IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Sport Collectors Guild Incorporated, et al.,

Plaintiffs,

v.

Bank of America NA,

Defendant.

No. CV-16-02229-PHX-ROS

ORDER

Sport Collectors Guild, Inc. ("Sport Collectors") and Patrice Lagnier ("Lagnier"), the owner of Sport Collectors, (collectively, "Plaintiffs") sued Defendant Bank of America, N.A. ("BANA"). (Doc. 1-1.) Plaintiffs alleged four claims: (1) BANA breached an arbitration provision in the 2003 Agreement when BANA filed the June 11, 2010 complaint against Plaintiffs; (2) BANA breached the covenant of good faith and fair dealing when BANA submitted a guaranty request to the U.S. Small Business Administration ("SBA") instead of arbitrating this claim; (3) BANA abused the process when it filed the June 11, 2010 complaint for an improper purpose; and (4) BANA intentionally inflicted emotional distress on Lagnier when BANA filed its June 11, 2010 complaint and submitted a guaranty request to the SBA. (*Id.* at 11-14.) BANA moved to dismiss. (Doc. 11.) BANA argues the first two claims are barred by res judicata and collateral estoppel, and the third and fourth claims are barred by the statute of limitations. (*Id.*) For the following reasons, the Court will grant in part and deny in part BANA's motion to dismiss.

I. BACKGROUND

Plaintiffs' Complaint makes the following allegations. On July 28, 2003, Sport Collectors executed a promissory note ("2003 Agreement") for a revolving line of credit from BANA in the amount of $150,000. (Doc. 1-1 at 6.) To secure payment, Sport Collectors and BANA entered into a commercial security agreement, which granted BANA a security interest in Sport Collectors' assets. (*Id.*) Lagnier also executed a commercial guaranty. (*Id.*) As a material inducement to entering into the 2003 Agreement, the Parties agreed to include an arbitration provision which states that "[a]t the request of any party to this agreement, any claim shall be resolved by binding arbitration in accordance with the Federal Arbitration Act." (*Id.*)

On January 30, 2009, BANA sent a letter to Sport Collectors expressing its interest in assisting Sport Collector's financial needs. (*Id.*) On February 15, 2009, Sport Collectors requested a loan modification in response, but in March 2009, BANA demanded a $146,798.61 payment. (*Id.*) BANA and Sport Collectors continued to communicate about the loan, and in October 2009, Plaintiffs sent BANA a letter invoking the arbitration clause and requesting they arbitrate the dispute. (*Id.* at 7.) But BANA threatened to remove Sport Collectors' inventory, and Sport Collectors began losing employees. (*Id.*) Sport Collectors told BANA it could no longer afford to pay the lease on its warehouse, BANA responded with willingness to restructure the loan, and Plaintiffs provided the requested financial information and reiterated their desire to invoke the arbitration provision. (*Id.* at 7-8.)

A. Previous Lawsuit

On June 11, 2010, however, BANA filed a complaint against Plaintiffs in Maricopa County Superior Court ("Superior Court"), case number CV-2010-014385 ("Previous Lawsuit"). (*Id.* at 8.) In the Previous Lawsuit, BANA sued Plaintiffs under two claims: (1) breach of contract/guaranty for Sport Collectors's failure to make timely payments as contractually required by the promissory note; and (2) replevin seeking immediate possession of the collateral associated with the promissory note. (Doc. 16, Ex.

5 at 5, 7.) BANA (as the plaintiff in the Previous Lawsuit) filed a motion for summary judgment. (Doc. 11-1 at 3.) Sport Collectors and Lagnier (the defendants in the Previous Lawsuit) argued in response that BANA breached the loan agreement by failing to pursue arbitration. (*Id.*) On the same day, they also filed an amended answer raising the binding arbitration provision as an affirmative defense. (*Id.*) BANA's reply in support of summary judgment argued that Sport Collectors and Lagnier waived the affirmative defense because they failed to raise it earlier. (*Id.*) The Superior Court found "the invocation of the arbitration clause untimely" and granted summary judgment. (*Id.*) The Superior Court granted summary judgment in BANA's favor on the note and guaranty and entered a judgment against Sport Collectors and Lagnier for $146,798.61 (plus costs and fees) ("September 12, 2011 Judgment"). (*Id.* at 14-15.)

B. Appeal in Previous Lawsuit

Sport Collectors and Lagnier appealed the issue of whether the invocation of the arbitration clause was untimely,[1] and the Arizona Court of Appeals found "the [Superior Court] erred in granting summary judgment on the basis that the arbitration issue was not timely raised." (*Id.* at 3-4.) And on January 16, 2014, the Arizona Court of Appeals vacated the Superior Court's September 12, 2011 Judgment and remanded for "further proceedings consistent with this decision." (*Id.*)

C. Remand in Previous Lawsuit and SBA Guaranty Request

On March 19, 2014, the Superior Court construed the mandate from the Arizona Court of Appeals as an instruction to "enforce the arbitration agreement," and the Superior Court ordered the parties to arbitrate the merits of BANA's breach of contract/guaranty claim for failure to make timely payments ("March 19, 2014 Order").[2]

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[1] Lagnier filed an answer on July 6, 2010 which did not raise the arbitration issue. (*Id.* at 4.) Although Lagnier purported to sign and submit the original answer on behalf of himself and Sport Collectors, the Arizona Court of Appeals found he was not authorized to do so since a company must be represented by an attorney in the practice of law. (*Id.*) The Arizona Court of Appeals held that raising arbitration as an affirmative defense in the amended answer and Sport Collector's response to the motion for summary judgment was timely. (*Id.*)

[2] The Superior Court restricted arbitration to the claims set forth in BANA's

(*Id.* at 6.) However, instead of resolving the dispute in arbitration, BANA submitted a guaranty request with the SBA on February 26, 2014 to collect the amount Sport Collectors allegedly owed. (*Id.* at 47.) According to Plaintiffs, BANA led the SBA to believe BANA had a valid judgment against Sport Collectors and Lagnier in the amount of $146,798.61 (plus costs and fees) when BANA knew the Arizona Court of Appeals already vacated the judgment. (Doc. 1-1 at 9.)

D. Post-Remand Motions

Because BANA chose not to arbitrate the payment dispute and instead sought relief through the SBA, Sport Collectors and Lagnier filed a motion on November 13, 2014 asking the Superior Court to find BANA in contempt of the March 19, 2014 Order. (Doc. 11-1 at 8.) Basing their motion on statutory authority and case law regarding contempt and sanctions, Sport Collectors and Lagnier's argued BANA's pursuit of an SBA guaranty (as opposed to arbitrating the payment dispute) was in contempt of the March 19, 2014 Order and BANA should be sanctioned. (*Id.* at 8-12.) On February 4, 2015, the Superior Court considered the arguments for an order to show cause regarding contempt and sanctions ("February 4, 2015 Ruling"); but determined (1) it could not stop BANA from abandoning its direct claims against Sports Collectors and Lagnier if BANA wished to do so, and (2) it could not stop plaintiffs from looking to the SBA for relief outside of arbitration. (*Id.* at 57-58.) The Superior Court found there was not a "basis for a finding of contempt" and denied Sport Collectors and Lagnier's motion for order to show cause re contempt and sanctions.

On February 10, 2015, Sport Collectors and Lagnier then moved for reconsideration. (*Id.* at 60.)[3] On February 12, 2015, the Superior Court stated "plaintiff is entitled to take advantage of federal programs" and denied the request to reconsider the

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complaint in the Previous Lawsuit. (*Id.*) By this time, BANA had already agreed to dismiss its replevin claim, so the only remaining claim in the complaint was the breach of contract claim for failure to make timely payments. (*Id.* at 3.)

[3] Although BANA provided copies of other motions in the Previous Lawsuit, it did not provide a copy of this motion. Thus, the Court's consideration of the arguments related to this motion is limited to the description in the Superior Court's brief ruling.

Superior Court's previous ruling regarding contempt and sanctions. (*Id.*)

On March 13, 2015, Sport Collectors and Lagnier filed a renewed motion for an order to show cause regarding contempt and sanctions pursuant to Arizona Revised Statues Section 12-864. (*Id.* at 62.) Sport Collectors and Lagnier referenced a statement where BANA agreed "there would be a basis for a contempt finding if [BANA] attempted to adjudicate The Claim in a forum other than an arbitration proceeding." (*Id.* at 63.) Since BANA attempted to adjudicate the payment dispute in a forum other than arbitration, they argued BANA should be sanctioned for its contemptuous conduct. (*Id.*) On March 24, 2015, the Superior Court again denied the renewed motion re contempt and sanctions. (*Id.* at 81.) In doing so, the Superior Court noted "nothing in the arbitration agreement precludes plaintiff from seeking relief from a government agency under federal regulations." (*Id.*) Because the parties did not appear to be arbitrating, the trial order placed the matter on the dismissal calendar to be dismissed without further notice on April 15, 2015. (*Id.*)

On April 14, 2015, Sport Collectors and Lagnier asked for permission to supplement their amended answer with several counterclaims: breach of the arbitration provision, breach of the covenant of good faith and fair dealing, abuse of process, intentional infliction of emotional distress, and negligence. (*Id.* at 84-86.) On May 27, 2015, the Superior Court entered a judgment of dismissal, "dismissing the matter without prejudice" ("May 27, 2015 Dismissal"). (*Id.* at 88.) The Superior Court then denied as moot Sport Collectors and Lagnier's request to supplement their answer. (*Id.*)

E. The Current Lawsuit

On June 10, 2016, Plaintiffs filed the instant matter in Maricopa County Superior Court, and BANA subsequently removed the matter to federal court ("Current Lawsuit"). (Doc. 1.)[4]

[4] As a result of the September 12, 2011 Judgment, Plaintiffs alleged Sport Collectors closed, Lagnier lost his only source of income, Plaintiffs' good credit and reputation were damaged, Lagnier filed for bankruptcy, Sport Collectors never got the loan modification, Plaintiffs became indebted to the federal government, and Plaintiffs faced collection from the U.S. Treasury Department. (Doc. 1-1 at 9-10.)

II. DISCUSSION

To survive a motion to dismiss for failure to state a claim, a complaint must meet the requirements of Federal Rule of Civil Procedure 8(a)(2). Rule 8(a)(2) requires a "short and plain statement of the claim showing that the pleader is entitled to relief," so that the defendant has "fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). To avoid dismissal, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 696 (2009). This requires "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012) (quoting *Iqbal*, 556 U.S. at 678). When evaluating a motion to dismiss, a court must accept all factual allegations as true but need not accept legal conclusions. *Coal. for ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, 501 (9th Cir. 2009).

BANA asserts Plaintiff's first two claims should be dismissed because they are barred by res judicata and collateral estoppel, and BANA further contends the third and fourth claims should be barred based on the statute of limitations. (Doc. 11.) The Court will address each claim in turn.

A. Breach of Contract for Failure to Arbitrate

To bring an action for breach of contract under Arizona law, the plaintiff has to allege "the existence of the contract, its breach[,] and the resulting damages." *Graham v. Asbury*, 112 Ariz. 184, 185 (1975). First, the Parties do not dispute the existence of the 2003 Agreement, nor do they dispute the existence of an arbitration provision which states the following: "[a]t the request of any party to this agreement, any Claim shall be resolved by binding arbitration in accordance with the Federal Arbitration Act (Title 9, U. S. Code) (the 'Act')." (Doc. 16, Ex. 5 at 11; *see also* Docs. 11, 19.) Second, Plaintiffs allege a material breach occurred when Plaintiffs invoked the arbitration provision but

BANA failed to resolve their payment dispute in arbitration. (Doc. 16 at 11.) Third, Plaintiffs allege BANA's decision to resolve their payment dispute by filing a complaint in the Previous Lawsuit resulted in various injuries: (1) the judgment which was later vacated caused Sport Collectors to close its doors; (2) Lagnier filed for personal bankruptcy; (3) Plaintiffs lost their good credit and reputation; (4) Plaintiffs became indebted to the federal government; and (5) resolving the payment dispute resulted in years of litigation when arbitration could have resolved the dispute much quicker. (Doc. 1-1 at 11.) However, BANA argues this claim has already been litigated and is precluded by the doctrines of res judicata and collateral estoppel.

1. Res Judicata

Under Arizona law[5], "a final judgment on the merits in a prior suit involving the same parties or their privies bars a second suit based on the same claim." *Dressler v. Morrison*, 212 Ariz. 279, 282 (Ariz. 2006) (en banc). Here, the Parties involved in the Current Lawsuit are the same parties involved in the Previous Lawsuit. However, BANA has failed to show that the Previous Lawsuit reached a final judgment on the merits and that the Current Lawsuit is based on the same claim.

First, the Superior Court in the Previous Lawsuit did not reach a final judgment on the merits of the breach of contract claim here. A dismissal without prejudice is not a final judgment. *McMurray v. Dream Catcher USA, Inc.*, 220 Ariz. 71, 74 (Ariz. Ct. App. 2009); *Canyon Ambulatory Surgery Ctr. v. SCF Arizona*, 225 Ariz. 414, 418-19 (Ariz. Ct. App. 2010) ("A dismissal without prejudice is not a final judgment and is therefore generally not appealable."); *Workman v. Verde Wellness Ctr., Inc.*, 240 Ariz. 597, 600 (Ariz. Ct. App. 2016) ("In contrast, an order dismissing without prejudice is not a final judgment because the plaintiff can refile the action . . . ."). When the Superior Court

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[5] Although both parties cite to and apply the test under federal law, in determining whether a state court decision is preclusive federal courts are required to refer to the preclusion rules of the relevant state. *Williams v. Bahadur*, No. 2:13-cv-2052-TLN-EFB P, 2017 WL 541098, at *3 (E.D. Cal. Feb. 10, 2017) (citing *Miofsky v. Superior Court of State of Cal., in and for the County of Sacramento*, 703 F.2d 332, 336 (9th Cir. 1983)). Here, the relevant state is Arizona, and the Court applies Arizona law.

entered its May 27, 2015 Dismissal, it "dismiss[ed] the matter without prejudice." (Doc. 11-1 at 88.) Because the Superior Court dismissed the matter without prejudice, the Superior Court did not reach a final judgment.

Even if the Superior Court's dismissal did constitute a final judgment, the Superior Court never reached a decision on the merits of a contract claim. BANA argues that in denying Sport Collectors and Lagnier's multiple attempts to hold BANA in contempt, the Superior Court ruled BANA did not have to arbitrate if it preferred to seek relief under a guaranty request with the SBA. (Doc. 11 at 8.) However, what the Superior Court decided was whether to hold BANA in contempt of the March 19, 2014 Order. (Doc. 11-1 at 57-58.) The Superior Court's ruling did not reach the merits of the claim here. Specifically, the Superior Court would have had to consider each element in a contract claim to consider the claim, such as whether there was a valid contract to arbitrate disputes, whether there was a material breach of that contract provision, and whether the breach damaged the plaintiff. The Superior Court's rulings do not reflect a determination on the merits of whether BANA is liable to Plaintiffs for a breach of the arbitration provision. Thus, there was no final judgment on the merits.

Second, Plaintiffs' breach of contract claim in the Current Lawsuit is not the same claim as the claim raised in the Previous Lawsuit. In determining whether the claim raised in a prior case is the same as the one raised in the present action, Arizona courts apply the same evidence test. *Phoenix Newspaper, Inc. v. Dep't of Corr., State of Arizona*, 188 Ariz. 237, 240 (Ariz. Ct. App. 1997) (acknowledging Arizona law differs from the transactional test applied in other jurisdictions). Under the same evidence test, "[i]f no additional evidence is needed to prevail in the second action than that needed in the first, then the second action is barred. *Id.*; *Wilson v. Bramblett*, 91 Ariz. 284 (Ariz. 1962) (finding an action on an open or stated account is not barred by a prior action on a promissory note—even though both actions are based on the same debt).

In the Previous Lawsuit, BANA sued Sport Collectors and Lagnier for failure to make timely payments pursuant to the 2003 Agreement. To prove such a claim, BANA

would have to show evidence a contract exists, Sport Collectors breached its payment obligations, and the amount of damages Sport Collectors would allegedly owe. Although the Plaintiffs' breach of the arbitration provision claim in the Current Lawsuit would also require Plaintiffs to show a contract exists, to prevail Plaintiffs would also have to proffer evidence to show BANA materially breached the arbitration provision and the damages Plaintiffs suffered as a result of BANA's refusal to arbitrate. The evidence to show BANA breached the arbitration provision requires additional evidence from what is necessary to show Plaintiffs breached by failing to make timely payments to BANA. The damages element would also require Plaintiffs to provide additional evidence to make their case. Thus, there is no identity of claims. In sum, Plaintiffs' claim for breach of the arbitration provision in the 2003 Agreement is not barred by Arizona's version of res judicata.

2. Collateral Estoppel

Under Arizona law,[6] collateral estoppel, or issue preclusion, applies when (1) "an issue was actually litigated in a previous proceeding," (2) "there was a full and fair opportunity to litigate the issue," (3) "resolution of the issue was essential to the decision," (4) "a valid and final decision on the merits was entered," and (5) "there is common identity of parties." *Hullett v. Cousin*, 204 Ariz. 292, 297-98 (Ariz. 2003); *Calpine Constr. Fin. Co. v. Arizona Dep't of Revenue*, 221 Ariz. 244, 249 (Ariz. Ct. App. 2009). The fifth element is not required if collateral estoppel is being used "defensively" as opposed to "offensively." *Campbell v. SZL Props., Ltd.*, 204 Ariz. 221, 223 (Ariz. Ct. App. 2003).[7] Because BANA is asserting collateral estoppel as a defense to prevent Plaintiffs from raising a previously litigated issue, BANA uses collateral estoppel

[6] Although both parties again cite to and apply the test under federal law, in determining whether a state court decision is preclusive federal courts are required to apply the issue preclusion rules under Arizona law. *See Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481-82 (1982) (holding state law of collateral estoppel determines the effect of a state court judgment).

[7] Collateral estoppel is offensive when used by a plaintiff to obtain judgment against a defendant, and collateral estoppel is used defensively when a defendant uses it to prevent a plaintiff from raising a previously litigated unsuccessful claim. *Id.*

defensively and identity of the parties is not required. In any case, the Parties do not dispute whether this prong is met.

Here, BANA argues the Superior Court's February 4, 2015 Ruling shows it "considered but rejected Plaintiffs' argument that BANA was required to arbitrate its claims against Plaintiffs, and that BANA was prohibited from satisfying Plaintiffs' debt obligation through the SBA."[8] (Doc. 11 at 8.) It would be fair to say the resolution of whether BANA was prohibited from satisfying Plaintiffs' debt obligation through the SBA was essential to reaching the Superior Court's February 4, 2015 Ruling regarding whether BANA's conduct was in contempt of the Superior Court's March 19, 2014 Order. It also appears there was a full and fair opportunity for Sport Collectors and Lagnier to raise arguments and litigate when the issue of BANA seeking relief through the SBA was implicated in the post-remand motions related to contempt and sanctions. However, despite BANA's framing, the issue implicated in the Current Lawsuit is not quite the issue that was actually litigated in the Previous Lawsuit. Moreover, because the Superior Court dismissed the matter without prejudice, the Superior Court in the Previous Lawsuit never entered a "valid and final decision on the merits."

The Court is hesitant to find that the relevant issue was actually litigated in the Previous Lawsuit because the issue of whether BANA can seek relief through the SBA came up in the Previous Lawsuit in the context of a motion to hold BANA in contempt of a specific court order. (Doc. 11-1 at 52-58.) The Superior Court's March 19, 2014 Order sent the dispute to be resolved in arbitration, and BANA subsequently abandoned its claim. (*Id.* at 57.) Sport Collectors and Lagnier brought their motion re contempt and sanctions in an effort to find BANA in contempt of the February 4, 2015 order. (*Id.* at 52-55.) When the Superior Court found BANA would not be held in contempt because BANA was not prohibited from seeking out federal programs, that conclusion is not quite

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[8] Despite BANA's briefing which states that collateral estoppel is a basis for dismissing Plaintiffs' breach of contract claim, the Court does not see how that is possible and assumes that BANA's argument here merely seeks to stop the relitigation of a particular issue contained within the claim.

the same as deciding whether BANA breached the arbitration provision by filing a complaint. Moreover, Plaintiffs have based their breach claim in the Current Lawsuit not on the failure of BANA to arbitrate in accordance with the February 4, 2015 order. (*See* Doc. 1-1 at 11.) Rather, Plaintiffs allege BANA breached the arbitration provisions when BANA filed the complaint in 2010. (*Id.*) Thus, the Court finds this claim is also not barred by collateral estoppel.

B. Breach of Covenant of Good Faith and Fair Dealing

The duty of good faith and fair dealing is implied in every contract. *Rawlings v. Apodaca*, 151 Ariz. 149, 153 (Ariz. 1986) (en banc). "The duty arises by virtue of a contractual relationship." *Id.* The duty requires that "neither party will act to impair the right of the other to receive the benefits which flow from their agreement or contractual relationship." *Id.* Generally, Arizona law recognizes two ways a party can violate this covenant: (1) "by exercising express discretion in a way inconsistent with a party's reasonable expectations," or (2) "by acting in ways not expressly excluded by the contract's terms but which nevertheless bear adversely on the party's reasonably expected benefits of the bargain." *Bike Fashion Corp. v. Kramer*, 202 Ariz. 420, 424 (Ariz. Ct. App. 2002). If a defendant breached the duty of good faith and fair dealing, the plaintiff is entitled to recover damages proved by the evidence to have resulted naturally and directly from the breach. *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 383 (1985). Plaintiffs allege BANA's failure to abide by the arbitration provision in the 2003 Agreement breached this duty and prevented Plaintiffs from receiving the benefit of their 2003 Agreement. (Docs. 1-1 at 11-12; 16 at 7.) BANA argues this claim was also previously litigated and would be precluded by res judicata and collateral estoppel. (Doc. 11 at 8-9.)

1. Res Judicata

BANA appears to argue that although brought under a different theory, this claim also seeks to relitigate the question of whether the underlying contract required BANA to arbitrate. (*Id.* at 7-8.) Plaintiffs, however, argue the Superior Court in the Previous

Action did not rule on whether BANA breached its covenant of good faith and fair dealing. (Doc. 16 at 9.) Similar to Plaintiffs' breach of the arbitration provision claim, res judicata does not apply here because the Previous Lawsuit did not reach a final judgment on the merits, and the claim raised in the Previous Lawsuit is not the same as Plaintiffs' claim in the Current Lawsuit for a breach of the covenant of good faith and fair dealing. *See Dressler v. Morrison*, 212 Ariz. 279, 282 (Ariz. 2006) (en banc).

First, because the matter was dismissed without prejudice, the Superior Court did not reach a final judgment on the merits. *See McMurry*, 220 Ariz. at 74. Second, BANA alleged two claims in the Previous Lawsuit: breach of contract for failure to make timely payments and replevin. (Doc. 16, Ex. 5 at 5, 7.) However, Plaintiffs' claim for breach of the covenant of good faith and fair dealing in the Current Lawsuit was never implicated in the Previous Lawsuit. In the Previous Lawsuit—where BANA sued to recover the payments Sport Collectors allegedly missed—the Superior Court did not deal with whether BANA's failure to abide by the arbitration provision impaired Plaintiffs' right to receive the benefits under the 2003 Agreement.[9] To prove their claim, Plaintiffs will likely have to introduce additional evidence to prove the damages that they claim resulted naturally and directly from the breach. Although the Parties in the Current Lawsuit are the same as the parties in the Previous Lawsuit, BANA failed to show the other two aspects to bar this claim under the doctrine of res judicata. Thus, Plaintiffs' claim for breach of the covenant of good faith and fair dealing is not barred by res judicata.

2. Collateral Estoppel

BANA does not clearly articulate the specific issue in Plaintiffs' second claim that it wishes to collaterally estop. To the extent its argument is also based on the assertion that the Superior Court rejected Plaintiff's argument that BANA was prohibited from satisfying Plaintiffs' debt through the SBA, this has nothing to do with the relevant issues

[9] The only time this claim surfaced at all was when Sport Collectors and Lagnier requested permission to supplement their amended answer with counterclaims the day before the Previous Lawsuit was to be dismissed. (Doc. 11-1 at 84-86.) Since the Superior Court first dismissed the matter and then subsequently denied the request as moot, this counterclaim was not even allowed into the Previous Lawsuit.

in Plaintiffs' claim. Specifically, the issue litigated in the Previous Lawsuit—whether BANA's request to seek relief through the SBA constituted a violation of the Superior Court's March 19, 2014 Order—has nothing to do with whether BANA filing the June 11, 2010 complaint in the Previous Lawsuit and the methods BANA used to seek relief from the SBA means BANA is liable to Plaintiffs for breaching the covenant of good faith and fair dealing. Thus, this claim is not barred by collateral estoppel.

C. Abuse of Process

The statute of limitations for an abuse of process claim in Arizona is two years. Ariz. Rev. Stat. § 12-542; *Zeman v. Baumkirchner*, No. 1 CA-CV 15-0228, 2016 WL 3176442, at *2 (Ariz. Ct. App. 2016) (stating the general two-year statute of limitations found in Ariz. Rev. Stat. § 12-542 applies to abuse of process claims). The statute of limitations period under Section 12-542 "begins to run upon accrual," which requires not only an alleged wrong but also injury. *Manterola v. Farmers Inc. Exch.*, 200 Ariz. 572, 576 (Ariz. Ct. App. 2001). Thus, it does not commence until the tort results in appreciable, non-speculative harm to the plaintiff. *Id.* In abuse of process claims, recoverable damages may include emotional distress, humiliation, inconvenience, or anxiety caused by the abuse of process. *Zeman*, 2016 WL 3176442, at *3.

BANA contends Plaintiffs' abuse of process claim is barred by the two-year statute of limitations because Plaintiffs "knew BANA sued them in 2010" and believed the harm occurred then. (Doc. 11 at 9.) In response, Plaintiffs argue—without citing any authority or stating any basis—that filing the Complaint on June 10, 2016 was within the statute of limitations because the abuse of process claim did not accrue until the Previous Action was dismissed on May 27, 2015. (Doc. 16 at 10.) However, the Arizona Court of Appeals has previously rejected a plaintiff's argument that the statute of limitations period for an abuse of process claim does not begin to accrue until after the underlying case is terminated. *Zeman*, 2016 WL 3176442, at *2. "Further, the statute of limitations for abuse of process begins to run from the termination of the acts that constitute the complained-of abuse." *Id.* Here, the complained-of abuse is "Bank of America brought

its complaint against [P]laintiffs on June 11, 2010, for the purpose of using the complaint in a wrongful manner that was not proper in the regular course of the proceedings." (Doc. 1-1 at 12.) Plaintiffs continue to allege BANA "brought its complaint against [P]laintiffs for an improper purpose or ulterior motive," and it was BANA's "wrongful use of the complaint" that "caused injury, damage, loss, and harm to plaintiffs." (*Id.* at 13.) Plaintiffs therefore acknowledge the alleged actionable wrong and corresponding injury occurred upon BANA's filing of its complaint in the Previous Lawsuit. Plaintiffs had until June 11, 2012 to bring an abuse of process claim but did not do so until June 10, 2016. (*See* Doc. 1-1.) Plaintiffs have not alleged any other basis for tolling the statute of limitations in this claim. Thus, Plaintiffs' abuse of process claim is time barred.

D. Intentional Infliction of Emotional Distress ("IIED")

Similar to a claim for abuse of process, an IIED claim must be brought within two years of the accrual date. *Mahon v. Hammond*, No. 1CA-CV 14-0539, 2016 WL 337493, at *3 (Ariz. Ct. App. 2016); *Hansen v. Stoll*, 130 Ariz. 454, 460 (Ariz. Ct. App. 1981); *see also* Ariz. Rev. Stat. § 12-542. BANA also contends Plaintiffs' IIED claim is barred by the two-year statute of limitations for the same reasons. (Doc. 11 at 9-10.) Plaintiffs provide the same response, arguing (but without any authority) that this claim is not barred because the claim did not accrue until the Previous Action was dismissed on May 27, 2015. (Doc. 16 at 10.)

Here, Plaintiffs allege two specific acts with regard to conduct that forms the basis of the IIED claim: (1) BANA and its employees "acted willfully in bringing its June 11, 2010 [c]omplaint against [P]laintiffs"; and (2) BANA and its employees "acted willfully in submitting a Guaranty Request with the U.S. Small Business Administration for the purpose of recovering the sum of $146,798.61." (Doc. 1-1 at 13.) As indicated in the Complaint, the first act occurred on June 11, 2010. (*Id.*) And the act of submitting a guaranty request with the SBA occurred on February 26, 2014. (Doc. 11-1 at 10, 47.) In any case, Plaintiffs filed the Complaint on June 10, 2016—more than two years after

either date.[10] Plaintiffs have not alleged any other basis for tolling the statute of limitations. Thus, Plaintiffs' IIED claim is time barred.

E. Attorneys' Fees

This case will proceed and the request for attorneys' fees is premature.

Accordingly,

IT IS ORDERED Defendant's motion to dismiss (Doc. 11) is **GRANTED** in part and **DENIED** in part. Defendant's motion to dismiss Claims One and Two are **DENIED**. Defendant's motion to dismiss Claims Three and Four are **GRANTED**. If Plaintiffs have a valid basis for amending the currently time-barred claims, they must allege additional facts identifying accrual dates within the statute of limitations. Should Plaintiffs choose to amend, Plaintiffs shall file an amended complaint by **no later than Wednesday, April 5, 2017**.

Dated this 27th day of March, 2017.

Honorable Roslyn O. Silver
Senior United States District Judge

[10] Furthermore, to the extent Plaintiffs' bare argument is based on a continuing tort theory, "[n]o Arizona court has applied the continuing tort rule to emotional distress." *Mahon*, 2016 WL 337493, at *4 (citing various Arizona appellate courts that rejected this application). "Conduct causing emotional distress where each act causes separate and cumulative injury does not trigger the continuing tort rule." *Id.* Thus, this doctrine does not apply here.