IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

WELLS FARGO BANK, NATIONAL ASSOCIATION,
AS TRUSTEE FOR THE REGISTERED HOLDERS OF LSTAR COMMERCIAL MORTGAGE TRUST 2014-2, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2014-2, BY AND THROUGH HUDSON AMERICAS LP,
ITS SPECIAL SERVICER,
Plaintiff/Appellee,

v.

JOHN RAYMUNDI AND ORFA RAYMUNDI, HUSBAND AND WIFE,
Defendants,

v.

FRANCISCO HUMBERTO GARCIA, A SINGLE MAN,
Intervenor/Appellant.

No. 2 CA-CV 2016-0222
Filed September 26, 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NOT FOR PUBLICATION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 Cochise County
No. S0200CV201600235
The Honorable Karl D. Elledge, Judge

AFFIRMED

COUNSEL

Quarles & Brady LLP, Phoenix
By Scott A. Klundt and Brian A. Howie
Counsel for Plaintiff/Appellee

Stachel & Associates, P.C., Sierra Vista
By Robert D. Stachel, Jr. and Alberta L. Chu
Counsel for Intervenor/Appellant

MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Judge Espinosa and Judge Kelly[1] concurred.

S T A R I N G, Presiding Judge:

¶1 Francisco Humberto Garcia appeals from the trial court's denial of his motion to intervene in a lawsuit between Wells Fargo Bank, National Association, and John Raymundi concerning secured debt on real property located in Douglas, Arizona. Because we agree with the trial court that the motion was untimely, we affirm.

Factual and Procedural Background

¶2 On May 9, 2016, Garcia contracted to purchase real property from Raymundi for $515,000, payable by August 9, and deposited in escrow $5,000 as earnest money. On May 10, Wells Fargo filed a lawsuit against Raymundi, alleging he had defaulted on a debt secured by the property. Wells Fargo scheduled a trustee's sale of the property for August 9. In addition, at Wells Fargo's request, the trial

[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

court appointed a receiver to manage the property and the associated apartment complex. On June 7, the receiver notified Garcia in writing that his contract was terminated, and, on June 16, returned his earnest money.

¶3 On July 8, Raymundi, Wells Fargo, and the receiver stipulated to the sale of the property to a third party, RFG Family Holdings, LLC. The trial court approved the sale that same day, and the parties completed the sale to RFG and cancelled the trustee's sale.

¶4 On August 11, Garcia filed a motion for intervention as a matter of right in the lawsuit in order to enforce his contract. The trial court denied the motion, concluding it was untimely. Garcia appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(3) because the order denying intervention is an "order affecting a substantial right . . . [that] in effect determines the action and prevents judgment from which an appeal might be taken." *See Hill v. Alfalfa Seed & Lumber Co.*, 38 Ariz. 70, 76, 297 P. 868, 870 (1931) (jurisdiction over appeal from denial of intervention based on predecessor of § 12-2101(A)(3)); *see also Winner Enters., Ltd. v. Superior Court*, 159 Ariz. 106, 107, 765 P.2d 116, 117 (App. 1988) (concluding denial of intervention motion appealable, without specifying statutory basis).

Discussion

¶5 "We will not set aside the court's ruling on the timeliness of a motion to intervene absent a clear abuse of discretion." *State ex rel. Napolitano v. Brown & Williamson Tobacco Corp.*, 196 Ariz. 382, ¶ 5, 998 P.2d 1055, 1057 (2000). The filing of a timely application is a prerequisite to intervention as a matter of right. Ariz. R. Civ. P. 24(a);[2] *Woodbridge Structured Funding, LLC v. Ariz. Lottery*, 235 Ariz. 25, ¶ 13, 326 P.3d 292, 295 (App. 2014). And it is appropriate to deny a request to intervene based on untimeliness alone. *See Weaver v. Synthes, Ltd. (U.S.A.)*, 162 Ariz. 442, 447, 784 P.2d 268, 273 (App. 1989). In determining timeliness, a court must consider "the stage to which the lawsuit has progressed . . . and whether the applicant could have

[2]Rule 24 was amended effective January 2017. The revisions were stylistic and are immaterial to the disposition of this appeal.

attempted to intervene earlier," and, most importantly, whether untimely intervention will prejudice the current parties. *Napolitano*, 196 Ariz. 382, ¶ 5, 998 P.2d at 1057.

¶6 By the time Garcia sought to intervene in this case, more than two months after the receiver provided him with notice that his contract was terminated, the subject property had already been sold, and the lawsuit was winding down. All that remained was the approval of the receiver's final report and accounting, and the stipulated dismissal of the action.

¶7 Further, Garcia had been aware of the receivership since at least June 7, when the receiver provided him with written notification that his contract was terminated. And the notice of cancellation was followed by the return of his earnest money deposit on June 16. Notably, although Garcia called the receiver on June 21 "to complain," he does not allege the receiver agreed to reinstate his contract. Under these circumstances, Garcia had no basis to presume his contract had been reinstated or to wait until his scheduled closing date to attempt to intervene.

¶8 Moreover, Garcia received ample warning that the receiver and the bank wanted to sell the property sooner than the August 9 closing date in his contract. Although Garcia disputes the specifics of his communications with the receiver, he admits the receiver inquired whether he had immediate access to funds, and Garcia responded by asserting he could close on August 9 as originally scheduled. The receiver, on the other hand, claimed that he had notified Garcia he decided to sell to another buyer with immediate access to funds and that he had left Garcia and his attorney eight messages asking for proof of funds before finally opening an escrow account on June 30 for the transaction with RFG. The record reasonably supports a conclusion that Garcia was aware the receiver wanted to sell the property before August 9, and we may thus consider this circumstance as supporting the trial court's decision even though the court did not explicitly rely on it. *See Coronado Co. v. Jacome's Dep't Store, Inc.*, 129 Ariz. 137, 139, 629 P.2d 553, 555 (App. 1981) (allowing inference of findings supported by record and not in conflict with express findings). The court's finding that Garcia could have intervened sooner was not clearly erroneous.

¶9 The trial court below and the parties on appeal have analyzed prejudice in relation to Garcia's requested remedy, equating intervention with reversal of the completed sale to RFG. The proper inquiry, however, is "whether *the delay in moving for intervention* will prejudice the existing parties in the case." *Napolitano*, 196 Ariz. 382, ¶ 5, 998 P.2d at 1057 (emphasis added). Because the stipulated sale had already disposed of the property that was the subject of dispute among the existing parties, Garcia's motion was analogous to a request for post-judgment intervention, which is timely only in exceptional circumstances. *See id.* And, although allowing Garcia to intervene would not necessarily result in reversal of the sale to RFG, Wells Fargo and Raymundi would suffer prejudice from being forced to continue litigation after they had settled all of their disputes with each other. *See id.* ¶¶ 6-8. Thus, although we do not fully agree with the prejudice analysis undertaken by the trial court and the parties, we agree with the court's conclusion that prejudice would result from Garcia's untimely intervention.

¶10 Garcia also raises several arguments challenging the receiver's authority to cancel his purchase contract and sell the property to RFG, and attacking the parties' failure to notify him of the pending sale. These arguments conflate Garcia's claimed interest in the property with the issue of whether his motion to intervene was timely. Moreover, we disagree with Garcia's assertion, relying on 65 Am. Jur. 2d *Receivers* § 164 (2017), that his contract gave him equitable title and was thus exempt from the receiver's authority to reject executory contracts. A contract for the sale of real estate does not by itself create or transfer title. *See* A.R.S. §§ 33-401 (general conveyance requirements), 33-402 (acceptable conveyance language); *Hoyle v. Dickinson*, 155 Ariz. 277, 280, 746 P.2d 18, 21 (App. 1987) ("In a land contract, legal title to the property is not conveyed but remains in the vendor."). And, equitable conversion applies only to contracts capable of specific performance. *Passey v. Great W. Assocs. II*, 174 Ariz. 420, 427, 850 P.2d 133, 140 (App. 1993). Specific performance was not available when Garcia moved to intervene because Raymundi no

longer had title to the property. *See Canton v. Monaco P'ship*, 156 Ariz. 468, 470, 753 P.2d 158, 160 (App. 1987).[3]

¶11 We conclude the trial court did not abuse its discretion by denying Garcia's motion to intervene as untimely.

Attorney Fees

¶12 Wells Fargo has requested an award of attorney fees pursuant to A.R.S. § 12-341.01(A) because it is the prevailing party in an action arising out of contract. In our discretion, we deny Wells Fargo's request. Because it is the prevailing party, however, Wells Fargo is entitled to its costs on appeal pursuant to A.R.S. § 12-341.

Disposition

¶13 We affirm the trial court's denial of Garcia's motion to intervene.

[3]Wells Fargo was not a party to Garcia's purchase contract, and therefore was not bound by it. Thus, specific performance would not necessarily have been available even had Garcia intervened in July. *See* 71 Am. Jur. 2d *Specific Performance* § 86 (2017) (contract cannot be specifically performed if consent of non-party is required but cannot be obtained).