DIVISION ONE
FILED: 9/12/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

GERARD ANDERSON, Plaintiff/Appellant, v. KENNETH C. DRAKE and RHONDA DRAKE, husband and wife; and YUMA SITE, L.L.C., an Arizona limited liability company, Defendants/Appellees.	)	1 CA-CV 12-0791 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)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 2007-019591

The Honorable Colleen L. French, Judge *Pro Tem*
The Honorable James P. Beene, Judge

AFFIRMED

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D O W N I E, Judge

¶1 Gerard Anderson appeals the entry of summary judgment against him and the denial of his motion for new trial. For the following reasons, we affirm.

BACKGROUND[1]

¶2 Yuma Site, L.L.C. ("Yuma Site") is a limited liability company created by Kenneth Drake and Rhonda Drake in April 1997.[2] Yuma Site's operating agreement lists the Drakes as its only members, requiring each to contribute capital, and assigning a 50% interest to each. Yuma Site owns commercial property in Yuma, which it leases to a restaurant, convenience store, and gas station.

¶3 Anderson, who has partnered with Kenneth in business ventures since 1984, claims that he and Kenneth always operated as equal partners and made equal capital contributions. According to Anderson, the two men orally agreed in 1997 that Anderson would become a 50% owner and member of Yuma Site once Anderson's divorce, pending since 1996, was finalized. At that time, Anderson would reportedly make capital contributions in

[1] We view the evidence in the light most favorable to Anderson, the party against whom summary judgment was granted, and draw inferences fairly arising from the evidence in his favor. *See Phoenix Baptist Hosp. & Med. Ctr., Inc. v. Aiken*, 179 Ariz. 289, 293, 877 P.2d 1345, 1349 (App. 1994) (citation omitted).

[2] We refer to the Drakes by their first names where necessary to distinguish between them.

exchange for his membership interest. Anderson and the Drakes had no written agreement concerning Yuma Site.

¶4 Anderson's divorce was final in 2000. He made no capital contribution at that time, but contends he performed services for Yuma Site without pay. In November or December of 2003, Anderson discussed a capital contribution with Kenneth and tendered a one-page handwritten agreement stating that he would purchase a 49% interest in Yuma Site from the Drakes in exchange for $77,800. Kenneth never signed the agreement. On January 3, 2007, Anderson mailed Kenneth a $41,830 check, which he asserts was the amount of his capital contribution due after offsets. Kenneth returned the check on January 15, 2007.

¶5 On October 24, 2007, Anderson sued the Drakes and Yuma Site. He asserted claims for breach of contract (count 1), accounting (count 2), declaratory relief as to the amount of capital contribution due (count 3), breach of fiduciary duty (count 4), and constructive trust (count 5). Defendants moved for summary judgment based on, *inter alia*, the statute of limitations. After briefing and oral argument the superior court granted summary judgment to defendants on all counts and awarded them attorneys' fees and costs.

¶6 Anderson unsuccessfully moved for a new trial. This timely appeal followed. We have jurisdiction pursuant to

Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) and (5).

DISCUSSION

¶7 Anderson contends his breach of contract action was improperly dismissed as time-barred. Because he has not challenged the trial court's statute of limitations ruling as to any other count of the complaint, we confine our analysis to the breach of contract claim. *See Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996) (citations omitted) (arguments not asserted in an appellate brief are waived). We review the grant of summary judgment *de novo*. *Brookover v. Robert Enters., Inc.*, 215 Ariz. 52, 55, ¶ 8, 156 P.3d 1157, 1160 (App. 2007) (citations omitted).

¶8 The parties agree that the applicable limitations period is set forth in A.R.S. § 12-543(1), which requires a lawsuit for breach of an oral contract to be filed "within three years after the cause of action accrues." A cause of action accrues when one party is able to sue another, which generally is when the plaintiff knows or, through the exercise of due diligence, should know the facts underlying the cause of action. *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 588, 898 P.2d 964, 966 (1995). "[W]hen discovery occurs and a cause of action accrues 'are usually and

necessarily questions of fact for the jury.'" *Walk v. Ring*, 202 Ariz. 310, 316, ¶ 23, 44 P.3d 990, 996 (2002). However, "when the plaintiff is aware of the injury and its causative agent (the 'what and who' elements), summary judgment is warranted." *Id.* "A plaintiff need not know *all* the facts underlying a cause of action to trigger accrual. But the plaintiff must at least possess a minimum requisite of knowledge sufficient to identify that a wrong occurred and caused injury." *Doe v. Roe,* 191 Ariz. 313, 323, ¶ 32, 955 P.2d 951, 961 (1998) (internal citation omitted). If no genuine issue of material fact exists as to whether the plaintiff possessed the minimum requisite knowledge, then the court may grant summary judgment. *Id.*

¶9 In ruling that Anderson's claims were time-barred, the superior court stated:

> It is undisputed that Plaintiff presented Defendants with a proposal for what he believed his capital contribution should be for Yuma Site, LLC, in November or December of 2003. It is undisputed that Defendants did not accept that offer. Plaintiff was aware, at that time, or at least he was aware within a month after that, that Defendants did not accept that offer because Defendants did not want Plaintiff to be a member of Yuma Site, LLC at that time.

¶10 The record supports the superior court's ruling. Anderson testified at his deposition that he realized in November or December of 2003, when he attempted to redeem his interest, that Kenneth was not going to grant him the promised

membership interest because Solana Foods -– a business Kenneth owned that operated the Yuma Site restaurant -– "was losing money and he didn't want me to be a partner until it started to make money and, therefore, I didn't pursue." Anderson explained that, if he were to become a member of Yuma Site, he would require Solana Foods to pay rent for the property.

¶11 Anderson possessed all facts necessary to support his claim for breach of the alleged oral contract for a one-half ownership interest by late 2003. At that point, he had attempted to redeem his partnership interest and, by his own admission, been denied that interest based on Kenneth's desire to protect Solana Foods financially. Anderson waited for nearly four years thereafter to file suit. As a result, his claim was untimely, and the superior court properly dismissed it. *See Thompson v. Pima County*, 226 Ariz. 42, 46-47, ¶ 14, 243 P.3d 1024, 1028-29 (App. 2010) (upholding summary judgment on statute of limitations grounds given plaintiffs' admissions demonstrating knowledge of facts essential to cause of action).

¶12 Notwithstanding the belated filing, Anderson argues that the statute of limitations was equitably tolled. The equitable tolling doctrine recognizes that "a defendant whose affirmative acts of fraud or concealment have misled a person from either recognizing a legal wrong or seeking timely legal redress may not be entitled to assert the protection of a

statute of limitations." *Porter v. Spader*, 225 Ariz. 424, 428, ¶ 11, 239 P.3d 743, 747 (App. 2010).

¶13 The elements of equitable tolling are: (1) specific promises, threats or inducements that prevented the plaintiff from filing suit; (2) the promises, threats or representations actually induced the plaintiff to forebear filing suit; (3) the conduct reasonably caused the plaintiff to forebear filing a timely action; and (4) the plaintiff filed suit within a reasonable time after the estoppel-inducing conduct ended. *Nolde v. Frankie*, 192 Ariz. 276, 280, ¶¶ 16-19, 964 P.2d 477, 481 (1998) (citations omitted). Application of equitable tolling is a legal question for the court. *McCloud v. State*, 217 Ariz. 82, 86, ¶ 9, 170 P.3d 691, 695 (App. 2007) (citation omitted).

¶14 Anderson identifies no promise, threat, or inducement by the defendants that prevented him from filing a timely breach of contract action. Kenneth's reported agreement to consult with his accountant and consider ramifications associated with transfer of an ownership interest was not a specific promise, threat or inducement that somehow prevented Anderson from filing suit. *See Nolde*, 192 Ariz. at 280, ¶ 16, 964 P.2d at 481 (vague statements and ambiguous behavior do not establish equitable tolling). And as noted *supra*, Anderson conceded in his deposition that, even after these statements by Kenneth, he knew

that Kenneth was denying his membership interest based on a desire to protect his own business interests. Even viewing the facts in the light most favorable to Anderson, the superior court correctly declined to apply the doctrine of equitable estoppel.

CONCLUSION[3]

¶15 Both parties request attorneys' fees on appeal pursuant to A.R.S. § 12-341.01(A). In the exercise of our discretion, we award reasonable fees to the Drakes and Yuma Site, contingent on their compliance with ARCAP 21(c). They are also entitled to recover their appellate costs upon compliance with ARCAP 21(a).

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
LAWRENCE F. WINTHROP, Presiding Judge

/s/
JON W. THOMPSON, Judge

[3] Our resolution of the statute of limitations issue obviates the need to address the parties' remaining arguments.