

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



DIVISION ONE
FILED: 10/29/2013
RUTH A. WILLINGHAM,
CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

GREGORY BEST,) No. 1 CA-CV 12-0593
)
Plaintiff/Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
)
MAGDALENO CORTEZ and BARBARA CORTEZ,) (Not for Publication -
Husband and wife; JUAN CORTEZ,) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
Defendants/Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-000526

The Honorable John C. Rea, Judge

AFFIRMED

Gregory Best Phoenix
In Propria Persona

Goldman & Zwillinger PLLC Tempe
By: Scott H. Zwillinger
Attorneys for Appellees

G O U L D, Judge

¶1 Plaintiff Gregory Best appeals from the order granting Magdaleno and Barbara Cortez (collectively "Cortez") summary judgment on Best's breach of contract claim. For the reasons that follow, we affirm.

BACKGROUND

¶2 The following material facts are undisputed. Cortez owns a home in South Phoenix ("Property"). On March 20, 2004, Best and Cortez signed an option agreement granting Best the exclusive right until March 23, 2009 to purchase their Property for \$75,000.00 ("Option Contract"). Best paid Cortez \$50.00 as "Earnest Money." On April 7, 2004, Cortez sent Best a "Cancellation of Exclusive Purchase Option Contract" by certified mail, stating Cortez "terminate[d]" the Option Contract on March 31 ("Cancellation Letter"). Best refused to accept the Cancellation Letter, and Cortez recorded it with the Maricopa County Recorder's Office.

¶3 On March 26, 2006, Best informed Cortez by letter that he was exercising his right under the Option Contract to purchase the Property, stating: "Let this also serve as a Notice of my intent to purchase, as of this date. Take your earnest money to the title company of your choice. Provide them with a copy of our contract and my mailing address, so I can successfully exercise my right to purchase, immediately." Cortez did not comply with Best's demands.

¶4 On January 7, 2008, Best filed a complaint alleging he had "exercised the [O]ption[,]" and Cortez breached the Option Contract by "refus[ing] to cooperate within [sic] Plaintiff to complete the terms of the Option Contract despite written demand

that they do so.”¹ For relief, Best sought damages and specific performance.

¶5 Cortez moved for summary judgment, arguing Best provided no evidence that he was ready, willing and able to pay Cortez \$75,000.00, and the trial court should therefore dismiss the complaint based on Best’s inability to perform under the Option Contract. The trial court denied Cortez’s motion,² and Best thereafter unsuccessfully moved for summary judgment. The trial court subsequently reconsidered its decision and granted Cortez summary judgment after Cortez presented it with three recent memorandum decisions (“Memo Decisions”) from this court. Based on the Memo Decisions, the trial court concluded that Best, under similar option agreements with other homeowners, had failed to provide evidence that he could perform under the applicable agreements; as a result, the trial court determined that Cortez was also entitled to summary judgment on Best’s breach of contract claims.³ Best timely appealed, and we have

¹ The trial court eventually dismissed the other defendants Best named in the complaint, including Juan Cortez, Cortez’s son. Best raises no issues on appeal pertaining to those defendants.

² The trial court stated its reasons for denying this motion “on the record,” but we have not been provided a copy of the relevant transcript.

³ See *Best v. Castillo*, 1 CA-CV 10-0848, 2011 WL 6651275 (Ariz. App. Dec. 20, 2011) (mem. decision); *Best v. J. Miranda*, 1 CA-CV 11-0178, 2012 WL 967048 (Ariz. App. March 20, 2012) (mem. decision); *Best v. A. Miranda*, 1 CA-CV 10-0886 (Ariz. App. Feb.

jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes sections 12-120.21(A)(1) (West 2013) and -2101(A) (West 2013).

DISCUSSION

¶6 Summary judgment is appropriate when “there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.” Ariz. R. Civ. P. 56(a). We review a grant of summary judgment *de novo*, viewing the facts and inferences drawn from those facts in the light most favorable to the party against whom judgment was entered. *Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, 55, ¶ 8, 156 P.3d 1157, 1160 (App. 2007). “We will affirm the superior court if its ruling was ‘correct for any reason, even if that reason was not considered’ by the court.” *Parkinson v. Guadalupe Pub. Safety Ret. Local Bd.*, 214 Ariz. 274, 277, ¶ 12, 151 P.3d 557, 560 (App. 2007) (quoting *Glaze v. Marcus*, 151 Ariz. 538, 540, 729 P.2d 342, 344 (App. 1986)).

¶7 Best argues the court erred as a matter of law in granting Cortez summary judgment. He contends that because Cortez repudiated the Option Contract, he was excused as a matter of law from having to actually tender the \$75,000.00 payment to Cortez. Best further argues that Cortez’ alleged repudiation also excused him from having to prove he was ready,

14, 2002) (mem. decision), subsequently published as an opinion, *Best v. Miranda*, 229 Ariz. 246, 274 P.3d 516 (App. 2012).

willing and able to tender the \$75,000.00 payment. As a result, Best asserts he is entitled to "specific performance."

¶8 "[A]n option agreement must be strictly construed, in that it must be exercised in exact accord with its terms and conditions. . . . If an option expresses a manner in which payment is to be made, the optionee must comply therewith in order to cause a contract of purchase to come into existence[.]" *Rogers v. Jones*, 126 Ariz. 180, 182, 613 P.2d 844, 846 (App. 1980).

¶9 Here, the Option Contract clearly states that if Best wants to exercise his option to purchase the Property, he is required to pay Cortez \$75,000.00.⁴ However, if Cortez has in fact repudiated the contract,⁵ then Best is not required to make

⁴ In relevant part, the Option provides: "The total purchase price is \$75,000.00. That amount must be paid in full on or before the 23rd hour (11 p.m.) on the day listed in March of the year 2009. (3/23/09) . . . Upon payment to Cortez . . . of above said amount, the . . . [P]roperty owner promises to relinquish her . . . complete ownership rights to . . . [the P]roperty."

⁵ In granting Cortez' motion for summary judgment, the trial court indicates, without expressly finding, that Cortez repudiated the Option Contract. See *United California Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 277, 681 P.2d 390, 429 (App. 1983) ("[I]n order to constitute an anticipatory breach of contract there must be a positive and unequivocal manifestation on the part of the party allegedly repudiating that he will not render the promised performance when the time fixed for it in the contract arrives.") (quoting *Diamos v. Hirsch*, 91 Ariz. 304, 307, 372 P.2d 76, 78 (1962)). While Cortez' Cancellation Letter and Barbara Cortez' deposition testimony would appear to constitute a clear repudiation of the

an actual, formal tender of the \$75,000.00 payment in order to pursue his claim for breach of contract. *Kammert Bros. Enterprises, Inc. v. Tanque Verde Plaza Co.*, 102 Ariz. 301, 306, 428 P.2d 678, 683 (1967). Under these circumstances, requiring Best to actually tender the \$75,000.00 payment would, in essence, require Best to perform a futile act, because Cortez has already expressed her intention not to accept the payment. *Kammert Bros. Enterprises, Inc.*, 102 Ariz. at 306, 428 P.2d at 683; *Nelson v. Cannon*, 126 Ariz. 381, 385, 616 P.2d 56, 60 (1980). See *Woliansky v. Miller*, 135 Ariz. 444, 446, 661 P.2d 1145, 1147 (App. 1983) (Holding that in reference to a purchase contract, "Before a buyer is awarded specific performance he generally must satisfy the court that he is ready and able to perform. However, in a case such as this where the seller repudiates the contract, the purchaser is not required to tender performance before commencing the action in order to preserve his right to enforce the contract.").

¶10 While Cortez' alleged repudiation may have excused Best from actually tendering the \$75,000.00 payment, Best is still required to prove that he is ready, willing, and able to perform under the Option Contract, e.g., pay Cortez \$75,000.00 to exercise his purchase option. *Kammert Bros. Enterprises, Inc.*, 102 Ariz. at 306, 428 P.2d at 683. See *Nelson*, 126 Ariz.

Option Contract, for the reasons set forth in this decision we need not decide this issue on appeal.

at 385, 616 P.2d at 60 (“[T]he buyer stood ready, willing and able to perform. This well settled condition precedent must be satisfied in order for the buyer to be entitled to the remedy of specific performance”); *Shreeve v. Greer*, 65 Ariz. 35, 41, 173 P.2d 641 (1946) (“[I]f defendant has openly refused to perform, the plaintiff need not make a tender or demand; it is enough that he is ready and willing” to perform the contract.) (internal citations omitted).

¶11 Here, Best has never showed he is ready, willing and able to comply with the terms of the Option Contract. Despite receiving Cortez’ Cancellation Letter in 2004,⁶ Best never accepted Cortez’ repudiation of the Option Contract. Rather, Best actually tendered his performance under the Option Contract by sending the March 26, 2006 letter to Cortez. The March 26, 2006 letter does not, however, tender payment of \$75,000.00 as required by the Option Contract; it merely states Best’s *intention* to purchase the Property, and directs Cortez to open an escrow account. Thus, Best’s *actual* tender in this case shows that he is not ready, willing and able to comply with the

⁶ While Best argues the Cancellation Letter was a clear and unequivocal repudiation of the Option Contract, because he refused to accept certified delivery of the letter he was not fully aware of Cortez’ repudiation until after he filed his complaint in 2008. However, even if we accept Best’s claim that he lacked actual knowledge of the Cancellation Letter, Best was provided constructive knowledge of the letter when it was recorded by Cortez. *SWC Baseline & Crismon Investors, LLC v. Augusta Ranch Ltd. Partnership*, 228 Ariz. 271, 283, ¶ 42, 265 P.3d 1070, 1082 (App. 2011).

terms of the Option Contract. Accordingly, we conclude the trial court did not err in granting Cortez' motion for summary judgment.

¶12 Best also argues that the court erred in "applying" the Memo Decisions when it granted Cortez summary judgment. Although Best is correct that the Memo Decisions are factually distinguishable from this case based on Cortez' apparent repudiation of the Option, the record reflects the court did not rely upon them as controlling precedent; rather, the court "independently agree[d] with the analysis in those cases concerning the requirement of strict construction and performance in option contracts." We find no reversible error.

¶13 Next, Best contends that the court's statement in its minute entry ruling that Best asserted a "legitimate issue" precludes summary judgment to Cortez. However, the court did not find that Best raised a "genuine dispute as to a[] material fact," the proper factual standard applicable to summary judgment determinations. Ariz. R. Civ. P. 56(a). Indeed, the court's statement is unclear. We will not find reversible error on this basis.

¶14 Best cursorily argues the court abused its discretion in denying his motion in limine to preclude certain statements from being admitted at trial. Because this case was resolved on summary judgment, there will be no trial. Accordingly, we

cannot find the court abused its discretion by denying the motion.

¶15 Finally, our disposition of this case obviates the need to address Best's remaining argument that he was improperly denied summary judgment.

CONCLUSION

¶16 The order granting Cortez summary judgment is affirmed. Cortez is entitled to costs incurred on appeal subject to compliance with ARCAP 21.⁷

/S/
ANDREW W. GOULD, Presiding Judge

CONCURRING:

/S/
MICHAEL J. BROWN, Judge

/S/
DONN KESSLER, Judge

⁷ See Arizona Supreme Court order No. R-12-0039 amending ARCAP 21 effective January 1, 2014.