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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 12/11/2012
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

GREGORY BEST, a single man,) No. 1 CA-CV 11-0678
)
Plaintiff/Appellant,) DEPARTMENT T
)
v.) **MEMORANDUM DECISION**
) Not for Publication
ROBERT WARRICK,) (Rule 28, Arizona Rules
) of Civil Appellate Procedure
Defendant/Appellee.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2006-090128

The Honorable Karen A. Potts, Judge

AFFIRMED

Gregory Best	Phoenix
In <i>Propria Persona</i> Plaintiff/Appellant	
Gary M. Sundberg	Phoenix
Attorney for Defendant/Appellee	

G E M M I L L, Judge

¶1 Plaintiff/appellant Gregory Best appeals the superior court's grant of summary judgment in favor of defendant/appellee Robert Warrick as personal representative of the Estate of Nathaniel Fanniel (hereinafter referred to as "Warrick PR"). Best asserts several claims, including breach of contract,

breach of implied covenant of good faith and fair dealing, and consumer fraud.¹ For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Nathaniel Fanniel died in January 2002, and Warrick was appointed as personal representative of his Estate in February 2002. Fanniel's Estate included a parcel of property located on South 13th Street in Phoenix, Arizona ("the Property"). On March 22, 2004, Best and Warrick entered into an exclusive purchase option contract purporting to convey to Best a right to purchase the Property. That option was terminated by the parties on November 8, 2004, and on the same day the same parties entered into a new option contract for the sale of the Property to Best. On November 30, 2004, however, Warrick sold the Property to Foresight Investment Group.

¶3 Best filed a lawsuit on August 19, 2005 against Warrick individually, not as personal representative, alleging breach of the subject option contracts, breach of the covenant

¹ On appeal, Best also asserts RICO violations and equitable estoppel against Warrick PR. These claims, however, were not asserted in the superior court against Warrick PR. We generally do not consider, on appeal from summary judgment, new legal claims or factual theories not raised in superior court. See *Schoenfelder v. Ariz. Bank*, 165 Ariz. 79, 90, 796 P.2d 881, 892 (1990) (citation omitted); *Regal Homes, Inc. v. CNA Ins.*, 217 Ariz. 159, 171, ¶ 52, 171 P.3d 610, 622 (App. 2007) (waiving claim on appeal that was not argued at the trial court level). The RICO and equitable estoppel claims are therefore waived against Warrick PR.

of good faith and fair dealing, and fraud. This lawsuit was subsequently dismissed on February 14, 2006 for lack of service.

¶14 Best filed a second lawsuit on January 18, 2006 containing identical claims to the first lawsuit against Warrick individually. Best's complaint was amended, however, in May 2010 to add Warrick PR, in addition to other parties.

¶15 Warrick PR subsequently filed a motion for summary judgment based on Best's failure to present a timely claim against the Estate. On July 7, 2011, the superior court granted summary judgment in favor of Warrick PR on all claims in the amended complaint. Although the superior court allowed the date of Best's claim against Warrick PR to relate back to January 18, 2006, the court found that Best's lawsuit against Warrick PR was asserted after expiration of the allowable time period. Therefore, the court granted summary judgment in favor of Warrick PR and dismissed Best's claims against the Estate in a judgment containing language of finality in accordance with Rule 54(b), Arizona Rules of Civil Procedure.

¶16 Best timely appeals, and we have jurisdiction under Arizona Revised Statutes ("A.R.S.") § 12-2101(A)(1) (Supp. 2012).²

² Unless otherwise specified, we cite the current versions of statutes when no material revisions have been enacted since the events in question.

ANALYSIS

¶17 Best argues the court erred in granting summary judgment on all claims to Warrick PR. Summary judgment is proper "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). When the moving party "makes a prima facie showing that no genuine issue of material fact exists," the burden then shifts to the non-moving party "to produce sufficient competent evidence to show there is an issue, and it must demonstrate that evidence is available to justify trial on the issue." *Nat'l Hous. Indus., Inc. v. E.L. Jones Dev. Co.*, 118 Ariz. 374, 377, 576 P.2d 1374, 1377 (App. 1978) (citation omitted).

¶18 In reviewing an order granting summary judgment, we determine de novo whether any genuine issues of material fact exist. *L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co.*, 189 Ariz. 178, 180, 939 P.2d 811, 813 (App. 1997). We also review the superior court's interpretation and application of a statute de novo. *Schwarz v. City of Glendale*, 190 Ariz. 508, 510, 950 P.2d 167, 169 (App. 1997). Our review is limited to the record before the superior court at the time it considered the motion, see *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165

Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990), and we view the facts in the light most favorable to the party against whom summary judgment was entered, giving that party the benefit of all favorable inferences fairly arising from the evidence. *Harvey*, 189 Ariz. at 180, 939 P.2d at 813.

¶9 To resolve this appeal, we must determine whether the superior court appropriately concluded that A.R.S. § 14-3803 (2012) barred Best's claims against Warrick PR. Subsection (C) provides:

All claims against a decedent's estate that arise at or after the death of the decedent, including claims of the state and any political subdivision, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort or other legal basis, are barred against the estate, the personal representative and the heirs and devisees of the decedent, unless presented as either of the following:

1. A claim based on a contract with the personal representative, within four months after performance by the personal representative is due.
2. Any other claim, within the later of four months after it arises or the time specified in subsection A, paragraph 1 of this section.

A.R.S. § 14-3803(C).

¶10 The superior court concluded that Best discovered the basis for his claims by August 19, 2005 regarding the Property because he filed a lawsuit on that date against Warrick

(individually) alleging breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud. By August 19, 2005, Best was aware that Fanniel's Estate had owned the Property and it had been sold to a third party. The superior court reasoned that under the doctrine of anticipatory repudiation and the discovery rule, Best had four months after August 19, 2005 to file his claims against Warrick PR pursuant § 14-3803(C). Best, however, did not file a claim or lawsuit until January 18, 2006; thus, the superior court determined Best's claims were time-barred. We agree.

¶11 Contract claims against an estate that arise after the death of the decedent must be brought within four months after performance by the personal representative is due. A.R.S. § 14-3803(C)(1). All other claims arising after the death of the decedent must be brought within four months after they arise. A.R.S. § 14-3803(C)(2), (A)(1). This court has affirmed a bar to both the right and remedy of a claimant who fails to comply with the requisite timeframes described in § 14-3803. *In re Estate of Levine*, 145 Ariz. 185, 188, 700 P.2d 883, 886 (App. 1985); *see also Fernandez v. Garza*, 88 Ariz. 214, 217-18, 354 P.2d 260, 262-63 (1960) (recognizing bar against party who does not present claim against estate within the time and manner prescribed by statute); *In re Elerick's Estate*, 11 Ariz. App. 559, 562-63, 466 P.2d 778, 780-81 (1970) (upholding four month

time limitation to bring claims against an estate).

¶12 Best argues the breach of contract claim is valid and the option contract was not breached as of August 19, 2005. Best explains that anticipatory repudiation does not apply because the sale of the Property to the third party in November 2004 did not constitute an "unequivocal manifestation" because performance of the option was still possible. We agree that "before an anticipatory repudiation will be found, there must be a 'positive and unequivocal manifestation on the part of the repudiating party that he will not render the required performance when it is due.'" *Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co.*, 140 Ariz. 174, 186, 680 P.2d 1235, 1247 (App. 1984) (quoting *McMahon v. Fiberglass Fabricators, Inc.*, 17 Ariz. App. 190, 192, 496 P.2d 616, 618 (1972)). We conclude, however, that the sale of the Property to a third party was a sufficient action to constitute anticipatory repudiation and therefore a breach.

¶13 Even if the sale of the Property by Warrick was not, in and of itself, sufficient to constitute anticipatory repudiation, Best's August 19, 2005 lawsuit against Warrick was sufficient to establish a breach. See *Crown Prods. Co. v. Cal. Food Prods. Corp.*, 175 P.2d 861, 865 (Cal. Ct. App. 1947) (finding it is well-settled law that the bringing of suit by the injured party is sufficient to treat the repudiation as a breach

and prevent its retraction). Therefore, the statutory time period for Best to make a claim against Fanniel's Estate began no later than the filing date of the original lawsuit, August 19, 2005. Because the breach of contract claim, however, was not brought against Warrick PR until January 18, 2006 – after the requisite four month period – the breach of contract claim is barred.

¶14 Best also contests the superior court's summary judgment in favor of Warrick PR regarding the implied covenant of good faith and fair dealing. Best generally claims the implied covenant was breached by Warrick acting in a manner contrary to his contractual promise in the option agreement. Because Best alleged a breach of contract claim, we assume he alleges the breach of this implied covenant as a tort claim. We do not reach the merits of this claim, however, because it is also time-barred.

¶15 A tort claim arises when the injured party knows or in the exercise of reasonable diligence should know of the defendant's negligent conduct. *Angus Med. Co. v. Digital Equip. Corp.*, 173 Ariz. 159, 162, 840 P.2d 1024, 1027 (App. 1992). Under § 14-3803(C)(2), a tort claim arising after the death of the decedent must be brought within four months after it arises. As described previously, Best was aware by August 19, 2005 of the alleged breach of contract and his potential claim under an

implied covenant of good faith and fair dealing. Therefore, because the claim was not brought within four months, it is barred as against the Estate.

¶16 The superior court also entered summary judgment on Best's claim regarding Warrick PR's alleged violation of the Consumer Fraud Act ("CFA"), A.R.S. §§ 44-1521 to -1534. In its explanation, the superior court determined the CFA does not apply to option purchase contracts. On appeal, Best argues that the court erred factually and legally. As with Best's other two claims on appeal, we do not reach the merits of the CFA claim because Best did not bring this claim within the requisite time period. A CFA claim arises when the defrauded party discovers or with reasonable diligence should have discovered fraud. *Alaface v. Nat'l Inv. Co.*, 181 Ariz. 586, 591, 892 P.2d 1375, 1380 (App. 1994). Under § 14-3803(C)(2), Best's CFA claim against Warrick PR must have been asserted within four months after August 19, 2005. It was not.

¶17 Finally, we note that Best, in his opening brief, describes a common law fraud claim but does not develop this argument in the argument section of his brief. This claim is waived, therefore; and, even if not waived, a common law fraud claim would also be barred by A.R.S. § 14-3803(C)(2).

CONCLUSION

¶18 We affirm the superior court's judgment in favor of

Warrick PR. Best requests an award of attorneys' fees on appeal, but we deny the request because he is not the successful party on appeal, he did not cite any substantive authority in support of an award of fees, see Arizona Rule of Civil Appellate Procedure 21(c), and he was self-represented on appeal. See *Connor v. Cal-Az Props., Inc.*, 137 Ariz. 53, 56, 668 P.2d 896, 899 (App. 1983) (denying attorneys' fees when requesting party not represented by attorney). Warrick PR, however, as the prevailing party is entitled to reimbursement of his taxable costs upon compliance with Arizona Rule of Civil Appellate Procedure 21(a).

_____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

_____/s/_____
MARGARET H. DOWNIE, Judge

_____/s/_____
LAWRENCE F. WINTHROP, Chief Judge