DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

AREK FRESSADI, an unmarried man, Plaintiff/Counter-Defendant/Appellant, v. GV GROUP, L.L.C., an Arizona limited liability company; MG DWELLINGS, INC., an Arizona corporation; BUILDING GROUP, INC., an Arizona corporation; MICHAEL T. GOLEC, an unmarried man; and KEITH VERTES and KAY VERTES, husband and wife, Defendants/Counter-Claimants/Appellees.	No. 1 CA-CV 12-0601 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2006-014822

The Honorable Eileen S. Willett, Judge

REVERSED AND REMANDED

Arek Fressadi — Tucson
Pro Se

Israel & Gerity, PLLC — Phoenix
By Kyle A. Israel
Attorneys for Defendants/Appellees

G O U L D, Judge

¶1 Plaintiff/appellant/counterdefendant Arek Fressadi appeals from a default judgment in favor of defendants/appellees/counterclaimants GV Group, LLC, MG Dwellings, Inc., Building Group, Inc., Michael T. Golec, and Keith and Kay Vertes (collectively "GV Group")[1] which resulted from the superior court's striking of Fressadi's Second Amended Complaint and his answer to GV Group's counterclaims for failing to appear at a pretrial conference. Because we find that the court abused its discretion in striking the complaint and answer to counterclaims, we reverse.

FACTS AND PROCEDURAL HISTORY

¶1 On October 16, 2003, Fressadi, as owner of parcels 211-10-010 A, B, and C (hereafter Lots 010A, 010B and 010C) in Cave Creek, Arizona, and GV Group, LLC, as owner of parcels 211-10-003, A, B, and C (hereafter Lots 003A, 003B, and 003C) entered into an agreement titled Declaration of Driveway Easement and Maintenance Agreement ("the DMA"). The DMA provided in part:

> **1. Easement.** The Lots shall have a perpetual, nonexclusive easement over and upon the Driveway for the purpose of access, maintenance, repair and reconstruction of

[1] Vertes was a manager and member of GV Group and president and principal shareholder of Building Group. Golec was a manager and member of GV Group and president and principal shareholder of MG Dwellings, which was also a member of GV Group.

> the Driveway and attendant rock retaining walls, and related utilities.

The DMA declared that the easements and covenants were to "run with each lot" and were to be "binding upon all parties having or acquiring any right, title or interest therein" and to "inure to the benefit of any successor to Declarant."

¶2 Before the DMA was executed, GV Group sold Lot 003A to Jocelyn Kremer, such that her lot was not included in the DMA as intended.

¶3 On October 21, 2003, the DeVincenzos purchased Lot 010C from Fressadi. The DMA and the warranty deed for the sale were recorded on October 22, 2003.

¶4 Disputes arose related to the failure to include Lot 003A in the DMA, including disputes as to the use of and maintenance of the driveway, the related costs, and the share of costs the parties were required to pay. After attempts to negotiate Kremer's inclusion in the DMA failed, on October 27, 2005, Fressadi sent an email stating that Kremer was not a party to the DMA, that because she was not included the DMA failed as an agreement between him and GV Group for lack of reciprocity, and that "what remains is an agreement between the DeVincenzos and myself."

¶5 On October 2, 2006, Fressadi filed a complaint against GV Group, alleging in part that, when it executed the DMA, GV

Group had misrepresented its authority to bind Lot 003A because it had previously sold that lot to Kremer.

¶6 GV Group answered and filed a counterclaim. GV Group alleged in part that it was in the home construction business and that Fressadi had on various occasions through various means blocked or otherwise obstructed use of the driveway and threatened violence against workers hired to construct homes on the properties, resulting in construction delays causing damages.

¶7 Real Estate Equity Lending, Inc. ("REEL") acquired Lot 003C on May 28, 2008, pursuant to a trustee's sale.

¶8 On August 26, 2009, Fressadi filed a Verified Second Amended Complaint, adding as defendants REEL and the DeVincenzos. Fressadi alleged that, because of Kremer's refusal to join the DMA, he had "sent an email formally rescinding the DMA" on October 27, 2005, because inclusion of Lot 003A was pivotal to his decision to enter into the agreement. Against all defendants, he alleged claims for declaratory relief, seeking a determination of whether the DMA was valid and enforceable, whether he had effectively rescinded the agreement, or whether he was entitled to rescind the agreement. Alternatively, Fressadi asserted that, if the agreement was valid and had not been rescinded, a justiciable controversy existed as to the rights and obligations of the parties under

the agreement. He alleged additional claims against GV Group for breach of contract, bad faith, fraud, negligent misrepresentation, and rescission or reformation of the DMA.

¶9 Fressadi moved to consolidate the case with four other actions arising out of the same circumstances.[2] The court denied the motion to consolidate, finding that "consolidation is not appropriate as a matter of law and, additionally, would result in unnecessary delay."

¶10 He also moved to add as necessary parties M&I Bank, which had foreclosed on Lot 003B; Jocelyn Kremer, the owner of Lot 003A; Security Title Company, which had handled the sale of Lot 010C to the DeVincenzos; and Kay Vertes as Trustee for the Vertes Family Trust. The motion, which did not have an attached proposed amended complaint, was denied for failure to comply with Rule 15(a), Arizona Rules of Civil Procedure, and for failure to set forth sufficient facts on which to base such a ruling.

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[2] Two of the cases involved Fressadi's claim that he was entitled to compensation for a sewer line that he had installed and to which the Town of Cave Creek had authorized other properties, including the 003 lots, to connect. He claimed that the utilities ran in the DMA easement and that GV Group had no right to access the sewer because it had breached the DMA. The third action concerned Fressadi's claim that construction on the 003 lots violated Cave Creek's building code and various ordinances, and the fourth case concerned a special action Fressadi filed to review a variance granted by Cave Creek to REEL for construction on Lot 003C.

¶11 REEL filed a motion for summary judgment, arguing that Fressadi was asserting contract-dependent claims pursuant to a contract that Fressadi argued was void or was rescinded prior to REEL becoming owner of Lot 003C. Fressadi argued that he alleged claims in the alternative and that REEL, although arguing that it had no agreement with Fressadi, was claiming in other actions that it had rights under the DMA. The DeVincenzos joined in REEL's motion.

¶12 The court granted summary judgment in favor of REEL and the DeVincenzos. The court found that Fressadi's claims failed because they were based on the existence of the DMA, which Fressadi claimed to have rescinded.[3]

¶13 On January 10, 2011, Fressadi failed to appear for a status conference. After noting that Fressadi had received notice of the hearing and had not contacted the court or requested a continuance, the court struck Fressadi's Second Amended Complaint and his answer to the counterclaim.

¶14 On January 18, 2011, Fressadi filed a motion for new trial seeking to "set aside all judgments." That same day,

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[3] Fressadi appealed from these judgments. This court reversed. We found that Fressadi had pleaded his claims in the alternative, that he had sought a declaration as to the rights of the parties under the DMA, and that questions of fact existed. *Fressadi v. Real Estate Equity Lending, Inc.*, 1 CA-CV 11-0728 (Ariz. App. Nov. 23, 2012) (mem. decision); *Fressadi v. DeVincenzo*, 1 CA-CV 12-0435 (Ariz. App. May 14, 2013) (mem. decision).

Fressadi notified the court that he had filed for bankruptcy; the bankruptcy stay was lifted July 28, 2011.

¶15 In an amended motion for new trial, Fressadi again asked the court to vacate all judgments. He specifically asked the court to vacate its ruling striking his Second Amended Complaint and his answer to GV Group's counterclaims, explaining that he had believed that his bankruptcy attorney had filed his petition and that all proceedings had been stayed. The court denied Fressadi's motion for new trial and amended motion for new trial.

¶16 On March 27, 2012, Fressadi filed a motion to vacate the judgment, in which he reiterated his reason for not appearing at the pretrial conference. He also argued that the court wrongly failed to consider lesser sanctions than dismissing his complaint and answer. The court denied the motion.

¶17 The court set an evidentiary hearing on damages for GV Group's counterclaims, after which Fressadi filed a "Motion for Clarification," asking the court to clarify the intent of the evidentiary hearing. The motion again explained that he missed the pretrial conference because his bankruptcy lawyer indicated that his bankruptcy petition would be filed; he failed to notify the court he would not appear because he forgot.

¶18 On May 4, 2012, the court held an evidentiary hearing on damages in which Fressadi participated. The court awarded GV Group compensatory damages in the amount of $1,611,453.70, punitive damages in the amount of $805,726.85, and attorneys' fees.

¶19 On July 3, 2012, the court entered final judgment, awarding GV Group $195,829 in attorneys' fees in addition to the compensatory and punitive damages awards. Fressadi filed additional motions to vacate, and then filed a notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (Supp. 2012).[4]

DISCUSSION

¶20 GV Group contends that this court lacks jurisdiction because Fressadi filed a notice of appeal specifically to the

[4] Generally, this court lacks jurisdiction to review a default judgment unless the appellant is challenging personal or subject matter jurisdiction or claiming the judgment was not properly entered pursuant to Rule 55, Arizona Rules of Civil Procedure. *Hirsch v. Nat'l Van Lines, Inc.*, 136 Ariz. 304, 311, 666 P.2d 49, 56 (1983); *Kline v. Kline*, 221 Ariz. 564, 568, ¶ 11, 212 P.3d 902, 906 (App. 2009). A defaulting party's primary remedy is to move to set aside the judgment pursuant to Rule 60 and appeal from a denial of that motion. *Hirsch*, 136 Ariz. at 311, 666 P.2d at 56. However, this court has held that we have jurisdiction over an appeal from a default judgment where, as here, the judgment is a consequence of the superior court's having stricken the appellant's pleadings as a sanction pursuant to Arizona Rule of Civil Procedure 37, rather than because of a party's failure to file a responsive pleading. *See Sears Roebuck & Co. v. Walker*, 127 Ariz. 432, 435, 621 P.2d 938, 941 (App. 1980).

Arizona Supreme Court and did not file a timely notice of appeal to the Court of Appeals.

¶21 A notice of appeal to the Court of Appeals must be filed with the clerk of the superior court not later than thirty days from entry of judgment from which the appeal is taken. ARCAP 9(a). The notice "shall specify the party or parties taking the appeal, shall designate the judgment or part thereof appealed from, and shall name the court to which the appeal is taken." ARCAP 8(c). Technical defects in the content of the notice of appeal, however, are usually not jurisdictional and do not render the notice ineffective unless misleading or prejudicial to the appellee. *Schwab v. Ames Constr.*, 207 Ariz. 56, 59, ¶ 11, 83 P.3d 56, 59 (App. 2004). Where an appellee has received adequate notice, technical error will not preclude this court from reaching the merits of the appeal. *Hill v. City of Phoenix*, 193 Ariz. 570, 572, ¶ 10, 975 P.2d 700, 702 (1999).

¶22 Fressadi's notice of appeal stated in part,

> Plaintiff appeals from the Order of Judgment entered on June 26, 2012 in favor of Defendants GV Group LLC et al to the Supreme Court pursuant to Rule 19 in keeping with his Motion to Transfer and Consolidate filed July 10, 2012 . . . .

Rule 19, Arizona Rules of Civil Appellate Procedure permits any party to an appeal pending before the Court of Appeals to petition the Supreme Court to order the transfer of the case to the Supreme Court. ARCAP 19(b).

¶23 Fressadi had filed a motion to transfer to the Arizona Supreme Court several related appeals pending in this court. Although the notice of appeal is technically defective in that it does not identify the Court of Appeals as the court to which Fressadi is appealing, Rule 19 itself requires that an appeal be brought to the Court of Appeals before it may be transferred, the notice of appeal obviously intended that the instant appeal be added to those already in this court that Fressadi sought to have transferred, and the notice was timely filed in the superior court, which is the proper procedure for filing a notice of appeal to the Court of Appeals. *See* ARCAP 8(a). More importantly, GV Group has not contended, much less shown, that it was in any way misled or prejudiced by any defect in the notice. Despite the technical defect, this court has jurisdiction over Fressadi's appeal.

¶24 The trial court's judgment in this case derives from its decision to strike Fressadi's Second Amended Complaint and his answer to GV Group's counterclaims because Fressadi failed to appear for a pretrial conference.

¶25 If a party fails to appear at a scheduling or pretrial conference, the court shall require the party to pay reasonable expenses incurred and, in addition, "shall, except upon a showing of good cause, make such orders with regard to such conduct as are just, including, among others, any of the orders

provided in Rule 37(b)(2)(B), (C), or (D)." Ariz. R. Civ. P. 16(f). These orders include an order "striking out pleadings or parts thereof, . . . or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party." Ariz. R. Civ. P. 37(b)(2)(C). Sanctions must be appropriate to the circumstances and be preceded by due process. *Roberts v. City of Phoenix*, 225 Ariz. 112, 119-20, ¶ 27, 235 P.3d 265, 273 (App. 2010); *Hammoudeh v. Jada*, 222 Ariz. 570, 572, ¶ 6, 218 P.3d 1027, 1029 (App. 2009). The trial court has discretion in imposing sanctions, but when the court strikes a pleading or enters a default or dismissal as a sanction, its discretion is more limited than when imposing lesser sanctions. *Roberts*, 225 Ariz. at 119, ¶ 27, 235 P.3d at 272. Striking a pleading and entering a default may be appropriate when the offending conduct was intentional, willful, or taken in bad faith. *Id.* When considering imposing dismissal or default as a sanction, the court must consider and reject lesser sanctions. *Id.* at 121, ¶ 31, 235 P.3d at 274; *Hammoudeh*, 222 Ariz. at 572, ¶ 6, 218 P.3d at 1029. Litigation should be disposed of on its merits, and therefore dismissal as a sanction should be used "with caution and restraint." *Zakroff v. May*, 8 Ariz. App. 101, 104, 443 P.2d 916, 919 (App. 1968).

¶26 This court previously considered the propriety of striking Fressadi's Second Amended Complaint in *Fressadi v. Real*

Estate Equity Lending, Inc., 1 CA-CV 11-0728 (Ariz. App. Nov. 23, 2012) (mem. decision) and *Fressadi v. DeVincenzo*, 1 CA-CV 12-0435, (Ariz. App. May 14, 2013) (mem. decision).[5] We concluded that the superior court had abused its discretion in striking the complaint and answer to counterclaims. We noted that the court's minute entry ruling included findings that Fressadi had received notice of the status conference, that he had not contacted the court, and that he had not requested a continuance, but did not refer to any other infractions or misconduct committed by Fressadi or provide any reasoning to support imposing such a severe penalty in the first instance. The minute entry gave no indication that the court considered and rejected lesser sanctions.

¶27 GV Group argues that, because Fressadi filed subsequent motions challenging the strike ruling, the superior court implicitly considered and rejected lesser sanctions when it denied the motions. Therefore, according to GV Group, the strike order should be affirmed.[6]

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[5] In those cases, Fressadi appealed from the superior court's earlier decisions granting summary judgment to REEL and the DeVincenzos. After determining that summary judgment was not correctly granted, we considered the propriety of the superior court's subsequent decision to strike Fressadi's Second Amended Complaint because, if the order to strike was appropriate, then remand would have been unnecessary.

[6] GV Group also contends that Fressadi did not argue in the trial court that the strike order was an excessive sanction and that he cannot raise that argument for the first time on appeal.

¶28 The superior court's orders denying the post-strike motions provide no more indication that the court considered and rejected lesser sanctions than the original ruling. In addition, like the original order, the subsequent orders do not mention any additional misconduct by Fressadi such that missing a single conference would warrant striking his complaint and answer to counterclaim.

¶29 We reject GV Group's argument that we should assume that the trial court appropriately considered lesser sanctions and that such "implicit consideration" is sufficient to affirm the ruling. We defer to a trial court's implicit factual findings only if supported by reasonable evidence. *Roberts*, 225 Ariz. at 119, ¶ 24, 235 P.3d at 272. Even were we to accept that the court implicitly considered and rejected lesser sanctions, sanctions must be appropriate to the circumstances. It is this court's obligation to determine whether the record contains a reasonable basis for the court's ruling. *See Poleo v. Grandview Equities, Ltd.*, 143 Ariz. 130, 133, 692 P.2d 309, 312 (App. 1984). The record before us shows only that Fressadi missed a pretrial conference; striking Fressadi's complaint and

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See Paloma Inv. Ltd. P'ship v. Jenkins, 194 Ariz. 133, 137, 978 P.2d 110, 114 (App. 1998) ("New arguments may not be raised for the first time on appeal."). However, in a motion to vacate the judgment filed March 27, 2012, Fressadi argued that the court should have considered lesser sanctions than the ultimate sanction of dismissal. We deem this sufficient to preserve the argument.

answer was not appropriate to the circumstances on this record. We therefore reverse the court's judgment.

¶30 GV Group argues that even if the strike order is reversed, the damages award should be affirmed contingent on GV Group's succeeding on its liability claims on remand. It offers no authority to support such a position, and we reject the argument. The damages award stems from the default judgment. Having reversed the default judgment, we have no basis for affirming the damages award.

¶31 Fressadi also argues that the superior court erred in denying his request to add indispensible parties and to consolidate this action with other related cases. His argument, however, refers only to the Town of Cave Creek.

¶32 Fressadi did not move to add Cave Creek as a necessary party. His motion named M&I Bank, Jocelyn Kremer, Security Title Company, and Kay Vertes. Having not made the appropriate motion to join Cave Creek as a necessary party, Fressadi has no basis for complaining that the court erred in failing to add Cave Creek to the action. *See Englert v. Carondelet Health Network*, 199 Ariz. 21, 26, ¶ 13, 13 P.3d 763, 768 (App. 2000) ("we generally do not consider issues . . . raised for the first time on appeal").

¶2 Fressadi also argues the court should have consolidated this action with his other actions against Cave

Creek. Fressadi had moved to consolidate this action with four other cases including two in which Cave Creek was a defendant--CV2009-050924, which involved Fressadi's claims the construction and improvements on the 003 lots violated building codes, and CV2009-050821, which concerned Fressadi's claim that he was owed compensation for the construction of a sewer line. The court ruled that consolidation was not appropriate as a matter of law, finding that the cases involved different questions of law and fact, and that consolidation would result in unnecessary delay.

¶3 Under Rule 42(a), Arizona Rules of Civil Procedure,

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions, or it may order all the actions consolidated, and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

The decision to consolidate an action is within the discretion of the trial court, and this court will not disturb that decision absent an abuse of the court's discretion. *Hancock v. McCarroll*, 188 Ariz. 492, 495, 937 P.2d 682, 685 (App. 1996). Consolidation is allowed as a matter of convenience and economy. *Torosian v. Paulos*, 82 Ariz. 304, 315-316, 313 P.2d 382, 390 (1957) (quoting *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479 (1933)). Consolidating cases does not result in a merger of the cases, does not affect the rights of the parties, and does not make the parties of one suit parties in another. *Id.*

¶33 Fressadi outlines his claimed grievances against Cave Creek, but he fails to articulate why the court erred in deciding not to consolidate the Cave Creek cases with this action. He does not explain how failure to consolidate the cases would prevent or hamper him from presenting his case in this action. Moreover, the cases involving Cave Creek—CV2009-050924 and CV2009-050821—were dismissed by the superior court, and both dismissals have been affirmed by this court. *See Fressadi v. Town of Cave Creek*, 1 CA-CV 11-0051 (Ariz. App. May 10, 2012) (mem. decision); *Fressadi v. Town of Cave Creek*, 1 CA-CV 12-0238 (Ariz. App. May 9, 2013) (mem. decision). Neither case remains to be consolidated on remand.

¶34 Fressadi's remaining arguments complain that the DMA is illusory, that non-party Cave Creek created illegal subdivisions making the DMA invalid, and that GV Group failed to disclose material facts. These arguments are not relevant to an appeal from the default judgment arising from the strike order. In addition, the arguments are based on unproven, disputed facts and legal conclusions that have not as yet been decided by the superior court. The superior court has issued no ruling on these matters for this court to review, and this court does not resolve factual disputes in the first instance. *See State v. Schackart*, 190 Ariz. 238, 247, 947 P.2d 315, 324 (1997) (noting

that the Supreme Court does not act as fact finder). We therefore do not address these arguments.

¶35 Both parties request an award of attorneys' fees on appeal pursuant to A.R.S. § 12-341.01, which authorizes a discretionary award of reasonable attorneys' fees to the successful party in a contested action arising out of contract. A.R.S. § 12-341.01(A) (West 2012). As no party has yet prevailed on the merits, we deny the request.

CONCLUSION

¶36 We find that the superior court abused its discretion in striking Fressadi's Second Amended Complaint and answer to GV Group's counterclaims for his failure to appear at a pretrial conference. We therefore vacate the judgment in favor of GV Group, reinstate the Second Amended Complaint and Fressadi's answer to GV Group's counterclaims, and remand for further proceedings.

/S/
ANDREW W. GOULD, Presiding Judge

CONCURRING:

/S/
MARGARET H. DOWNIE, Judge

/S/
PATRICIA A. OROZCO, Judge