are strictly construed, and that the subsequent conduct of the parties could not modify the option

agreement after it expired, as claimed by Chevron. *Id.* at 1477. The court reversed the trial court's ruling regarding the lis pendens, looking beyond the pleadings. *Id.* at 1479-80. The court noted that Chevron knew that the option contract had expired and that it knew or should have known that under Arizona law once the option contract had expired, subsequent conduct could not modify the option contract absent a written agreement. *Id.* at 1480.

¶61 The Sanders contend that this case is similar to *Chevron*. The Sanders argue that the Jesses failed to deposit the earnest money for the 1823 and 1926 properties or the closing funds on any of the three properties by the closing date and that they therefore had no basis and knew they had no basis for claiming a right to the property.

¶62 Although somewhat similar, this case is also different. In *Chevron*, the court had already made a determination on the merits in favor of Schirmer. Here, unlike in *Chevron*, it was not apparent at the time the court ruled on the Sanders' § 33-420 counterclaim that the action had no arguable basis or was not supported by the evidence. The court had denied summary judgment motions on the underlying merits, finding need for a trial. The Jesses' claim that they were prevented from performing by the conduct of the Sanders required a factual inquiry that would require a determination of the merits.

¶63 The Sanders also argue that the court erred in denying their request for reconsideration of the court's decision that the lis pendens was not groundless in light of evidence presented at trial. We review a motion for reconsideration for an abuse of discretion. *McGovern v. McGovern*, 201 Ariz. 172, 175, ¶ 6, 33 P.3d 506, 509 (App. 2001).

¶64 The trial court as fact-finder heard five days of testimony. It was in the best position to determine whether that evidence warranted reconsidering its earlier decision that the notices of lis pendens were groundless. We are not persuaded that the trial court abused its discretion in finding that reconsideration was not warranted.

Attorneys' Fees in the Trial Court

¶65 The Sanders also argue that the trial court erred in awarding them only $21,866.63 of their requested $109,333.13 in attorneys' fees. The contract provided that if the buyer or seller filed suit to enforce the contract or to seek damages sustained by reason of its breach, "all parties prevailing in such action, on trial and appeal, shall receive their reasonable attorneys' fees and costs as awarded by the court." A court will enforce a contractual provision for attorneys' fees according to its terms. *First Fed. Sav. & Loan Ass'n v. Ram*, 135 Ariz. 178, 181, 659 P.2d 1323, 1326 (App. 1982).

¶66 The Sanders argue that they were the prevailing parties and that under the contracts they were entitled to recover all of their attorneys' fees. The contracts, however, provide for an award of reasonable fees, and where a contract so provides, the determination of the reasonable amount is within the discretion of the trial court. *Woliansky v. Miller*, 146 Ariz. 170, 172, 704 P.2d 811, 813 (App. 1985). In this case, the contracts themselves also provide that the reasonable fees were to be "as awarded by the court."

¶67 The Sanders were the prevailing parties. The court was not required, however, to award all fees requested, but only fees it deemed reasonable. The court having heard and seen the evidence was in the best position to determine the appropriate amount of fees. The Sanders have not persuaded this Court that the trial court abused its discretion by reducing the amount requested.

Attorneys' Fees on Appeal

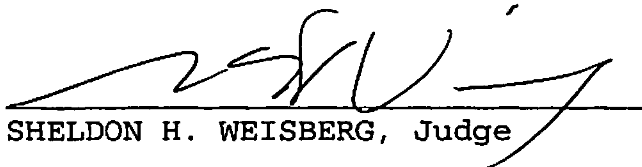
¶68 The Sanders also request an award of fees on appeal. Pursuant to the contracts, we award reasonable attorneys' fees to the Sanders as the prevailing party on appeal, upon their compliance with Rule 21(a), Arizona Rule of Civil Appellate Procedure.

CONCLUSION

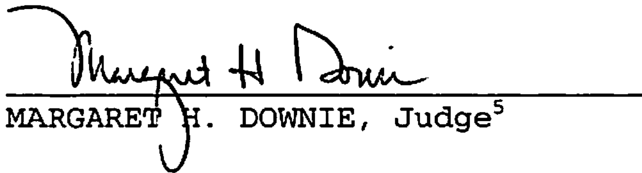
¶69 We find that the trial court erred in not awarding the $24,500 in earnest money for the 1823 and 1926 properties as liquidated damages because Michael had not signed Addendum 2 for those properties. We otherwise affirm the trial court's ruling.

PATRICK IRVINE, Presiding Judge

CONCURRING:



SHELDON H. WEISBERG, Judge



MARGARET H. DOWNIE, Judge[5]

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[5] The Honorable Margaret H. Downie, Judge of the Maricopa County Superior Court, was authorized by the Chief Justice of the Arizona Supreme Court to participate in the disposition of this appeal pursuant to the Arizona Constitution, Article 6, Section 3, and A.R.S. §§ 12-145 to -147 (2003).