

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

GREGORY BEST,
Plaintiff/Appellant,

v.

LETICIA MIRANDA GARCIA AND MANNY GARCIA,
HUSBAND AND WIFE,
Defendants/Appellees.

No. 2 CA-CV 2016-0106
Filed March 10, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Maricopa County
No. CV2005093565
The Honorable Robert H. Oberbillig, Judge

AFFIRMED

Gregory Best, Phoenix
In Propria Persona

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MEMORANDUM DECISION

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

ESPINOSA, Judge:

¶1 Gregory Best appeals the trial court's summary dismissal of his successive motion seeking relief under Rule 60, Ariz. R. Civ. P. Because the court correctly found no basis for considering the untimely collateral challenge to its previous ruling, we affirm.

Factual and Procedural Background

¶2 In late 2005, Best sued Manny and Leticia Garcia for breach of a real estate agreement. The complaint alleged the Garcias had contracted to sell specified property to Best and breached that contract by refusing to close the sale or transfer the property even though Best was "ready, willing and able" to pay the \$200,000 purchase price and complete the sale. The Garcias abandoned the litigation, and in November 2012 the trial court entered a default judgment ordering specific performance of the contract.

¶3 In February 2013, Best filed a motion to set aside the judgment under Rule 60(c), arguing newly discovered evidence that the Garcias had sold the property warranted a new damages trial. The trial court, however, concluded the motion was an attempt to assert new claims based on different conduct, and denied it. Best appealed and Division One of this court granted relief, concluding Best's motion "c[ould] be read to request damages in lieu of specific performance in light of the fact that, at the time [the] court ordered specific performance, the Garcias did not hold title to the land at issue." *See Best v. Garcia*, No. 1 CA-CV 13-0271, ¶ 11 (Ariz. App. June 10, 2014) (mem. decision). The case was remanded "for further consideration only of whether the motion presents newly discovered evidence consistent with the constraints of Rule 60(c)(2) sufficient to warrant setting aside the judgment to allow Best to attempt to prove

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alternative contract damages against the Garcias in lieu of specific performance.” *Id.*

¶4 On remand, the trial court denied Best’s Rule 60 motion, finding he “ha[d] not made the requisite showing” of a meritorious claim. Best again sought relief in the appellate court, but his appeal was dismissed after he failed to avail himself of two opportunities to secure a final appealable order from the trial court.¹

¶5 Best thereafter filed a new “Motion for New Damage Trial” in which he again argued newly discovered evidence required a stay of the specific performance judgment and sought a new default damages trial. The trial court concluded Best’s new motion “appear[ed] to be a collateral and improper appeal” of its previous denial of his Rule 60 motion, and after finding no basis to reverse that ruling, denied the motion in May 2016. Best appealed that decision, which we review for an abuse of discretion. *See State ex rel. Brnovich v. Culver*, 240 Ariz. 18, ¶ 4, 375 P.3d 83, 84-85 (App. 2016). We have jurisdiction pursuant to A.R.S. §§ 12-2101(A)(2) and 12-120.21(A)(1).

Discussion

¶6 On appeal, Best argues the trial court erred “by claiming [Best]’s right to a new damage trial appeared to be a collateral attack as his reason to deny the new damage trial.” But Best’s argument is premised on a misunderstanding that the

¹On November 3, 2015, this court suspended Best’s appeal and revested jurisdiction in the superior court “for the limited purpose of permitting counsel to apply for an appropriate final judgment.” Best failed to do so and, on December 8, 2015, his appeal was dismissed. Best requested reversal of the dismissal order, and his appeal was reinstated on January 5, 2016, with an additional twenty days to obtain a final, appealable order from the superior court. Best again did not do so, and his appeal was again dismissed on February 26, 2016. The mandate on the second dismissal issued on April 15, 2016 after it went unchallenged.

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Division One decision required the trial court to conduct a new damages trial. In that decision, this court clearly stated it was remanding “for further consideration *only of whether the motion presents newly discovered evidence* consistent with the constraints of Rule 60(c)(2) sufficient to warrant setting aside the judgment to allow Best to attempt to prove alternative contract damages against the Garcias in lieu of specific performance.” *Best*, No. 1 CA-CV 13-0271, ¶ 11 (emphasis added). On remand, the trial court reconsidered Best’s motion, and in December 2014 concluded he “ha[d] not made the requisite showing of a meritorious claim.” Best’s appeal of that decision was dismissed over a year ago, and we have no jurisdiction to reconsider its merits here. It is the trial court’s denial of Best’s subsequent Rule 60 motion that is the subject of this appeal.

¶7 In a signed minute entry, the trial court characterized Best’s unopposed second Rule 60 motion as a “collateral and improper appeal” of its previous decision and denied the motion without a hearing. In neither his opening brief nor his Rule 60 motion did Best provide authority for the filing or granting of a second Rule 60 motion, and we are not aware of any. *Cf. Tovrea v. Nolan*, 178 Ariz. 485, 491, 875 P.2d 144, 150 (App. 1993) (rule providing for relief from judgment does not provide relief where party asks court to reconsider previous ruling). To the extent Best relies on the Division One decision permitting the filing of a new Rule 60 motion, its clear and limited holding provides him no support. *See Best*, No. 1 CA-CV 13-0271, ¶ 11. And, Best’s subsequent motion, filed over twenty months after the appellate court decision he relies on, was untimely. *See Ariz. R. Civ. P. 60(c)* (requiring newly discovered evidence claims be asserted “within a reasonable time,” but “not more than 6 months after the entry of the judgment or order”). Accordingly, we find no error in the trial court’s denial of his second motion.²

²Although the Garcias’ failure to file an answering brief could constitute a confession of error, in the absence of a debatable issue, as here, it will not be so construed. *See Lopez v. Barraza*, 150 Ariz.

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Conclusion

¶8 In the underlying case filed in November 2005, Best asserted but one claim, breach of contract, and requested but one remedy, specific performance. To the extent Best sought a different remedy in his first Rule 60 motion, the trial court determined he had failed to make a requisite showing of a meritorious claim, and the time to seek review of that determination has passed. The court's subsequent denial of a new Rule 60 motion, with no apparent authority to consider it, was not an abuse of its discretion. Best has also requested that this court conduct a damages trial or that he be permitted to "submit a damage brief to be reviewed and ruled on." But we have no jurisdiction to conduct such a proceeding. *See In re Marriage of Kassa*, 231 Ariz. 592, ¶ 3, 299 P.3d 1290, 1291 (App. 2013) (appellate court jurisdiction strictly defined by statute).

¶9 The trial court's May 2016 summary dismissal is affirmed.

291, 292, 723 P.2d 109, 110 (App. 1986); *see also Nydam v. Crawford*, 181 Ariz. 101, 101, 887 P.2d 631, 631 (App. 1994) (appellate court reluctant to reverse based on implied confession of error when trial court has correctly applied the law).