FILED BY CLERK
FEB 29 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DONALD RAY PALMER, Plaintiff/Appellant, v. TINA KAYE HOWELL, Defendant/Appellee.	2 CA-CV 2011-0094 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20085582

Honorable John E. Davis, Judge
Honorable Richard E. Gordon, Judge

AFFIRMED

Donald Ray Palmer — Buckeye
In Propria Persona

Tina Kaye Howell — Tucson
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 Appellant Donald Palmer assigns a number of errors following the trial court's grant of summary judgment in favor of appellee Tina Howell and its dismissal of his complaint against her alleging claims for (1) "partition of personal property," (2) "theft of real property," (3) defamation, and (4) breach of contract. We affirm the judgment for the reasons that follow.

Factual and Procedural Background

¶2 As we explained more fully in an earlier decision involving these parties, Palmer is currently imprisoned for violent crimes he committed against Howell. *See Howell v. Palmer*, No. 2 CA-CV 2008-0163, ¶ 2 (memorandum decision filed Aug. 28, 2009); *see generally State v. Palmer*, No. 2 CA-CR 2010-0100-PR (memorandum decision filed June 25, 2010); *State v. Palmer*, No. 2 CA-CR 2007-0118 (memorandum decision filed Sept. 18, 2008). The trial court noted below that "[t]here is considerable overlap among P[almer]'s claims, his crimes, his prosecution, and his relationship with his victim, as well as the parties' prior lawsuit." The year after Howell initiated her civil action against Palmer requesting damages for battery and partition of their real property, *Howell*, No. 2 CA-CV 2008-0163, ¶ 3, Palmer filed the present complaint against her. Howell filed a motion to "dismiss th[e] case for lack of evidence and substance to any of Plaintiff's claims." Construing the motion as one for summary judgment, the court determined that Palmer had presented no genuine issues of material fact as to the claims he had alleged and that the claims could be resolved as a matter of law. Specifically, the court found Palmer's property and contract claims were barred by applicable statutes of

limitation.[1] With respect to the defamation claim, which was based on "statements [Howell had] made to authorities and in the underlying trial related to her shooting," the court found Howell was entitled to absolute immunity. *See Ledvina v. Cerasani*, 213 Ariz. 569, ¶¶ 7, 14, 146 P.3d 70, 73, 75 (App. 2006). The court granted summary judgment in favor of Howell and dismissed all counts of the complaint with prejudice. This appeal followed.

Summary Judgment

¶3 In a somewhat disjointed argument, Palmer contends "the trial court erred in granting [Howell]'s motion to dismiss and/or motion for summary judgment having the dismissal have no factual finding or inference drawn therefrom and not justified and is clearly against reason and the evidence." To the extent we understand this argument, it is not responsive to the court's grounds for granting judgment in favor of Howell. Nor is the argument developed and supported by citations to relevant legal authority, as required by Rule 13(a)(6), Ariz. R. Civ. App. P. *See Ritchie v. Krasner*, 221 Ariz. 288, ¶¶ 61-62, 211 P.3d 1272, 1289 (App. 2009). Rather, Palmer's opening brief contains a list of conclusory statements alleging different ways the trial court "abuse[d] its discretion" and "clearly demonstrated bias" against him. This does not comply with Rule 13. *See In re $26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 28, 18 P.3d 85, 93 (App. 2000). Thus, we find the argument waived. *See id.*

[1]The court also found the real property and contract claims were barred by Rule 13(a), Ariz. R. Civ. P., finding these were compulsory counterclaims that "should have been raised" in Howell's lawsuit against Palmer, which raised issues relating to "the partition and fraudulent transfer of the home."

¶4 Palmer also has attempted to refer to certain trial court filings and thereby incorporate them into the argument section of his opening brief. This practice is not permitted. *Cf. State v. Walden*, 183 Ariz. 595, 605, 905 P.2d 974, 984 (1995) (under analogous rule of criminal procedure, "[a]rgument must be in the body of the brief," and text in appendix stricken), *overruled on other grounds by State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996). We therefore find no basis to disturb the judgment. *See Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 193, 836 P.2d 404, 406 (App. 1992) (burden on appellant to overcome "initial presumption that a judgment is correct" and to show court abused discretion).

Other Issues

¶5 Although Palmer otherwise does not directly challenge the judgment in favor of Howell, he does claim judgment should have been entered in his favor earlier in the action. Specifically, he maintains the trial court should have granted (1) his motion to strike Howell's answer, (2) his application for an entry of default and default judgment, and (3) his motion for summary judgment. Because the denial of a motion for summary judgment itself is not an appealable order, we exercise our discretion and decline to address the court's ruling on the latter motion. *See In re 1996 Nissan Sentra*, 201 Ariz. 114, ¶ 16, 32 P.3d 39, 44 (App. 2001); *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 7, 965 P.2d 47, 50 (App. 1998).

Default

¶6 Palmer argues the trial court erred in denying his motion for default judgment because Howell's answer was untimely. This argument, however, is based on a misunderstanding of the rules of civil procedure.

¶7 Howell was served personally with a summons and complaint on November 20, 2008. Her answer was due twenty days later, by December 10. *See* Ariz. R. Civ. P. 12(a)(1). If a proper application for entry of default had been filed, Howell would have had an additional ten business days to file her answer, meaning it would have been due by December 24. *See* Ariz. R. Civ. P. 55(a)(2); *Corbet v. Superior Court*, 165 Ariz. 245, 247, 798 P.2d 383, 385 (App. 1990); *see also* Ariz. R. Civ. P. 6(a). But, Howell filed her answer on December 19. Thus, the trial court correctly found that Howell "[wa]s not subject to default or to have judgment taken against her." Palmer's argument to the contrary overlooks the fact that he filed an application for entry of default prematurely—more than one week before the answer was due. That application had no legal effect. *See* Ariz. R. Civ. P. 55(a) (default entered by clerk "[w]hen a party . . . has failed to plead or otherwise defend"); *cf. Ruiz v. Lopez*, 225 Ariz. 217, ¶ 18, 236 P.3d 444, 449 (App. 2010) (Rule 55 "allow[s] entry of default only upon adequate notice to the defaulting party"). In sum, the court correctly denied Palmer's motion based upon his failure to "compl[y] with the applicable rules."

Motion to Strike

¶8 Palmer argues the trial court erred in denying his motion to strike Howell's pro se answer because it purportedly failed to comply with the rules of civil procedure in

a number of respects. On appeal, he reiterates his objections that the answer was unsigned, *see* Ariz. R. Civ. P. 11(a), and unverified, *see* Ariz. R. Civ. P. 9(i); its caption did not contain the name of the court, *see* Ariz. R. Civ. P. 10(a), or the judge assigned to the case; and it did not contain Howell's address, *see* Ariz. R. Civ. P. 11(a).[2] The court denied Palmer's motion based on the alternative grounds "that the relief sought is not appropriate" and that Palmer's motion failed to comply with the rules of procedure.

¶9 Palmer makes a broad argument that "[i]f the appellee[] does not comply with any applicable court rules, including the Arizona Rules of Civil Procedure . . . appellant is entitled to a judgment in his favor to strike appellee's documents, pleading or other filings." This proposition is unsupported in Palmer's brief, however, and contrary to the law.

¶10 It has long been the policy of our state that "[c]auses should be determined on their merits rather than upon matters of procedure." *Colboch v. Aviation Credit Corp.*, 64 Ariz. 88, 94, 166 P.2d 584, 588 (1946). Procedural defects will not be fatal if they can be cured by a later amendment. *See In re Cassidy's Estate*, 77 Ariz. 288, 296-97, 270 P.2d 1079, 1084-85 (1954). And amendments to pleadings are to be granted liberally so as to serve the interests of justice. *See* Ariz. R. Civ. P. 15(a)(1). Motions to strike, in

[2]Palmer also argues, for the first time, that Howell "did not sen[d] a[] response/answer . . . until 1-2-09," in contravention of Rule 12(a)(1), Ariz. R. Civ. P. Palmer merely noted in his motion that he had "received [the] response on January 2." Howell maintains she mailed a copy of her answer the same day it was filed, and she argues she cannot be responsible for when Palmer receives his mail. We find Palmer has waived any objection to the lack of timely mailing by failing to clearly raise the issue below. *See Schoenfelder v. Ariz. Bank*, 165 Ariz. 79, 88, 796 P.2d 881, 890 (1990) ("As a general rule, we will not review an issue on appeal that was not argued or factually established in the trial court.").

contrast, generally are disfavored. *Engel v. Landman*, 221 Ariz. 504, n.2, 212 P.3d 842, 847 n.2 (App. 2009). So although the granting of a motion to strike often may be reversible error, the denial of a motion to strike is wholly within the sound discretion of the trial court. *MacNeil v. Vance*, 48 Ariz. 187, 193, 60 P.2d 1078, 1080 (1936); *Birth Hope Adoption Agency, Inc. v. Doe*, 190 Ariz. 285, 287, 947 P.2d 859, 861 (App. 1997).

¶11 We acknowledge that Rule 11(a) requires an unsigned pleading to be stricken, but that sanction is mandated only when "the omission [ha]s [been] called to the attention of the pleader" and she has failed to sign it promptly thereafter. Palmer never called Howell's attention to the defects in her answer or gave her the opportunity to cure them before filing his motion to strike. Hence, the trial court properly rejected his motion on the ground that it did not comply with the rules of procedure.

¶12 Apart from the signature issue, nothing else would have compelled the trial court to strike Howell's answer. *See* Ariz. R. Civ. P. 11(a) state bar committee note ("The striking of a pleading, motion or other paper is now mandatory where a failure to sign is not cured after notice, and within the court's discretion in other appropriate cases."). A motion to strike is available under Rule 12(f) to remove "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter," which Palmer did not complain of here. Instead, he identified only procedural defects in Howell's answer, and he has identified no prejudice resulting from them, either in his motion or in his appellate brief. Accordingly, the trial court did not abuse its discretion by denying Palmer's motion to strike Howell's answer.

Disposition

¶13 For the foregoing reasons, the judgment in favor of Howell is affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge