DIVISION ONE
FILED: 05/14/2013
RUTH A. WILLINGHAM, CLERK
BY: JT

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

AREK FRESSADI, an unmarried man, Plaintiff/Appellant, v. SALVATORE DE VINCENZO and SUSAN DE VINCENZO, husband and wife, Defendants/Appellees.	No. 1 CA-CV 12-0435 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure) AMENDED PER ORDER FILED 6/20/13

Appeal from the Superior Court in Maricopa County

Cause Nos. CV2006-014822

The Honorable Eileen S. Willett, Judge

REVERSED AND REMANDED

Arek Fressadi — Tucson
In Propria Persona

Righi Law Group, PLLC — Phoenix
By Richard L. Righi
Elizabeth Savoini Fitch
Attorneys for Defendants/Appellees

G O U L D, Judge

¶1 Plaintiff/appellant Arek Fressadi appeals from the superior court's decision granting summary judgment to

defendants/appellees Salvatore and Susan DeVincenzo on his claims for declaratory judgment, breach of contract, rescission, and reformation related to a recorded driveway maintenance agreement and for rescission of his sale of a parcel of real property to the DeVincenzos. For the following reasons, we reverse and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶1 On October 16, 2003, Fressadi, as owner of parcels 211-10-010 A, B, and C (hereafter Lots 010A, 010B and 010C respectively) and GV Group, LLC, as owner of parcels 211-10-003, A, B, and C (hereafter Lots 003A, 003B, and 003C, respectively) entered into an agreement titled, Declaration of Driveway Easement and Maintenance Agreement ("the DMA"). The property was located in Cave Creek, Arizona. Lots 010A, 010B, and 010C created a vertical rectangle with Lot 010A located in the eastern half of the rectangle, Lot 010B located in the southwestern two-thirds of the rectangle, and Lot 010C located in the northwestern portion of the rectangle. Lots 003A, 003B, and 003C were located east to west contiguous to the southern boundaries of Lots 010A and 010B. Schoolhouse Road ran north to south along the eastern boundaries of Lot 010A and Lot 003A. The driveway that was the subject of the DMA consisted of easements along 25-foot-wide contiguous strips running east to west from Schoolhouse Road across the south of Lot 010A and

across the north of Lots 003A and 003B, and continuing south to north between Lot 010A to the east and Lots 010B and 010C to the west. The DMA provided in part:

> **1. Easement.** The Lots shall have a perpetual, nonexclusive easement over and upon the Driveway for the purpose of access, maintenance, repair and reconstruction of the Driveway and attendant rock retaining walls, and related utilities.

The DMA declared that the easements and covenants 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 to be the Caretaker (as defined in the agreement) responsible for the care and maintenance of the driveway with the parties sharing in the cost based on the number of lots owned. The DMA was signed by Keith Vertes on behalf of GV Group.

¶2 Before the DMA was executed, GV Group sold Lot 003A to Jocelyn Kremer, such that her lot was not included in the DMA as intended.

¶3 On October 21, 2003, the DeVincenzos purchased Lot 010C from Fressadi. The purchase contract was contingent on "Seller recording CC&Rs prior to close of escrow & recording of driveway maintenance agreement." The warranty deed for the sale was recorded concurrently with the DMA on October 22, 2003.

¶4 Disputes arose related to the failure to include Lot 003A in the DMA, including disputes as to the use of and

maintenance of the driveway, the related costs, and the share of costs the parties were required to pay. After attempts to negotiate Kremer's inclusion in the DMA failed, on October 27, 2005, Fressadi sent an email to Michael Golec[1] stating that Kremer was not a party to the DMA, that because she was not included the DMA failed as an agreement between him and GV Group for lack of reciprocity, and that "what remains is an agreement between the DeVincenzos and myself."

¶5 On October 2, 2006, Fressadi sued GV Group and related entities and individuals for, among other things, breach of the DMA, fraud, fraudulent concealment, and reformation. The complaint alleged in part that, when GV Group executed the DMA, it had misrepresented its authority to bind Lot 003A because it had previously sold that lot to Kremer, who was refusing to ratify and join the agreement.[2]

¶6 The GV Group defendants answered and filed a counterclaim, alleging that Fressadi was obligated to pay three shares under the DMA and the DeVincenzos one share, but that after Cave Creek required him to recombine his lots because of allegedly improper lot splitting, he started paying only one share under the DMA, requiring the others to pay more than

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[1] The email also addressed three other individuals whose identities are not clear.

[2] Fressadi alleged that he learned on October 21, 2003, that Kremer had purchased Lot 003A prior to October 16, 2003.

anticipated. The GV Group also alleged that Fressadi incurred unreasonable costs in maintaining the driveway without providing the required notification and had on various occasions through various means blocked or otherwise obstructed use of the driveway and threatened violence against workers hired by GV Group to build on its lots.

¶2 Real Estate Equity Lending, Inc. ("REEL") acquired Lot 003C on May 28, 2008, pursuant to a trustee's sale.

¶7 On August 26, 2009, Fressadi filed a Verified Second Amended Complaint, adding as defendants REEL and the DeVincenzos. Against the DeVincenzos, Fressadi asserted claims for declaratory judgment as to the validity and enforceability of the DMA, breach of contract, rescission of the DMA, and reformation of the DMA. He acknowledged that he had rescinded the DMA, but questioned whether he was entitled to do so and therefore whether the rescission was effective. 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. He alleged that if the DMA was deemed valid, then the DeVincenzos had failed to pay their proportionate share of costs and expenses required under the agreement.

¶8 The DeVincenzos answered and filed counterclaims, alleging that, when they purchased Lot 010C, Fressadi had represented Lot 010C had legal and physical access, that they had executed a copy of the DMA, that Fressadi had presented an invoice for unauthorized costs and expenses related to the DMA, that he had repeatedly blocked the driveway preventing access to Lot 010C, and that as a consequence they had been required to purchase a contiguous piece of property to gain unfettered access to Lot 010C. They asserted claims for breach of contract and breach of the covenant of good faith and fair dealing for Fressadi's failure to comply with the DMA, which they contended was binding on Fressadi, and fraud and negligent misrepresentation based on Fressadi's representations that the DeVincenzos would have access to Lot 010C.

¶9 On August 18, 2010, Fressadi recorded a document titled "Revocation of Driveway Easement and Maintenance Agreement," in which Fressadi declared that the DMA "was disavowed on August 26, 2005 and revoked, rescinded and otherwise cease [sic] to operate on September 3, 2005."[3]

¶10 REEL moved for summary judgment in which the DeVincenzos verbally joined at oral argument. REEL argued that Fressadi was asserting contract-dependent claims pursuant to a

[3] The dates refer to a letter sent by Kremer to Fressadi on August 26, 2005, in which she stated she would not join the DMA, and a letter from Fressadi to Kremer dated September 3, 2005, in which he stated he would "move to have the agreement rescinded."

contract that Fressadi argued was void or rescinded before REEL became 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. Similarly, REEL argued, Fressadi could not maintain a breach of contract claim based on the DMA when, according to Fressadi, the DMA was not in effect when REEL became the owner of Lot 003C in 2008.

¶11 In response, Fressadi, citing Rule 8, Arizona Rules of Civil Procedure, argued that he could assert alternative claims. He further argued that the DMA ran with the land and so, if valid, did apply to REEL. At oral argument, he also argued that, although he had attempted to and intended to rescind the DMA, he could not unilaterally rescind it.

¶12 In its reply, REEL specifically asked the court not to rule on the status of the DMA, conceding that questions of fact existed with respect to that issue.

¶13 The court found that REEL was entitled to summary judgment as a matter of law. The court 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 court also granted summary judgment in favor of the DeVincenzos.

> Plaintiff asserts that the Driveway Maintenance Agreement ("DMA") entered on October 16, 2003 was rescinded by Plaintiff on October 27, 2005. Defendants DeVincenzo became owners of Lot C on October 21, 2003 and executed a copy of the DMA at closing. However, Plaintiff now sues Defendants DeVincenzo for declaratory relief, rescission and reformation under the DMA. These claims are all based upon a contract Plaintiff admits he rescinded. Therefore, Plaintiff's claims fail as a matter of law.

¶14 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.

¶15 Fressadi filed a motion for reconsideration, a motion for new trial, and an amended motion for new trial; on September 28, 2011, the trial court denied the motions.

¶16 On March 27, 2012, Fressadi filed a motion to vacate. On April 14, 2012, he filed a document titled "Notice," which included a copy of a motion to vacate filed in another lawsuit against the Town of Cave Creek. In that document, Fressadi asserted that the Town of Cave Creek had improperly subdivided parcel 211-10-003 in violation of state law and its own ordinances, creating an "ultra vires subdivision." In his reply to his motion to vacate, Fressadi argued that Cave Creek had exacted Lots 003D and 010D and by doing so had created illegal subdivisions because the remaining lots and parcels no longer

had adequate legal and physical access as required by the town ordinance. The court denied the motion to vacate.

¶17 On May 11, 2012, the court entered judgment in favor of the DeVincenzos on all of Fressadi's claims and awarded the DeVincenzos attorneys' fees and costs in the amount of $19,035.00 and $521.80, respectively. Fressadi timely appealed.

DISCUSSION

¶18 This court previously addressed the propriety of the superior court's decision granting summary judgment in this case in *Fressadi v. Real Estate Equity Lending, Inc.*, 1 CA-CV 11-0728 (Ariz. App., Nov. 23, 2012), where we considered Fressadi's appeal from the judgment in favor of REEL based on the same summary judgment motion at issue here. The factual differences between the DeVincenzos and REEL do not warrant a different outcome, and we reverse.

¶19 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). We determine de novo whether genuine issues of fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). We review the decision on the record made in the trial court, and consider only the evidence presented to the court when it considered the motion. *Phoenix*

Baptist Hosp. & Med. Ctr., Inc. v. Aiken, 179 Ariz. 289, 292, 877 P.2d 1345, 1348 (App. 1994); *GM Dev. Corp. v. Com'n Am. Mortg. Corp.*, 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990).

¶20 The trial court granted judgment to the DeVincenzos based on Fressadi's claimed rescission of the DMA, concluding that Fressadi could not assert contract-dependent claims on a contract that he admitted he rescinded. The DeVincenzos argue that Fressadi cannot rescind an agreement and sue for damages on that same agreement. The record, however, reveals questions of fact as to whether Fressadi ever rescinded or even claimed to have rescinded the DMA with respect to the DeVincenzos. In the October 27, 2005, email Fressadi claims constituted his formal attempt to rescind, he specifically noted that the DMA failed for lack of reciprocity with respect to the GV Group such that "an agreement between the DeVincenzos and myself" was all that remained. His Verified Second Amended Complaint alleged, "The DeVincenzos never objected to Fressadi's rescission notice *to the GV Defendants*." (Emphasis added.)

¶21 In addition, an attempt by Fressadi to rescind the DMA does not necessarily accomplish rescission. 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). A mutual mistake of material fact generally supports rescission of an agreement; however, 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). The existing record does not establish an effective rescission as to the DeVincenzos.

¶22 Furthermore, Fressadi pleaded his complaint in the alternative. Although he asserted that the DMA was not a valid enforceable agreement, he sought a declaratory judgment as to whether the DMA had been rescinded, was void or voidable, or was a viable enforceable agreement.[4] In the event the DMA was found invalid, he sought rescission of the sale of Lot 010C to the DeVincenzos, on the ground that the sale was contingent on the existence of a valid DMA. In the event the DMA was enforceable, he asserted claims for breach of the DMA and for rescission or reformation of the DMA.

[4] REEL, whose motion was the basis of the DeVincenzos' judgment, conceded that questions of fact exist as to the validity of the DMA.

¶23 Fressadi may assert alternative and inconsistent claims. *See* Ariz. R. Civ. P. 8(e).[5] Although a 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 before the case is submitted to the jury 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 (App. 2012); *see also Edward Greenband Enters. of Ariz. v. Pepper*, 112 Ariz. 115, 118, 538 P.2d 389, 392 (1975) ("[W]e are still of the view that a person cannot be forced to elect in advantage at his peril upon what theory or remedy he will proceed until the conclusion of the trial.").

¶24 We find that the court improperly granted summary judgment to the DeVincenzos based on Fressadi's claimed rescission.

¶25 We also consider the propriety of the trial court's decision striking Fressadi's Verified Second Amended Complaint and answer to GV Group's counterclaim because if the court

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[5] 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. Proc. 8(e).

properly dismissed the complaint then the action against the DeVincenzos would also have been dismissed, making remand unnecessary.

¶3 If a party fails to appear at a scheduling or pretrial conference, the court shall require the party to pay reasonable expenses incurred and, in addition, "make such orders with regard to such conduct as are just." Ariz. R. Civ. P. 16(f). These orders include an order "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 must 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). The trial court has discretion in imposing sanctions, but its discretion is more limited when it strikes a pleading or enters a default 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. Because litigation should be disposed of on its merits, dismissal as a sanction should be

used "with caution and restraint." *Zakroff v. May*, 8 Ariz. App. 101, 104, 443 P.2d 916, 919 (App. 1968).

¶4 The trial court here struck Fressadi's Second Amended Complaint and his answer to GV Group's counterclaim for failure to appear for a status conference. The related minute entry reflects findings by the court that Fressadi had received notice of the status conference, that he had not contacted the court, and that he had not requested a continuance. The minute entry does not refer to any other infractions or misconduct committed by Fressadi or provide any other reason for imposing such a severe penalty in the first instance. It gives no indication that the court considered and rejected lesser sanctions.

¶26 We conclude that the court abused its discretion in essentially 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 the DeVincenzos.

¶27 In his opening brief, Fressadi spends considerable time asserting that the Town of Cave Creek engaged in improper conduct that created illegal subdivisions on parcels 211-10-003 and 211-10-010 in a "fraudulent scheme to convert and control the property of others." He argues that, because the parcels are illegal subdivisions, sale of the lots is unlawful, any permits issued pertaining to the lots were void, summary

judgment is precluded, and all judgments in any case pertaining to parcels 211-10-003 and 211-10-010 are void.

¶28 These arguments were not raised in the trial court in response to the motion for summary judgment, but were first brought before the court months after the court granted summary judgment to the DeVincenzos.[6] We therefore do not consider these arguments in reviewing the summary judgment ruling. *See GM Dev. Corp.*, 165 Ariz. at 4, 795 P.2d at 830. Moreover, because we have already determined that remand is appropriate, and because Fressadi's written argument is difficult to comprehend and replete with conclusions arising from as-yet unsupported and unproven facts not yet addressed in the trial court, consideration of this argument by this court at this time is neither necessary nor appropriate. *See State v. Brita*, 158 Ariz. 121, 124, 761 P.2d 1025, 1028 (1988) ("It is particularly inappropriate to consider an issue for the first time on appeal where the issue is a fact-intensive one.").

¶29 Fressadi also argues that Cave Creek is a necessary party to this action. Fressadi does not contend that the superior court denied an attempt to join Cave Creek to the action and it does not appear from the record that any attempt

[6] Fressadi appears to have first raised the issue in a filing titled "Notice," which included a copy of a Motion to Vacate from another lawsuit against Cave Creek. Fressadi raised the arguments again in his reply to his motion to vacate the judgment in favor of the DeVincenzos.

was made or decision rendered for this court to review. Fressadi is free to make an appropriate motion on remand for the superior court's consideration.

¶30 Because we reverse the court's summary judgment ruling and remand, we vacate the award of attorneys' fees and costs to the DeVincenzos as they are no longer the successful party. We decline to award fees on appeal.

CONCLUSION

¶31 We find that the trial court erred in concluding that, because Fressadi claimed to have rescinded the DMA, he could not assert contract-dependent claims. A question of fact exists as to whether Fressadi attempted to rescind the DMA with respect to the DeVincenzos. In addition, even if he attempted to rescind the DMA, he is still permitted to plead contract claims in the alternative, which he did. The superior court's decision is reversed and the matter remanded for further proceedings.[7]

/S/_____
ANDREW W. GOULD, Judge

CONCURRING:

/S/_____
PATRICIA K. NORRIS, Presiding Judge

/S/_____
RANDALL M. HOWE, Judge

[7] We deny as moot Fressadi's motion to suspend rules and supplement the record (filed January 27, 2013).