IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

CORRINE GONGORA,
Plaintiff/Counterdefendant/Appellee,

v.

SHURROD M. BOWMAN,
Defendant/Counterclaimant/Appellant,

No. 2 CA-CV 2016-0067
Filed February 28, 2017

Appeal from the Superior Court in Pima County
No. C20132746
The Honorable Sarah R. Simmons, Judge

AFFIRMED IN PART; REVERSED IN PART AND REMANDED

Shurrod M. Bowman, Florence
In Propria Persona

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Staring and Judge Miller concurred.

E S P I N O S A, Judge:

¶1 Shurrod Bowman appeals the trial court's ruling awarding Corrine Gongora sole legal possession of a property after Bowman defaulted on a "lease to own" agreement. He additionally challenges the court's ruling permitting Gongora to retain a $7,000 payment made under that agreement. Gongora has not filed an answering brief.[1] For the reasons that follow, we affirm the portion of the judgment invalidating the joint tenancy deed and awarding sole legal possession of the home to Gongora, but we reverse the portion of the judgment allowing Gongora to retain the $7,000 payment.

Factual and Procedural Background[2]

¶2 In March 2013, Gongora and Bowman agreed Bowman would take possession of a home Gongora was attempting to sell in

[1]Although Gongora was represented by counsel in the trial court, it appears the representation did not continue to the appeal.

[2]Bowman has failed to include a transcript of the trial court's proceedings in the appellate record, thus we rely on the trial court's recitation of facts. Although we would normally find a failure to abide by the Arizona Rules of Civil Appellate Procedure (ARCAP) a waiver of his argument, because Gongora has not objected to the deficiency, in our discretion we overlook the defect and consider Bowman's arguments. *See* ARCAP 11(c) (appellant's duty to order transcripts); *Delmastro & Eells v. Taco Bell Corp.*, 228 Ariz. 134, n.2, 263 P.3d 683, 686 n.2 (App. 2011) (waiving procedural defects and addressing merits).

exchange for a large up-front sum and smaller monthly payments. To memorialize what the parties characterized as an agreement to "lease to own" the home, they executed two documents. According to the terms of a "Lease With Option To Purchase," Bowman was to pay Gongora $15,000 and make $750 payments monthly until the "end of [the twenty year] option term" or a total balance of $152,706 had been paid.[3] They additionally executed a "basic rental agreement" containing a handwritten "addendum" in which Gongora retained the "right to cancel month to month lease and revoke lease to own option." In the event the right to terminate was exercised, the addendum provided that Gongora would "refund [the] full deposit of $15,000 minus any charges for damage or repairs."

¶3 Bowman made an initial $7,000 payment and took possession of the property in mid-March.[4] On March 15, 2013, Gongora recorded a joint tenancy deed granting Bowman an ownership interest in the property. Bowman was arrested and jailed a few days later, and it is uncontested he failed to make any further payments. Gongora then initiated eviction proceedings under the Arizona Residential Landlord and Tenant Act, and retook possession in mid-April.

¶4 In May 2013, Gongora filed a complaint in Pima County Superior Court seeking a judgment voiding the joint tenancy deed and requesting "actual and consequential damages resulting from [Bowman]'s breach(es) of contract." Following a bench trial in August 2015, the trial court awarded "sole possession of the property" to Gongora, voided the joint tenancy deed, and ruled that

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[3]As discussed in greater detail *infra*, the executed documents were poorly drafted, but suggest an intent for Bowman to either repay a $152,706 "loan" or to "lease" the property "for a period of 20 years, commencing the 15[th] day of March, 2033."

[4]At trial, Bowman testified he had made an additional $8,000 payment on March 15, but the trial court found him not credible. Bowman has not challenged that finding on appeal.

Gongora "may retain the $7000 paid to her." Bowman filed a motion for reconsideration in which he alleged the court "failed to take into consideration" the addendum allowing for a "refund" of the "full deposit of $15,000." The court denied the motion without elaboration.

¶5 Bowman then filed a motion for new trial, arguing the trial court had improperly relied on *United Farmers' City Market v. Donofrio*, 43 Ariz. 35, 29 P.2d 144 (1934), as authority for allowing Gongora to retain the partial payment. Gongora responded that the "two possible interpretations" of the $7,000 payment were that it was "a down payment in the form of 'earnest money' to secure the real estate," or that "it was an option premium giving [Bowman] the right to purchase the house." Under neither interpretation, Gongora argued, was the payment refundable. In a written ruling, the court noted that "Arizona law supports forfeiture of a partial payment for the purchase of real property after the purchaser defaults on the purchase agreement," and concluded it had "correctly cited *United Farmers* for the rule that the payor forfeits his or her partial payment towards the purchase of a property, even if labeled a partial option payment."

¶6 Bowman appealed and the trial court entered orders regarding fees for incarcerated appellants pursuant to A.R.S. § 12-302. Bowman filed his pro se opening brief, and after the time for filing an answering brief had passed, we deemed the appeal at-issue. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1), (5)(a).[5]

[5]Although the trial court's ruling on the motion for new trial is unsigned, we exercise jurisdiction over that ruling pursuant to A.R.S. § 12-2102(B). *Id.* ("If a motion for new trial was denied, the court may, on appeal from the final judgment, review the order denying the motion although no appeal is taken from the order."); *see also Bauer v. Crotty*, 167 Ariz. 159, 163 n.1, 805 P.2d 392, 396 n.1 (App. 1991) (section 12-2102(B) empowers appellate court to review denial of a motion for new trial in review of signed final judgment),

Joint Tenancy Deed

¶7 Bowman first argues the trial court "erred when it voided the joint tenancy deed," claiming his "right to one-half interest" had "'vested' in the Pima County of Arizona property once notarized by [Gongora] and [himself]," and that his "vested interest" was protected by the Due Process and Equal Protection Clauses of the United States Constitution. The trial court rejected that argument, finding that Gongora granted Bowman a property interest in her house in anticipation of him "fully perform[ing]" his obligations under the contract. In its ruling on Bowman's motion for new trial, the court reiterated that "Ms. Gongora [had] conveyed title to and possession of the property to Mr. Bowman with the expectation that he would, thereafter, make monthly payments to her to deduct from the remainder owed towards the purchase price of the property." Because Bowman "fail[ed] to fulfill his obligations," the court reaffirmed its determination that Gongora be awarded sole possession of the property.

¶8 The interpretation of contracts is a question of law subject to our de novo review. *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, ¶ 9, 218 P.3d 1045, 1050 (App. 2009). However, where a debatable issue has been raised, we generally view an appellee's failure to file an answering brief as a confession of reversible error. *See DeLong v. Merrill*, 233 Ariz. 163, ¶ 9, 310 P.3d 39, 42 (App. 2013).

¶9 We first note that Bowman has failed to support his vague allegations that the trial court erroneously voided the deed. As described above, the court found he had failed to perform his obligations under the contract. Bowman does not dispute this on appeal, nor does he challenge the court's finding that the deed was conveyed in anticipation of his performance. His assertion that the joint tenancy cannot be voided once "vested" is unsupported, and has no basis in the law. *Cf. Kline v. Kline*, 14 Ariz. 369, 376-77, 128 P. 805, 809 (1912) (deeds executed under duress or undue influence

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disapproved on other grounds by Williams v. Thude, 188 Ariz. 257, 934 P.2d 1349 (1997).

voidable); *Clovis v. Clovis*, 460 P.2d 878, 881 (Okla. 1969) (joint tenancy deed obtained by fraud invalid).

¶10 Second, we decline Bowman's invitation to excuse his nonperformance by "legally view[ing]" the lease with option to purchase and joint tenancy deed as separate documents. In a case which Bowman himself has cited, our supreme court noted that the controlling factor in the interpretation of contracts is "the purpose and objects of the parties and results which they anticipated when they entered into the agreements." *Russell v. Golden Rule Mining Co.*, 63 Ariz. 11, 24, 159 P.2d 776, 782 (1945). Ignoring a document executed as part of the same transaction is contrary to that obligation. *See* Restatement (Second) of Contracts § 202(1), (2) (1981) (words and other conduct are interpreted in light of all the circumstances and all writings part of same transaction interpreted together). Accordingly, Bowman has failed to persuade us the trial court erred in finding Gongora entitled to sole possession of the property or in declaring the joint tenancy deed void.[6]

$7,000 Payment

¶11 Bowman next argues the trial court erred in allowing Gongora to retain the $7,000 payment made prior to his taking possession of the property. In essence, Bowman asks us to determine each party's rights to the $7,000 payment under a contract both parties acknowledged was "badly prepared and is in many respects incomprehensible." When interpreting contracts, our goal

[6]To the extent Bowman raises additional arguments related to the deed in his opening brief, including but not limited to his due process and equal protection claims, we find those arguments undeveloped and therefore waived. *See* Ariz. R. Civ. App. P. 13(a)(7) (opening brief must contain supporting reasons for each contention with citations to legal authorities and appropriate references to portions of the record relied on); *In re Aubuchon*, 233 Ariz. 62, ¶ 6, 309 P.3d 886, 888-89 (2013) (finding waived arguments not supported by adequate explanation, citations to the record, or authority).

is to enforce them according to the parties' intent. *Russell*, 63 Ariz. at 24, 159 P.2d at 782. "It is not the province of the court to alter a contract by construction"; rather, our duty is confined to interpreting the agreement the parties have made for themselves. *Id.*, *quoting former* 17 C.J.S. *Contracts* § 296. We review issues of contract interpretation de novo, *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, ¶ 15, 246 P.3d 938, 941 (App. 2010), but defer to the trial court's factual findings if not clearly erroneous, *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶ 65, 181 P.3d 219, 237 (App. 2008).

¶12 On appeal, Bowman renews his argument made below that he is entitled to the benefit of the addendum that gave Gongora the right to cancel but required a full refund of his deposit if that right were exercised. The trial court observed that "Gongora, concededly, sent Mr. Bowman notice of the termination of their agreement," but concluded she was entitled to retain the $7,000 payment because "this notice was not the result of [Gongora] exercising a unilateral right to end the agreement," but rather "in response to Mr. Bowman's default." Bowman does not contest this finding, nor does he disagree that he failed to make required monthly payments under the agreement. He contends, however, that the agreement "as it stands on its face" requires a refund of his deposit because Gongora terminated the agreement.

¶13 We first observe that the agreement lacks any term or language under which Gongora may terminate the agreement yet retain the down payment. In its entirety, the addendum reads: "Owner has the right to cancel month to month lease and revoke lease to own option. Owner will refund full deposit of $15,000 minus any charges or repairs." Even were we to construe the provision as ambiguous in that regard, we construe ambiguous contractual provisions against Gongora, the drafter.[7] *See Polk v. Koerner*, 111 Ariz. 493, 495, 533 P.2d 660, 662 (1975). As previously noted, the duty of the court is limited to interpreting the contract the

[7] The trial court found that the documents executed by Bowman and Gongora had been prepared by Gongora's friend.

parties have made for themselves, *see Russell*, 63 Ariz. at 24, 159 P.2d at 782, rather than to making new contracts for the parties, *see Ernst v. Deister*, 42 Ariz. 379, 383, 26 P.2d 648, 649 (1933). Because Gongora and Bowman did not set forth circumstances where Gongora could terminate the agreement yet retain the down payment, we will not read such a provision into the agreement absent any legal compulsion to do so. *See Shattuck v. Precision-Toyota, Inc.*, 115 Ariz. 586, 588, 566 P.2d 1332, 1334 (1977).

¶14 In the absence of any terms regarding the forfeiture of Bowman's down payment, the trial court relied on *United Farmers'* "for the rule that the payor forfeits his or her partial payment towards the purchase of a property." In that case, under the terms of a "Lease with Option to Purchase," the lessees could exercise an option to purchase the property within thirty months of the commencement of the lease by paying the option price with a balance of $40,000 plus interest due within ten years. *United Farmers'*, 43 Ariz. at 37-39, 29 P.2d at 145-146. After the option had been validly exercised, the lessees defaulted on the monthly interest payments resulting in the lessors retaking possession and filing a quiet title action. *Id.* at 40, 29 P.2d at 146. In upholding the lessor's retention of the $17,000 option payment, our supreme court held "when a vendee in possession under an executory contract of sale is delinquent in his payments . . . the vendor may declare a forfeiture of the vendee's rights, recover possession of the premises, and thereafter bring suit to quiet title without being held ipso facto to have rescinded the contract." *Id.* at 49, 29 P.2d at 149. In arriving at that conclusion, the court noted that because the plaintiffs' notice of forfeiture was only "for the purpose of forcing the payment of interest," there was no "rescission intended or attempted on the part of plaintiffs." *Id.* at 46, 48, 29 P.2d at 148, 149. "[T]he test is the intention of the parties, to be determined by all their acts, and . . . an attempt to act in pursuance of a contract . . . is an affirmance rather than a rejection thereof." *Id.* at 47, 29 P.2d at 149.

¶15 Notwithstanding the broad language of its holding, we do not think *United Farmers'* negates the parties' express agreement here that Gongora's termination of the agreement would require

refunding Bowman's deposit. Unlike *United Farmers'*, the record does not suggest Gongora sought to void the joint tenancy deed or Bowman's eviction in "an attempt to act in pursuance of [their] contract." *Id.* at 47, 29 P.2d at 149. And we find persuasive Bowman's argument that *United Farmers'* holding should be "limited to a factual situation in which a lease/option has been exercised and the parties have thus entered into a valid contract for purchase and sale." We have found no cases extending the *United Farmers'* holding outside the context of a validly executed option contract, and, because it appears Bowman and Gongora structured their agreement as an executory contract for the purchase of real estate, rather than an option contract,[8] we hesitate to do so here. Indeed, the addendum allowing Gongora "the right to cancel month to month lease and revoke lease to own option" would contradict any implied intent to form an option contract. *See* Restatement § 25 ("An option contract is a promise which meets the requirements for the formation of a contract and *limits the promisor's power to revoke an offer*.") (emphasis added). And, notwithstanding the documents' titles, the parties variously referred to the $7,000 payment as "rent," a "d[ow]n pay[m]ent," and a "security deposit," but never as an option premium.[9]

¶16 Although we disagree that *United Farmers'* compels Gongora's entitlement to retain Bowman's partial down payment, we will uphold a trial court's ruling if correct for any reason. *See Voland v. Farmers Ins. Co. of Ariz.*, 189 Ariz. 448, 451, 943 P.2d 808,

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[8]*Cf. Gompert v. Frost*, 177 N.W. 71, 73 (Iowa 1920) (contract for sale of land drawn such that selling price is fixed and made payable in successive installments, with agreement that default on installment works as a forfeiture of the purchaser's rights without liability except loss of payments already made, does not constitute an option within the meaning of the law).

[9]As discussed in *E-Z Livin' Mobile Sales, Inc. v. Van Zanen*, we are not bound by the titles of documents, but rather "look to the purpose of the instruments, their substance and not their form." 26 Ariz. App. 363, 364, 548 P.2d 1175, 1176 (1976).

811 (App. 1997). As an alternative basis for its award the trial court cited A.R.S. § 33-742(A) for the "general rule" that "Arizona law supports forfeiture of a partial payment for the purchase of real property after the purchaser defaults on the purchase agreement." But the court did not find, and the record does not support, that Gongora complied with that statute's requirements.[10] Rather, it appears she terminated the agreement pursuant to the procedures set forth under the Landlord Tenant Act, which contemplates recovery of reasonable damages, but not entitlement to a down payment made in a lease to own agreement. *See* A.R.S. § 33-1368. Finding no other basis for upholding the trial court's ruling, we conclude Bowman has, at the very least, presented a debatable issue as to the nature of the $7,000 payment. *Cf. DeLong*, 233 Ariz. 163, ¶ 9, 310 P.3d at 42.

Disposition

¶17 We affirm the trial court's judgment concerning the joint tenancy deed at issue in this appeal. But because a debatable issue exists regarding the nature of the $7,000 payment, we construe Gongora's failure to file an answering brief as a confession of reversible error, and we vacate that portion of the judgment permitting her to retain the payment. However, because Gongora also prayed for actual or consequential damages in her complaint but the trial court did not rule on that issue, we remand for a determination of any damages incurred by Gongora, including but not limited to the April 2013 rent which the court found to be unpaid, as an offset to the return of Bowman's payment.

[10]Section 33-742 requires, inter alia, service of a notice of election to forfeit and recordation of that notice with the county recorder pursuant to § 33-743.