DIVISION ONE
FILED: 02/25/10
PHILIP G. URRY, CLERK
BY: JT

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LUCY CHAPA, a single woman, Plaintiff-Appellant, v. JOHN F. ROBERTS and CHRISTINA ROBERTS, husband and wife, Defendants-Appellees.	)	1 CA-CV 08-0845 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)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 2006-010648

The Honorable Sam J. Myers, Judge

REVERSED AND REMANDED

Stevens & Van Cott, PLLC
by Laurence B. Stevens
Charles Van Cott
Attorneys for Appellant — Scottsdale

The Law Office of Gregory G. McGill
by Gregory G. McGill
Attorneys for Appellees — Scottsdale

W E I S B E R G, Judge

¶1 Lucy Chapa appeals from the superior court's judgment in favor of John F. Roberts and his wife, Christina Roberts, on

Chapa's action for breach of a real estate purchase agreement. She also appeals from denial of her motions for new trial and for relief from judgment. Neithe the Roberts nor their counsel of record have filed an answering brief.[1] For reasons that follow, we reverse and remand for a new trial.

BACKGROUND

¶1 Chapa's complaint alleged that in May 2004, she had entered a written agreement to purchase the Roberts' home in Phoenix, Arizona. Chapa also alleged that she had paid $100,000 toward the purchase price of $259,000 and that the $50,000 down payment was "to apply towards the remodeling." In November 2004, the parties cancelled the agreement. When the Roberts repaid only $8,000 to Chapa, she filed suit and sought $92,000, attorney's fees and costs, as well as prejudgment interest.

¶2 After a bench trial on May 3, 2008, the superior court found that the parties had entered into a contract on May 10, 2004 and that on November 5, 2004, had amended and revoked the May agreement. Chapa had testified that the Roberts had agreed

[1]In a motion seeking an extension of time, filed in this court on August 21, 2009, the Roberts' trial counsel stated that the Roberts had "refused to retain counsel in this appeal or to file or cooperate in filing an Answering Brief, and the relationship between appellee and counsel is so irretrievably broken that a conflict exists and it is in appellee's interest to retain counsel or file [their] own Answering Brief, *pro per*." We denied the motion and ordered that the appeal be submitted on the record and the opening brief.

to repay $100,000 within twelve months and John Roberts had testified that he had agreed to begin repayments no later than twelve months from the November 5 signing. Thus, the court concluded that a mutual mistake had occurred and that the proper remedy was excision of the sentence, "This agreement to be executed within twelve months of signing." The court cited *Chantler v. Wood*, 6 Ariz. App. 134, 430 P.2d 713 (1967). Furthermore, the court ruled that the November 5 agreement otherwise remained valid and required the Roberts to repay Chapa "upon the sale or refinance of the" house. Because no sale or refinance had occurred, Chapa had not met her burden of proving a breach by the Roberts. The court signed a judgment reflecting the above findings and conclusions.

¶3 Chapa moved for relief from judgment or a new trial. She argued that the inclusion of the handwritten sentence referring to twelve months was not a mistake by either party and that she had just discovered that on April 7, 2008,[2] the Roberts had executed a deed of trust to secure a loan for $30,000 and thus had refinanced the home. Chapa asserted that the Roberts had breached the November 5, 2004 agreement. The court denied the motion without explanation.

[2]In the joint pretrial statement filed April 10, 2008, the Roberts stated that from November 4, 2004 until that date, they had not sold or refinanced the residence.

¶4 Chapa timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) and (F)(1) (2003).

DISCUSSION

¶5 On November 5, the parties signed an agreement acknowledging that:

> the agreement to purchase the property . . . is hereby nullified due to lack of sufficient funds to complete the purchase. The seller acknowledges the payment of $100,000 for remodeling the residence on the buyer's behalf and the balance held as a deposit for the sale of the property. Buyer and Seller have agreed to hold the other harmless from any legal action resulting in encumbrance of the property now or in the future and forgive any damages incurred real or otherwise in connection with this transaction. *Upon a future sale of this property or in the case of a refinance on the sellers part Lucy Chapa is to receive $100,000.00*

(Emphasis added.) The agreement also stated: "In the case that Lucy Chapa, for any reason, were unable to recieve [sic] this payment it is hereby set forth that the dispersal of these funds would be made to her heirs" and listed three individuals. Finally, John Roberts hand wrote, "This agreement to be executed within 12 months of signing."

¶6 On appeal, Chapa argues that the superior court erred in reforming this agreement to delete the final handwritten sentence. She additionally contends that the court erred in

denying her motion for new trial based on newly-discovered evidence and that she is entitled to attorney's fees for the trial and appellate proceedings.

¶7 The Roberts have not filed an answering brief. We have previously held that when a party raises "a debatable issue," and the opposing party has not filed a responsive brief, we generally will find a confession of error by the opposing party. *Liberty Mut. Ins. Co. v. MacLeod*, 17 Ariz. App. 449, 450, 498 P.2d 523, 524 (1972). Thus, if we determine that a debatable issue exists, *id*., the Roberts' failure to file an answering brief constitutes a concession that the superior court committed reversible error. *Civil Serv. Emp. Ins. Co. v. Sticht*, 14 Ariz. App. 36, 37, 480 P.2d 373, 374 (1971); *Stover v. Kesmar*, 84 Ariz. 387, 388, 329 P.2d 1107, 1108 (1958).

¶8 Chapa's motion for new trial attached evidence of a possible refinancing of the subject property by the Roberts. She also asserted that the Roberts had breached the November agreement because they had neither paid in full within twelve months nor made any effort to pay twelve months after the parties had signed the November agreement. The superior court apparently declined to consider the evidence of the $30,000 loan obtained by the Roberts in April 2008 and the deed of trust they had given to determine whether those events had triggered the provision of the November 2005 agreement that "[u]pon a future

sale . . . or in the case of a refinance on the sellers part Lucy Chapa is to receive $100,000.00." We conclude that a debatable issue exists over whether the Roberts did refinance the subject property in April 2008. Therefore, the Roberts have conceded that the superior court committed reversible error in denying Chapa's motion for new trial. We vacate the ruling denying Chapa's motion and remand for a new trial.

/S/_____
SHELDON H. WEISBERG,
Presiding Judge

CONCURRING:

/S/_____
PHILIP HALL, Judge

/S/_____
JOHN C. GEMMILL, Judge