DIVISION ONE
FILED: 03/01/11
RUTH WILLINGHAM, ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JIM EIFFERT and TERRI EIFFERT, Plaintiffs/Appellees, v. ROBERT TARANTO and DAWN SHERI TARANTO, Defendants/Appellants.	)	No. 1 CA-CV 09-0736
	)	DEPARTMENT E
	)	**MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2006-016562

The Honorable Eileen S. Willett, Judge

AFFIRMED

Michael J. Fuller — Phoenix
Attorney for Plaintiffs/Appellees

Gregory G. McGill — Scottsdale
Attorney for Defendants/Appellants

S W A N N, Judge

¶1 Robert and Dawn Taranto (collectively, "Taranto") appeal a judgment entered against them following a jury verdict in favor of Jim and Terri Eiffert (collectively, "the Eifferts")

on claims for breach of contract, fraud and related causes of action. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 This case arises out of two loan transactions. On June 8, 2005, the Eifferts borrowed $160,000 from Taranto to purchase a condominium ("Colter property"). On July 21, 2005, the Eifferts borrowed $55,000 from Taranto to purchase another condominium ("Cave Creek property"). In both transactions, the Eifferts signed promissory notes in which they promised to pay monthly installments with interest to Taranto, payable in full by a date certain. To secure the loans, the Eifferts executed deeds of trust. The Eifferts also executed and delivered to Taranto warranty deeds to the properties. The parties agreed that Taranto would not record the deeds in his name unless the Eifferts defaulted on the loan (the "first agreement").[2]

¶3 In November 2006, the Eifferts filed a five-count[3] complaint against Taranto alleging that the warranty deeds on both properties were recorded without their knowledge, that the

---

[1] We view the facts in the light most favorable to sustaining the trial court's judgment. *Sabino Town & Country Estates Ass'n v. Carr,* 186 Ariz. 146, 148, 920 P.2d 26, 28 (App. 1996).

[2] We recognize that recordation is not necessary to transfer an interest in real property. Though the issue was raised at trial, it is not central to this appeal.

[3] The counts identified claims for breach of contract, unjust enrichment, conversion, breach of covenant of good faith and fair dealing, and constructive trust.

properties were sold to a third party, and that Taranto failed to account for or return any sales proceeds.

¶4 In September 2007, the Eifferts moved to amend the complaint to allege that on or about the due date for the payments the parties verbally agreed that Mr. Eiffert would place both properties on the market, that he could avoid payments on both notes, and that each note would be satisfied from the sales proceeds, with the remaining proceeds to be distributed to Mr. Eiffert (the "second agreement"). The proposed amended complaint further alleged that Taranto advised Mr. Eiffert in August that he had recorded the two deeds in his name, but "made assurances" that he would account for the profits from any sale. It also added two additional counts alleging equitable estoppel and fraud. Taranto did not oppose the motion and the court granted it in December 2007.

¶5 In January 2008, the Eifferts filed their First Amended Complaint. Taranto filed a counter-claim for breach of contract and fraudulent inducement. The counter-claim alleged that Mr. Eiffert knew that Taranto was a "private hard money lender," that Mr. Eiffert defaulted on the loans and deeds of trust, and that Taranto recorded the two deeds and sold the properties pursuant to the agreement between the parties.

¶6 In November 2007, Taranto filed a motion for summary judgment, arguing that the Eifferts' claims were barred by the

statute of limitations and the statute of frauds. After briefing and oral argument, the trial court denied the motion.

¶7 In July 2009, Taranto filed a motion in limine ("July 30 motion in limine") to preclude Eiffert "from making any suggestion that the deeds from Eiffert to Taranto were 'illegal,' improper, or a violation of A.R.S. Title 33 or Arizona law." The trial court granted the motion.

¶8 After a seven-day jury trial, a jury found for the Eifferts on their claims against Taranto and on Taranto's counter-claim. The jury awarded the Eifferts $184,847.11 in compensatory damages and $50,000 in punitive damages. The Eifferts filed an application for attorney's fees in the amount of $102,407.89, and the court entered judgment in the aggregate amount of $409,662.29.

¶9 Taranto timely appeals. We have jurisdiction pursuant to A.R.S. § 12-2101(B).

DISCUSSION

I. MOTION FOR SUMMARY JUDGMENT

¶10 Taranto first contends that the trial court erred as a matter of law in denying his motion for summary judgment.

¶11 The denial of a motion for summary judgment generally is neither appealable nor subject to review after judgment. *Martin v. Schroeder,* 209 Ariz. 531, 533, ¶ 5, 105 P.3d 577, 579 (App. 2005). *See also O'Day v. George Arakelian Farms, Inc.,* 24

Ariz. App. 578, 582, 540 P.2d 197, 201 (1975) (finding that the denial of a motion for summary judgment becomes "moot as a legal issue" when the case is presented at trial). A party may, however, preserve arguments raised in a motion for summary judgment by reasserting them in a motion for judgment as a matter of law.[4] *See* Ariz. R. Civ. P. 50; *John C. Lincoln Hosp. and Health Corp. v. Maricopa Cnty.,* 208 Ariz. 532, 539, ¶ 19, 96 P.3d 530, 537 (App. 2004). In this case, Taranto reasserted some of his summary judgment arguments in a Rule 50 motion made at the close of evidence. We review de novo a trial court's ruling on a Rule 50 motion. *Acuna v. Kroack,* 212 Ariz. 104, 110, ¶ 23, 128 P.3d 221, 227 (App. 2006).

¶12 Taranto first asserts that any action on the second agreement is barred by the statute of frauds.[5] The trial court

[4] The opening brief fails to cite this standard of review or make arguments related to Taranto's Rule 50 motion. Instead, Taranto limits his argument on appeal to the trial court's error in denying his motion for summary judgment. Our review, therefore is limited to those issues advanced on summary judgment that were both properly preserved and advanced on appeal. *See Schabel v. Deer Valley Unified Sch. Dist. No. 97,* 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996) ("Issues not clearly raised and argued in a party's appellate brief are waived.").

[5] We decline to address Taranto's assertion for the first time on appeal that "courts have also held that a contract to provide a mortgage falls within the statute of frauds as a 'sale' of an interest in real property." *See Richter v. Dairy Queen of S. Ariz., Inc.*, 131 Ariz. 595, 596, 643 P.2d 508, 509 (App. 1982). We note, as well, that this line of argument is contrary to Taranto's motions in limine below, in which he successfully precluded any discussion that the warranty deeds were illegal,

denied his motion for summary judgment on this issue, finding the statute of frauds was not applicable because the second agreement provided for "loan recoupment, not the sale of real estate." We agree.

¶13 The agreement fell outside the statute of frauds because it related to proceeds of sale, *not* an interest in land. *See* A.R.S. § 44-101(6) (requiring an agreement in writing "for the sale of real property or an interest therein"). The First Amended Complaint does not assert that the second agreement created an interest in the real property sold, but instead objects to Taranto's refusal to "account for and return" the money he received in excess of the Eiffert's loan obligation when the properties were sold. The Eifferts' interest in these proceeds was not converted into an interest in the land merely because the money at issue was derived from the sale of real property. *Cf. Turley v. Ethington,* 213 Ariz. 640, 644, ¶ 14, 146 P.3d 1282, 1286 (App. 2006) (claim for profits based on an oral partnership agreement not involving a transfer of an interest in real property is not within the statute of frauds). In fact, the Eiffert's interest in the properties was effectively defeated when the warranty deeds were delivered to

---

improper or a violation of Arizona law and prevented Eiffert's expert from opining that the warranty deeds were actually an equitable mortgage.

Taranto -- a legal conclusion that Taranto stressed during argument of his Rule 50 motion.

¶14 Taranto also argued in his Rule 50 motion and now argues on appeal that the second agreement lacked specificity and violated the rule against perpetuities. We disagree. Taranto's objection can be summarized as follows: the parties purportedly agreed that the Eifferts could cure their default and satisfy their obligations under the notes by selling the properties and using the proceeds to pay the loan balances, but did not agree on the consequences of any indefinite failure to sell the properties. Though it was for the jury to decide whether such an agreement was actually formed, we note that such agreements are neither uncommon nor unenforceable –- the lender gains the enhanced prospect that the debt will be paid in full without the risk and expense involved in taking the property and marketing it himself, and the borrower retains the right to any excess proceeds. The fact that the parties did not plan for every contingency, such as the prospect that the properties would never sell, does not render the agreement invalid. In the event that the Eifferts had failed to market the properties in good faith, Taranto would have had a right of rescission. Moreover, any rights that the Eifferts acquired under the agreement vested immediately, and the rule against perpetuities was not offended.

II. THE COURT DID NOT ABUSE ITS DISCRETION CONCERNING OBJECTIONS TO WITNESS TESTIMONY.

¶15 Taranto next asserts that the trial court erred by allowing witnesses to make "scandalous and inflammatory" remarks during their testimony at trial. A trial court's decision regarding the admission or exclusion of evidence will not be overturned absent a clear abuse of discretion and resulting prejudice. *Schwartz v. Farmers Ins. Co. of Ariz.,* 166 Ariz. 33, 37, 800 P.2d 20, 24 (App. 1990). "An 'abuse of discretion' is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Torres v. N. Am. Van Lines, Inc.,* 135 Ariz. 35, 40, 658 P.2d 835, 840 (App. 1982).

¶16 Taranto challenges the admission of three separate instances of witness testimony.[6]

A. Statement #1

¶17 On the third day of trial, a witness referenced a "private money" loan, which prompted the following colloquy.

> Q. Can you explain what you mean by that. Private money is designed for those types of transactions. What types of transactions?

[6] Taranto challenges a fourth colloquy, regarding Taranto's admission of conversion, but provides no citation to the record where the colloquy took place. Additionally, the opening brief acknowledges that the trial court sustained his objection to the testimony. The jury was instructed to disregard any question for which an objection was sustained by the court, and we presume a jury follows its instructions. *State v. Velazquez,* 216 Ariz. 300, 312, ¶ 50, 166 P.3d 91, 103 (2007).

> A. Well, it's known as a hard-money loan, which is basically a loan shark, except most of them don't really break your legs, you know, if you don't pay.
>
> Q. Objection. Objection to that description, your honor. It's highly prejudicial. It's not testimony. It's not based on any facts. It's highly prejudicial to describe hard-money lenders in that fashion.
>
> THE COURT: Overruled. You can cross.

The witness then further described private money loans as an alternative to a conventional loan, where the money comes from a person who loans money at a high interest rate with hefty up-front fees. Taranto then cross-examined the witness, but did not ask him to further discuss "hard-money" loans.

B. Statement #2

¶18 On the second day of trial, a witness explained that he voluntarily appeared to testify rather than appear subject to a subpoena because "there's just been a huge wrongdoing here." Taranto objected and the trial court asked opposing counsel to "re-phrase" the question. Instead, counsel stated he would "move on. "

C. Statement #3

¶19 Taranto contends that opposing counsel "repeatedly violated the limiting instruction of the court in an effort to get [a witness] to prejudice Taranto by characterizing" the structure of the loans as a "red flag."

¶20 Taranto does not cite any portion of the record that demonstrates these violations. Our review reveals five objections before the testimony at issue occurred, and none of them related to a limiting instruction.[7] All objections afterward, except one discussed *infra*, were likewise unrelated to any limiting instruction.

¶21 The record also demonstrates that Taranto objected to the witness's "red flag" statement because he assumed the witness would assert an opinion regarding the validity of the deeds. Opposing counsel, however, assured the court that the witness would not be asked his opinion of the transaction. When the witness later once mentioned the deeds, the court sustained Taranto's objection.

¶22 Taranto asserts that the cumulative effect of these statements was prejudicial. He fails, however, to reveal *how* he was prejudiced and our review of the record reveals nothing that rendered the trial unfair.

III. THE COURT DID NOT ABUSE ITS DISCRETION IN ITS RULINGS FOLLOWING THE MOTION IN LIMINE.

¶23 Taranto argues that the trial court erred by allowing witnesses to discuss topics that violated the July 30 motion in limine. We address each such contention in turn.

---

[7] The first was to Statement #2 discussed above; the second was to foundation; the third to a question relating to the honesty of the witness's statements; and the fourth and fifth to hearsay statements.

A. Examination of Taranto

¶24 Taranto objects that the trial court erred in allowing opposing counsel to question him about excess profits. The testimony concerned the amount of profit from the third-party sale of the Colter property and whether Taranto believed that profit was fair. But the record reflects that Taranto failed to timely object at trial to these questions. The opening brief acknowledges that Taranto objected to this testimony on August 6 -- a day *after* it was presented. "[A]bsent fundamental error, lack of timely objection operates as a waiver on appeal." *State v. Brown,* 125 Ariz. 160, 162, 608 P.2d 299, 301 (1980).

¶25 We find no abuse of discretion regarding questioning concerning whether Taranto gave the excess proceeds from the third-party sale to Eiffert. The record reflects that the line of questioning actually referenced language in the deeds of trust, which were admitted in both the complaint and counter-claim, and admitted at trial.

¶26 Taranto's challenge to a final line of questioning cannot stand because the opening brief and trial transcript demonstrate that Taranto objected at trial because the question "call[ed] for a legal conclusion." Taranto's challenge on appeal asserts a different basis -– that the line of questioning violated the court's ruling on the motion in limine. A party cannot preserve an objection by raising one objection at trial

and another on appeal. *State v. Kelly,* 122 Ariz. 495, 497, 595 P.2d 1040, 1042 (App. 1979).

B. Dialogue with Expert

¶27 Taranto contends that "most of" Eiffert's questions posed to his expert "consisted of a dialogue about 'excess proceeds' and 'equitable mortgages.'" He asserts that this testimony was prejudicial because it suggested that Eiffert was entitled to the excess of proceeds as a matter of law. Taranto, however, provides no citation to legal authority or to the record to support his argument and we need not develop this point for him. *See* ARCAP 13(a)(6); *Ace Auto. Products, Inc. v. Van Duyne,* 156 Ariz. 140, 143, 750 P.2d 898, 901 (App. 1987); *Adams v. Valley Nat'l Bank of Ariz.,* 139 Ariz. 340, 343, 678 P.2d 525, 528 (App. 1984).

IV. FRAUD AND PUNITIVE DAMAGES

¶28 Taranto contends that Eiffert introduced no evidence of the "present intent not to perform a promise" necessary to sustain the fraud claim, or to support the award of punitive damages, and refers this court to "App. Vol. I" and "App. Vol. III" without further discussion.[8] In their answering brief, the Eifferts assert the contrary -- that the jury had "significant"

[8] "App. Vol. I" contains eight separate tabbed records from the proceeding below, including "[p]ertinent" minute entries, verdict forms, an affidavit from Eiffert, and various motions. "App. Vol. III" contains full transcripts of the August 7, 10, 11, and 12 trial days.

evidence to support the verdict -- and provide five conclusions they contend that the "evidence establish[ed]." They provide, however, no citation to the record to support this statement, other than specified paragraphs from their "Statement of Facts above."

¶29 Absent meaningful argument from the parties concerning the evidence that the jury heard, we have no basis upon which to consider reversal. The purpose of an appeal is to attack legal defects in the proceeding below, not to seek de novo review of the evidence in hopes that the appellate court will see the case differently than the jury. *See* ARCAP 13(a)(6), (b)(1).

V. ATTORNEY'S FEES AND COSTS

¶30 Taranto requests attorney's fees and costs on appeal pursuant to ARCAP 21. The Eifferts, likewise, request attorney's fees and costs but cite no authority for their request.

¶31 Requests for attorney's fees and costs on appeal must state the statutory, contractual, or other basis for the award. *See* ARCAP 21 (requiring a claim for attorney's fees and costs on appeal to be made "pursuant to statute, decisional law or contract"); *Roubous v. Miller,* 214 Ariz. 416, 420, ¶ 21, 153 P.3d 1045, 1049 (2007) (requiring a claim to state the "statutory or contractual basis for the award" of attorney's fees and costs); *Ezell v. Quon,* 224 Ariz. 532, 539, ¶ 31, 233

P.3d 645, 652 (App. 2010) (holding that Rule 21 "is a procedural rule that does not provide a substantive basis for an appellate court to consider an award of attorneys' fees").

¶32 Because Taranto has not prevailed, and the Eifferts have not provided legal support for their request, we deny both requests.

CONCLUSION

¶33 For the foregoing reasons we affirm the judgment against Taranto.

/s/
PETER B. SWANN, Presiding Judge

CONCURRING:

/s/
PATRICK IRVINE, Judge

/s/
MAURICE PORTLEY, Judge