

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: 03/06/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

GREGORY BEST, a single man,) No. 1 CA-CV 11-0181
)
Plaintiff/Appellant,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
)
CHARLES R. FANNIEL and LUCILLE) (Not for Publication -
W. FANNIEL, husband and wife,) Rule 28, Arizona Rules of
) Civil Appellate Procedure
Defendants/Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2005-092924

The Honorable Karen A. Potts, Judge

AFFIRMED

Gregory Best Phoenix
Plaintiff/Appellant *in propria persona*

Charles R. Fanniel Phoenix
Lucille W. Fanniel
Defendants/Appellees *in propria persona*

T I M M E R, Judge

¶1 Gregory Best appeals the summary judgment entered in his lawsuit asserting various claims against Charles and Lucille Fanniel arising out of an option contract to purchase real property. For the following reasons, we affirm.

BACKGROUND

¶2 Nathaniel Fanniel owned Lot 25 Center Grove Tract in Phoenix ("the Property") before his death in January 2002. Thereafter, the court appointed Robert Warrick to serve as personal representative for Nathaniel's estate.

¶3 On February 16, 2004, Charles Fanniel entered in a contract with Warrick to purchase the Property from the estate. A checked box on the standard form contract indicated Charles would take title as a joint tenant with right of survivorship, but the contract did not identify the other prospective owner. The sale closed two-and-one-half months later, and a warranty deed to the property was recorded in the names of Charles and Lucille as joint tenants with rights of survivorship.

¶4 On March 9, 2004, Charles entered in an Exclusive Purchase Option Contract with Gregory Best, by which Charles gave Best the exclusive option to purchase the Property for \$75,000, provided Best exercised the option before its expiration date of March 23, 2009. The contract reflects Charles's acknowledgement he received \$50 earnest money at the time he entered the contract.

¶5 After taking title to the Property, the Fanniels received a purchase offer for it. Charles asked Best to either purchase the Property or release the option, but Best declined.

Regardless, the Fanniels sold the Property to Foresight Investment Group ("Foresight") in October 2004.

¶16 In August 2005, Best initiated this lawsuit against the Fanniels, Foresight, and eventually others. Best alleged claims against the Fanniels for breach of contract, racketeering, and consumer fraud. The Fanniels ultimately moved for summary judgment, which the trial court granted. This appeal followed.¹

¶17 The trial court properly granted summary judgment if "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). In reviewing the court's ruling, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Best Choice Fund, LLC v. Low & Childers, P.C.*, 624 Ariz. Adv. Rep. 24, ¶ 10 (App. Jan. 6, 2012) (as amended). We view the facts and inferences arising from them in the light most favorable to Best as the party against whom judgment was entered. *Id.* We will affirm if the court was correct for any

¹ Best filed a premature appeal, which was made final and appealable by the filing of a subsequent judgment on June 29, 2011, with language entered pursuant to Rule 54(b), Arizona Rules of Civil Procedure. See *Snell v. McCarty*, 130 Ariz. 315, 317, 636 P.2d 93, 95 (1981) (recognizing appellate jurisdiction when premature appeal in multi-party case is followed by subsequent Rule 54(b) determination and entry of judgment over which court has jurisdiction).

reason. *City of Phoenix v. Geyler*, 144 Ariz. 323, 330, 697 P.2d 1073, 1080 (1985).

DISCUSSION

I. Validity of the option contract

¶18 The trial court ruled as a matter of law that the option contract is invalid because the Fanniels did not own the Property at the time Charles entered the contract, and the contract lacked consideration. Best argues the court erred in this ruling because Charles had a fee simple ownership interest in the Property as of February 16, 2004, in light of his purchase contract with the estate, and he therefore possessed the ability to enter in the option contract. Best further contends the earnest money paid constituted sufficient consideration. Unsurprisingly, the Fanniels support the court's ruling and additionally argue the ruling was justified because Lucille was not a signatory to the option contract as required by Arizona Revised Statutes ("A.R.S.") section 25-214(c) (West 2012).²

¶19 The February 16 purchase contract is not evidence Charles owned the Property as of that date. It shows only that the parties entered in an agreement for Charles to purchase the Property contingent on him qualifying for financing; he did not

² Absent material revision after the date of the events at issue, we cite a statute's current Westlaw version.

obtain any possessory interest in the Property at that time. *Mining Inv. Group, LLC v. Roberts*, 217 Ariz. 635, 639, ¶ 13, 177 P.3d 1207, 1211 (App. 2008) ("It is well-established that '[a] contract for the sale of realty does not effect a transfer of legal title,' which remains in the seller's name until the close of escrow." (citation omitted)). For this reason, we reject Best's argument that the court erred in its ruling because Charles actually owned the Property at the time he executed the option contract.

¶10 In his reply brief, Best additionally argues the court erred because Charles held an equitable interest in the Property from the date he executed the purchase contract with Warrick, and therefore he had authority to enter in the option contract. Even assuming Best properly raised this argument in his opening brief, he has waived the issue by failing to raise it to the trial court. *Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, 109-10, ¶ 17, 158 P.3d 232, 238-39 (App. 2007) (holding party waives argument raised for first time on appeal when the trial court had no opportunity to address the issue on its merits).

¶11 For these reasons, we reject Best's challenge to the trial court's ruling that the option contract was invalid due to the Fanniels' lack of ownership of the Property at the time the option contract was executed. In light of our decision, we need

not address the parties' remaining arguments concerning consideration and the failure of Lucille to sign the option contract.

II. Consumer Fraud Act and racketeering

¶12 The trial court entered summary judgment on Best's claims for a violation of the Consumer Fraud Act ("CFA"), A.R.S. §§ 44-1521 to 44-1534, and the racketeering statutes ("RICO"), A.R.S. §§ 13-2301 to 13-2323. The court reasoned the CFA does not apply to an option purchase contract. It additionally ruled the RICO claim fails because it does not involve a pattern of conduct.

¶13 Best argues the trial court erred because after entry of its ruling, the court struck Foresight's answer, deemed the allegations of the complaint against it admitted, and entered default judgment against it.³ Although somewhat unclear, Best seems to contend that because he obtained judgment against Foresight and the Fanniels assisted it in committing wrongdoing against Best, the court acted prematurely by entering summary judgment for the Fanniels. Best does not cite any authority to support this contention, and we are not aware of any. When a default is entered, the well-pleaded factual allegations of a complaint are deemed admitted by the defaulted party. *Moran v.*

³ Best also asserts he obtained similar relief against Jackson, but the portion of the record cited for this assertion does not reflect this fact.

Moran, 188 Ariz. 139, 146, 933 P.2d 1207, 1214 (App. 1996). The admissions, however, do not apply to co-defendants. *Clugston v. Moore*, 134 Ariz. 205, 207-08, 655 P.2d 29, 31-32 (App. 1982). Thus, the Fanniels had no need to oppose the entry of default judgment against Foresight, as Best implies, Foresight's admissions cannot bind the Fanniels, and entry of the default judgment had no bearing on the summary judgment already entered in the Fanniels' favor.

¶14 In his reply brief, Best argues extensively that the court erred by ruling the CFA is inapplicable to option contracts. But Best waived these arguments by failing to raise them in his opening brief. *Romero v. Sw. Ambulance*, 211 Ariz. 200, 204, ¶ 7 n.3, 119 P.3d 467, 471 n.3 (App. 2005) (holding arguments raised for first time in reply brief on appeal are waived); see also *Meiners v. Indus. Comm'n*, 213 Ariz. 536, 538, ¶ 8 n.2, 145 P.3d 633, 635 n.2 (App. 2006) (noting waiver policy avoids surprise and allows input from parties). We do not address this argument further.

III. Common law fraud

¶15 Best also argues the trial court erred by not awarding him damages because its ruling permits the Fanniels to commit fraud against him without consequence. Specifically, he asserts that if the court's ruling stands, he relied to his detriment on Charles' representations he could enter a binding option

contract. But the consequence of the court's ruling neither makes the ruling unsound nor requires the court to award damages to Best for fraud. Although Best's first amended complaint alleges Charles made misrepresentations, it did so in the context of the CFA and RICO; he did not allege common law fraud against Charles as he could have done. We do not discern error.

**IV. Acceptance of the Fanniels' testimony
and pleadings**

¶16 Best finally asserts the court erred by permitting the Fanniels to defend this lawsuit with testimony and pleadings once the court dismissed with prejudice the State's case against Best in CV2006-016293. He contends Charles committed perjury in that case, which resulted in that case going forward and Best's lawsuit against the Fanniels being delayed. Apparently, Best contends the court should have entered judgment against the Fanniels in light of Charles' actions in the other lawsuit. But Best provides no authority for such punitive action, and we are unaware of any. And Best neglects to identify the testimony and pleadings the court should have excluded or cite the record demonstrating Best asked for such relief. Consequently, he has waived this argument, and we do not address it further. See ARCAP 13(a)(6) ("An argument . . . shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes

and parts of the record relied on."); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, 491, ¶ 6 n.2, 154 P.3d 391, 393 n.2 (App. 2007) (concluding appellant's failure to develop and support argument waives issue on appeal).

REQUEST FOR FEES ON APPEAL

¶17 We deny Best's request for an award of attorneys' fees on appeal because he has not prevailed, and he represented himself on appeal. We award the Fanniels their costs upon compliance with Rule 21, Arizona Rules of Civil Appellate Procedure. See A.R.S. § 12-341.

CONCLUSION

¶18 For the foregoing reasons, we affirm.

/s/

Ann A. Scott Timmer, Judge

CONCURRING:

/s/

Maurice Portley, Presiding Judge

/s/

Andrew W. Gould, Judge