DIVISION ONE
FILED: 11/23/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

AREK FRESSADI, an unmarried man, Plaintiff/Appellant, v. REAL ESTATE EQUITY LENDING, INC., an Arizona corporation, Defendant/Appellee.	1 CA-CV 11-0728 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2006-014822

The Honorable Eileen S. Willett, Judge

REVERSED AND REMANDED

Arek Fressadi — Tucson
Plaintiff/Appellant Pro Se

Turley Childers Humble & Torrens, P.C. — Phoenix
by Scott Humble
Attorneys for Defendant/Appellee

G E M M I L L, Judge

¶1 Arek Fressadi appeals the superior court's summary judgment in favor of Real Estate Equity Lending, Inc. ("REEL").

Fressadi's claims for declaratory judgment, rescission, and reformation relate to a dispute over the continued viability of a recorded driveway easement. Because issues of fact exist, summary judgment is not proper. We reverse and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶2 In October 2003, Fressadi and GV Group, LLC each owned three lots adjacent to one another. Fressadi owned parcels 211-10-010 A, B, and C (hereafter Lots 010A, 010B and 010C) and GV Group owned parcels 211-10-003 A, B, and C (hereafter Lots 003A, 003B, and 003C). On October 16, 2003, Fressadi and GV Group entered into an agreement titled, Declaration of Driveway Easement and Maintenance Agreement ("the DMA").

¶3 The DMA was recorded on October 22, 2003. The agreement established a mutual driveway easement across the GV Group and Fressadi lots. The DMA declared that the easements were to "run with each lot" and were to be "binding upon all parties having or acquiring any right, title or interest therein, and to "inure to the benefit of any successor to Declarant." Fressadi was named the Caretaker responsible for the care and maintenance of the driveway. The parties agreed to share in the cost based on the number of lots owned.

¶4 On October 2, 2006, Fressadi filed a complaint against GV Group, LLC, MG Dwellings, Inc., Building Group, Inc., Michael

T. Golec, and Keith and Kay Vertes (collectively "GV Group"). The complaint alleged that, when the DMA was executed, GV Group had misrepresented its authority to bind Lot 003A because it had previously sold that lot to Jocelyn Kremer. Because Kremer refused to ratify and join the DMA, Fressadi claimed the maintenance payments were not being made for Lot 003A, causing him to pay more than was expected. The defendants answered and filed a counterclaim asserting various claims against Fressadi including that he was not paying his full share under the DMA, had incurred unreasonable costs in maintaining the driveway, and had obstructed GV Group's construction business.[1]

¶5 On May 28, 2008, REEL acquired Lot 003C pursuant to a trustee's sale. The following day, REEL entered into an agreement with GV Group to complete construction and sale of the

[1] GV Group's counterclaim alleged that GV was being forced to pay more than it had contemplated when it signed the agreement. By mutual mistake, the parties neglected to include in the DMA a fourth lot belonging to Fressadi, and then Fressadi transferred Lot 010C to a third party (the DeVincenzos), leaving Fressadi only paying three shares under the DMA. After the town of Cave Creek required Fressadi to combine his lots into one lot because of improper lot splitting, he started paying only one share under the DMA. GV Group also contended that Fressadi incurred unreasonable costs in maintaining the driveway without providing the required notification to GV Group. GV Group asserts that Fressadi filed an improper lien against GV Group property when GV Group refused to pay the unauthorized charges in full. GV Group also alleged that Fressadi had on various occasions blocked or otherwise obstructed the use of the driveway. GV Group alleges Fressadi threatened violence against workers hired by GV Group, which along with the filing of the improper lien, resulted in construction delays causing damages.

property.

¶6 On August 26, 2009, Fressadi filed a Verified Second Amended Complaint adding as defendants REEL and the DeVincenzos.[2] Fressadi realleged that GV Group did not possess authority to bind Lot 003A. He further asserted that, as a result of Kremer's refusal to join the DMA, Fressadi "sent an email formally rescinding the DMA" in October 2005. He claimed the inclusion of Lot 003A in the DMA was pivotal to his decision to enter into the agreement. Fressadi contended that while the defendants did not object to the rescission, they continued to use the driveway over his objection. The complaint asserted that, if the DMA was found to be valid, then the defendants were in breach of the DMA because they failed to pay their share of the costs incurred to improve the driveway.

¶7 Against REEL, the Second Amended Complaint alleged claims for declaratory relief, for rescission of the DMA, or for reformation of the DMA. Fressadi asserted that a justiciable controversy existed as to whether the DMA was enforceable or

[2] Fressadi previously sold Lot 010C to the DeVincenzos. Against the DeVincenzos, Fressadi asserted claims for declaratory judgment, breach of contract, rescission of the DMA, and reformation. Fressadi also sought rescission of his sale of Lot 010C to the DeVincenzos, asserting that a valid DMA was a condition precedent to the sale, that he relied on representations of GV Group that Lot 003A would be bound by the DMA, and that without a valid DMA, he would not have sold the property to the DeVincenzos.

whether Fressadi was entitled to rescind the agreement and recover damages. Alternatively, Fressadi sought reformation of the DMA, asserting it failed to conform to what the parties intended. Specifically, the parties were mistaken as to the number of lots bound by the agreement.

¶8 Fressadi moved to consolidate this case with four other actions. Two of the actions (CV2009-05821 and CV2010-004383) involve a dispute over a sewer line Fressadi had installed on his property. Fressadi alleges that the Town of Cave Creek permitted seven houses, including all 003 lots, to connect to the sewer without reimbursing Fressadi.[3] The third suit (CV2009-050924) involves Fressadi's claim that the construction on the 003 lots violated Cave Creek's building code and various zoning ordinances. The fourth (LC2010-000109-001DT) is a special action filed by Fressadi to review a variance the Town of Cave Creek granted to REEL on Lot 003C. The court denied the motion to consolidate, finding that "consolidation is not appropriate as a matter of law and, additionally, would result in unnecessary delay."

¶9 Fressadi also moved to add as defendants: M&I Bank, which had foreclosed on Lot 003B, Jocelyn Kremer, the owner of

[3] In one of these two suits, REEL was the plaintiff and the Town of Cave Creek the defendant.

Lot 003A, and others as necessary parties.[4] The motion, which did not have an attached proposed amended complaint, was denied for failure to comply with Arizona Rule of Civil Procedure 15(a).

¶10 REEL filed a motion for summary judgment, arguing that Fressadi was asserting contract-dependent claims pursuant to a contract that Fressadi argued was void or was rescinded prior to REEL becoming owner of Lot 003C. REEL argued that Fressadi could not maintain claims for reformation, rescission, or declaratory relief on an agreement that Fressadi asserted did not exist.

¶11 In response, Fressadi argued that he could assert alternative claims, citing Arizona Rule of Civil Procedure 8. He argued that the DMA runs with the land and contended that REEL has taken inconsistent positions in litigating the DMA. Fressadi argued that "REEL cannot claim that they have no contract with Plaintiff yet simultaneously argue and demand use of his property and his utilities." Fressadi offered that REEL could stipulate to the rescission of the DMA and be released from the action. Fressadi informed the court that he had

[4] Fressadi asserted that if the DMA was not rescinded, then M&I Bank was liable for repair and maintenance costs. Alternatively, if the agreement was rescinded, then the lot "violates the town's zoning ordinance for excessive lot disturbance, and the permit for the house under construction is void."

reached a tentative settlement with GV Group whereby the parties agreed to stipulate that the DMA was void *ab initio*.

¶12 In reply in support of its motion for summary judgment, REEL asserted,

> The Plaintiff does not dispute that the DMA was not in force at that time when REEL became the owner of Lot C, and summary judgment is mandated. REEL notes that its request for summary judgment is not reliant upon any finding of fact as to whether the DMA was void, voidable, or rescinded, and specifically requests that the Court not make ruling in that regard as facts are in dispute on those issues. Rather, REEL simply makes the common sense argument that the Plaintiff cannot maintain contract based claims against REEL on a contract he claims was not in place at the time REEL became the owner of Lot C.

¶13 Fressadi filed a notice with respect to the proposed settlement with GV Group, MG Dwellings, Building Group, Golec, and the Vertes. REEL filed an objection to the settlement to the extent that Fressadi might attempt to bind REEL to the stipulation that the DMA was void. At oral argument, however, Fressadi reported that the settlement with GV Group was "not possible because third parties have detrimentally relied upon the reciprocal easement agreement."

¶14 The court found that REEL was entitled to summary judgment as a matter of law. The court said that Fressadi's claims failed because they were "based upon a contract Plaintiff admits he rescinded." The court further reasoned:

> That no Driveway Maintenance Agreement was in effect at the time REEL became owner of Lot C is undisputed. Plaintiff's claims fail as a matter of law as they are founded on the existence of a Driveway Maintenance Agreement with REEL. The factual issues argued by Plaintiff are immaterial as a matter of law to his alleged claims against REEL.

Subsequently, on January 10, 2011, Fressadi failed to appear for a status conference. After noting that Fressadi had received notice of the hearing and had not contacted the court or requested a continuance, the court struck Fressadi's Second Amended Complaint and his answer to GV Group's counterclaim. REEL sought attorneys' fees in the amount of $39,220.00 and costs in the amount of $785.10.

¶15 The court entered a signed minute entry in favor of all defendants from which Fressadi appealed. That order, however, did not resolve issues of attorneys' fees and did not include a determination of finality pursuant to Arizona Rule of Civil Procedure 54(b). The court also entered a judgment in favor of REEL, however, that awarded attorneys' fees and included Rule 54(b) language. This court determined that it only had appellate jurisdiction over the appeal related to REEL and dismissed as premature the appeal with respect to the other defendants. We have jurisdiction over this appeal pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (Supp. 2012).

DISCUSSION

¶16 In this decision we consider Fressadi's challenge to the trial court's grant of summary judgment to REEL. Fressadi argues on appeal that the trial court erred by granting summary judgment to REEL and striking his amended complaint for missing a status conference. We consider these arguments but do not address those that were not raised below or that concern other parties.[5]

I. Summary Judgment

¶17 Summary judgment may be granted when "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c). In reviewing a motion for summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media*

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[5] Fressadi argues on appeal the court should not have granted summary judgment to REEL because REEL is a joint venture partner with GV Group and is vicariously liable for GV Group's actions. He contends REEL's liability would extend back to the execution of the DMA prior to REEL becoming an owner or a partner with the GV Group.

This argument was not raised at the trial court. Generally, the appellate court will not consider issues that were not raised in the trial court. *Hawkins v. Allstate Ins. Co.,* 152 Ariz. 490, 503, 733 P.2d 1073, 1086 (1987). Even if the argument was not waived, however, it does not establish grounds for reversing summary judgment. Assuming the existence of a joint venture partnership, Fressadi cites no authority that would impose liability on a joint venture partner that arose before the existence of the partnership.

Co. v. City of Tucson, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000) (citation omitted).

A. Alternative Arguments

¶18 In granting summary judgment to REEL, the trial court relied on Fressadi's position that he had rescinded the DMA and the fact that REEL did not dispute the rescission. The court accepted REEL's argument that Fressadi cannot maintain contract-dependent claims against REEL based on a contract Fressadi claims did not exist when REEL became owner of Lot 003C.

¶19 The fact that Fressadi claims to have rescinded the agreement does not, however, establish that the agreement was in fact rescinded. An agreement may be rescinded "by applying to the courts for a decree of rescission, by one party declaring a rescission based upon a legally sufficient ground without the consent of the other party, or . . . by mutual agreement of the parties." *Bazurto v. Burgess*, 136 Ariz. 397, 399, 666 P.2d 497, 499 (App. 1983). To justify rescission, the rescinding party must offer to restore the other party to the status quo. *Mortensen v. Berzell Inv. Co.*, 102 Ariz. 348, 350-51, 429 P.2d 945, 947-48 (1967). If the other party accepts the tender, then the agreement is rescinded at that point, even if the rescinding party must ultimately seek assistance from the courts to recover what he had given under the agreement. *Dewey v. Arnold*, 159 Ariz. 65, 69, 764 P.2d 1124, 1128 (App. 1988).

¶20 Fressadi's complaint alleges alternative claims depending on the viability of the DMA. In Fressadi's first cause of action, he asked the court for a declaratory judgment in accordance with A.R.S. § 12-1832 (2003), regarding whether the DMA had been rescinded or was an enforceable contract. In spite of Fressadi's request for a declaration regarding whether the DMA was rescinded, the trial court has not entered any ruling determining whether the DMA was rescinded. REEL admitted in its reply that there were questions of fact as to the viability of the DMA. Fressadi next requested that if the DMA was not already rescinded, that the court order a rescission of the DMA. Lastly, in the event the DMA was enforceable, Fressadi sought reformation of the agreement.[6]

¶21 Fressadi is permitted to assert alternative and inconsistent claims. *See* Ariz. R. Civ. P. 8(e).[7] Although a

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[6] Fressadi asserted other claims based on a valid agreement, including breach of contract, against other defendants, but not against REEL.

[7] The rule provides in part:

> A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. . . . A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or equitable grounds or both.

Ariz. R. Civ. P. 8(e).

plaintiff cannot both rescind a contract and also affirm the same contract and sue for damages, the plaintiff may pursue inconsistent claims until required to elect a remedy at the conclusion of trial. *Cal X-Tra v. W.V.S.V. Holdings, L.L.C.*, 229 Ariz. 377, 396, ¶¶ 64-65, 276 P.3d 11, 30 (2012); *Vinson v. Marton & Assocs.*, 159 Ariz. 1, 4, 764 P.2d 736, 739 (App. 1988).

¶22 Consequently, REEL was not entitled to summary judgment on this record. Although Fressadi has claimed that he rescinded the DMA, he also sought a judicial determination regarding the status of the DMA. If the agreement was not rescinded, then REEL may be bound by it. The DMA by its terms and recording runs with the land and encumbers Lot 003C, which presumably bound REEL when it became an owner of the property.

B. Indispensible Party

¶23 REEL further contends summary judgment was appropriate because Fressadi failed to join M&I Bank, which had foreclosed on Lot 003B in November 2009. REEL argues that M&I Bank is in the same position as REEL in this litigation. Therefore, REEL argues M&I Bank should be similarly treated as an indispensible party under Arizona Rule of Civil Procedure 19, and Fressadi's failure to join M&I Bank required dismissal of his action against REEL.

¶24 A person should be joined in an action if, in the person's absence, complete relief cannot be given to the parties

before the court or the parties may incur inconsistent obligations. Ariz. R. Civ. P. 19(a). If such a person cannot be made a party, then the court must determine "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed." Ariz. R. Civ. P. 19(b).

¶25 In response to Fressadi's motion to add M&I Bank as a defendant, M&I Bank argued that Fressadi failed to comply with Arizona Rule of Civil Procedure 15(a), by not attaching a proposed amended complaint to the motion. The court denied Fressadi's motion primarily on that basis. The court made no determination under Rule 19 whether M&I Bank was a necessary party, whether M&I Bank could be joined, or whether M&I Bank, if it was a necessary party that could not be joined, was indispensible. The court denied Fressadi's motion based on a procedural defect. On this record, we decline to determine in the first instance whether M&I Bank is an indispensible party, and we therefore reject REEL's argument on this issue.

II. Sanctions

¶26 Fressadi also argues that the court erred in striking his Second Amended Complaint and dismissing his action for failure to appear at a scheduled conference. At the time of the court's ruling, REEL had already been granted summary judgment. We consider this argument, however, because we have concluded

that entry of summary judgment was inappropriate. If the court did not err in striking the complaint, the action against REEL would have been dismissed at that point, making remand unnecessary.

¶27 If a party fails to appear at a scheduling or pretrial conference, the court shall require the party to pay reasonable expenses incurred and may impose sanction orders. Ariz. R. Civ. P. 16(f). These sanction orders may include "striking out pleadings or parts thereof . . . or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party." Ariz. R. Civ. P. 37(b)(2)(C). Sanctions must be appropriate to the circumstances and be preceded by due process. *Roberts v. City of Phoenix*, 225, Ariz. 112, 119-20, ¶ 27, 235 P.3d 265, 273 (App. 2010); *Hammoudeh v. Jada*, 222 Ariz. 570, 572, ¶ 6, 218 P.3d 1027, 1029 (App. 2009) (citation omitted).

¶28 The trial court has discretion in imposing sanctions, but when the court strikes a pleading or enters a dismissal, its discretion is more limited than when imposing lesser sanctions. *Roberts*, 225 Ariz. at 119, ¶ 27, 235 P.3d at 272. When considering imposing dismissal or default as a sanction, the court must consider and reject lesser sanctions. *Id*. at 121, ¶ 31, 235 P.3d at 274; *Hammoudeh*, 222 Ariz. at 572, ¶ 6, 218 P.3d at 1029. Litigation should be disposed of on its merits, and

therefore dismissal as a sanction should be used "with caution and restraint." *Zakroff v. May*, 8 Ariz. App. 101, 104, 443 P.2d 916, 919 (1968).

¶29 The trial court struck Fressadi's Second Amended Complaint and his answer to GV Group's counterclaim for failure to appear for a status conference. The minute entry does not refer to any other infractions or misconduct committed by Fressadi, nor does it recite any other reason for imposing such a severe penalty in the first instance. There is no indication that the court considered and rejected lesser sanctions.

¶30 We conclude that the court erred in dismissing Fressadi's Second Amended Complaint for failing to appear at one conference. Consequently, the dismissal does not provide an alternative ground to affirm the trial court's judgment in favor of REEL.

III. Consolidation

¶31 Fressadi argues the trial court should have granted his motions to consolidate this case with other actions related to the development of the 003 and 010 lots. Fressadi argues generally that the issues from the actions spill over into one another.

¶32 Under Arizona Rule of Civil Procedure 42(a),

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or

> all the matters in issue in the actions, or it may order all the actions consolidated, and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

The decision to consolidate an action is within the discretion of the trial court, and this court will not disturb that decision absent an abuse of the court's discretion. *Hancock v. McCarroll*, 188 Ariz. 492, 495, 937 P.2d 682, 685 (App. 1996) (citation omitted). Consolidation does not affect the rights of the parties, nor does it make the parties of one suit parties in another. *Torosian v. Paulos*, 82 Ariz. 304, 316, 313 P.2d 382, 390 (1957)(citation omitted).

¶33 Fressadi generally refers to various asserted facts and argues that they require consolidation to be properly adjudicated. He does not explain, however, how the lack of consolidation would prevent him from presenting any relevant information or would otherwise prejudice his case. Even assuming that the cases have common questions of law or fact, Fressadi has not shown that the trial court abused its discretion in declining to consolidate the actions.

¶34 Fressadi also appears to assert that the trial court should have allowed him to join "indispensible parties." Fressadi, however, only identifies M&I Bank as an entity he was precluded from joining. As noted earlier, the court denied Fressadi's request because of his failure to comply with Rule

15(a). Fressadi has not challenged that ruling in this appeal.

¶35 Fressadi lastly asserts that the trial court erred in awarding attorneys' fees to REEL.[8] REEL argues that it was entitled to attorneys' fees pursuant to A.R.S. § 12-341.01(A)(2003). Given our decision reversing the trial court's grant of summary judgment, REEL is no longer the prevailing party. We therefore vacate the trial court's decision awarding fees.

¶36 We deny an award of any fees on appeal.

CONCLUSION

¶37 We conclude that the court erred in granting summary judgment to REEL. REEL is the successor-in-interest to Lot 003C, which is subject to the DMA if the DMA is determined to be valid. Fressadi's complaint raises various claims in the alternative, including a request for a determination of the validity of the DMA. REEL admits that questions of fact exist as to whether the DMA was void, voidable or rescinded. Consequently, summary judgment was inappropriate. We therefore reverse the summary judgment, vacate the fee award, and remand

[8] Fressadi also contends that the court erred in "awarding counterclaims." REEL is the only appellee in this appeal, and REEL asserted no counterclaims against Fressadi.

to the trial court for further proceedings.

/s/
JOHN C. GEMMILL, Judge

CONCURRING:

/s/
ANN A. SCOTT TIMMER, Presiding Judge

/s/
MARGARET H. DOWNIE, Judge