

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

TRAILS AT AMBER RIDGE HOMEOWNERS ASSOCIATION,
AN ARIZONA NONPROFIT CORPORATION,
Plaintiff,

v.

GERARDO MACIAS, A MARRIED MAN, AS HIS SOLE AND SEPARATE PROPERTY;
COMMUNITY HOUSING RESOURCES OF ARIZONA; ARIZONA HOME
FORECLOSURE PREVENTION FUNDING CORPORATION,
Defendants/Appellees,

MARICOPOLY, LLC, A LIMITED LIABILITY COMPANY,
Intervenor/Appellant.

No. 2 CA-CV 2022-0096
Filed October 17, 2022

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NOT FOR PUBLICATION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. CV2017092698
The Honorable Brian D. Kaiser, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
By Valerie L. Marciano, Assistant Attorney General, Phoenix
*Counsel for Defendant/Appellee Arizona Home Foreclosure Prevention Funding
Corporation*

TRAILS AT AMBER RIDGE HOMEOWNERS ASS'N v. MACIAS
Decision of the Court

Law Offices of Kyle A. Kinney PLLC, Scottsdale
By Kyle A. Kinney
Counsel for Intervenor/Appellant

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Eckerstrom and Judge Cattani concurred.

V Á S Q U E Z, Chief Judge:

¶1 Maricopoly LLC appeals the trial court's order granting Arizona Home Foreclosure Prevention Funding Corporation's ("AZ Home") post-judgment motion for the release of excess proceeds and its denial of Maricopoly's motion to set aside that order. Maricopoly argues the court erred by prematurely granting AZ Home's motion, violating its right to due process. It further contends the court erred by denying its motion pursuant to Rule 60, Ariz. R. Civ. P. For the following reasons, we affirm.

Procedural Background

¶2 In 2018, Trails at Amber Ridge Homeowners Association obtained a default judgment against Gerardo Macias and judicially foreclosed on his home. Maricopoly purchased the property at a sheriff's sale, and after the Association's judgment was paid, \$59,819.17 in excess proceeds were deposited with the clerk of the court. Maricopoly sought to intervene in the foreclosure action and asserted its entitlement to the excess proceeds. AZ Home, an entity with a lien junior to the Association's, also applied for release of the proceeds and opposed Maricopoly's intervention. Macias applied to receive any excess proceeds remaining upon satisfaction of AZ Home's lien. The trial court granted Maricopoly's intervention and ultimately ordered the clerk of the court to release the excess funds to Maricopoly, accepting Maricopoly's argument that it had "acquired an equitable assignment by paying off the senior lien." AZ Home and Macias appealed. In that appeal, we found that "the record d[id] not support Maricopoly's contention that it received an equitable assignment" of senior lien rights, vacated the trial court's order directing payment to Maricopoly, and remanded "for further proceedings," specifically directing the court to

TRAILS AT AMBER RIDGE HOMEOWNERS ASS'N v. MACIAS
Decision of the Court

order Maricopoly to return the proceeds. *Ariz. Home Foreclosure Prevention Funding Corp. v. Maricopoly LLC*, No. 1 CA-CV 20-0254 (Ariz. App. Mar. 23, 2021) (mem. decision).

¶3 On August 19, 2021, after our mandate issued, AZ Home moved for an order “directing the release of excess proceeds in the amount of \$21,902.81” from the total proceeds with the balance to be paid to Macias. The trial court signed that order, and it was filed on September 1. That same day, Maricopoly moved to set aside the order because the court had granted AZ Home’s motion before Maricopoly’s opposition was due. In an unsigned minute entry, the court denied Maricopoly’s motion. Maricopoly thereafter filed a notice of appeal from both the court’s signed order directing the release of proceeds to AZ Home and its unsigned minute entry denying the set-aside motion. Because the unsigned minute entry was not appealable, we stayed the appeal and revested jurisdiction in the trial court. The court signed its denial of Maricopoly’s motion, and Maricopoly filed a supplemental notice of appeal. We have jurisdiction under A.R.S. § 12-2101(A)(1).

Discussion

¶4 Maricopoly challenges the trial court’s order granting AZ Home’s motion for release of the excess proceeds. Maricopoly claims it was denied “an opportunity to be heard on its objection in violation of [its] procedural due process rights” because the court ruled on AZ Home’s motion before Maricopoly’s response was due and “before Maricopoly could otherwise set its record.”

¶5 AZ Home filed its motion on August 19, 2021. Under Rule 7.1(a)(3), Ariz. R. Civ. P., “an opposing party must file any responsive memorandum within 10 days after the motion and supporting memorandum are served.” And because the motion was served by U.S. mail under Rule 5(c)(2)(C), Ariz. R. Civ. P., five calendar days are added to the deadline. *See* Ariz. R. Civ. P. 6(c). Thus, the due date for Maricopoly’s response was September 7, 2021. *See* Ariz. R. Civ. P. 6(a)(2) (exclude Saturdays, Sundays, and legal holidays if period is less than eleven days). The trial court, however, granted AZ Home’s motion before that deadline on September 1.

¶6 Although a trial court may summarily grant a motion under Rule 7.1(b), none of the requisite conditions were satisfied here, and summary treatment was therefore inappropriate. *See* Ariz. R. Civ. P. 7.1(b) (court may summarily grant motion if: “(1) the motion, supporting

TRAILS AT AMBER RIDGE HOMEOWNERS ASS'N v. MACIAS
Decision of the Court

memorandum, or responsive memorandum does not substantially comply with Rule 7.1(a); (2) the opposing party does not file a responsive memorandum; or (3) counsel for any moving or opposing party fails to appear at the time and place designated for oral argument"). Thus, Maricopoly is correct that the court erred by ruling on AZ Home's motion prior to the responsive pleading deadline.

¶7 Nevertheless, Maricopoly was not prejudiced and its due process rights were not violated by the premature ruling. Procedural due process requires that a party be given the opportunity to be heard at a meaningful time and in a meaningful manner. *Sycamore Hills Ests. Homeowners Ass'n v. Zablotny*, 250 Ariz. 479, ¶ 24 (App. 2021). Maricopoly fully presented its claim to the excess proceeds below, asserting only equitable assignment as its basis. Although the trial court previously found that Maricopoly had established an equitable assignment, we rejected that argument in the prior appeal. See *Raimey v. Ditsworth*, 227 Ariz. 552, ¶ 6 (App. 2011) ("[A]n appellate mandate, along with the decision it seeks to implement, is binding on the trial court and enforceable according to its 'true intent and meaning.'" (quoting *Vargas v. Superior Court*, 60 Ariz. 395, 397 (1943))); *State v. Bocharski*, 218 Ariz. 476, ¶ 60 (2008) ("[T]he decision of an appellate court in a case is the law of that case on the points presented throughout all the subsequent proceedings in the case in both the trial and the appellate courts." (quoting *State v. King*, 180 Ariz. 268, 278 (1994))).

¶8 Maricopoly properly concedes in its reply brief that, on remand, it was not entitled to re-assert its equitable assignment claim or present new evidence supporting it. See *United Dairywomen of Ariz. v. Schugg*, 212 Ariz. 133, ¶ 21 (App. 2006) ("When a party has chosen not to present evidence that could support the proper recovery for its claim, remand on that claim is not justified."); cf. *Crouch v. Truman*, 84 Ariz. 360, 362 (1958) ("When a party has full and complete opportunity to develop his case but does not do so and the case is reversed for this reason, the law does not call for a new trial to permit him to do what he should have done in the first trial."). Nor was Maricopoly entitled to raise on remand "other grounds for priority" to the excess proceeds, such as equitable subrogation. This argument, raised for the first time in its reply brief, is untimely, and we deem it waived.¹ See *United Bank v. Mesa N. O. Nelson Co.*, 121 Ariz. 438, 443

¹ AZ Home sought to have Maricopoly's reply brief stricken or alternatively leave to file a sur-reply, arguing it could not raise its "untimely equitable subrogation claim" for the first time in a reply brief. Maricopoly then filed an opposition to that motion and a conditional motion to file a brief in response to the sur-reply if AZ Home's motion to file a sur-reply

TRAILS AT AMBER RIDGE HOMEOWNERS ASS'N v. MACIAS
Decision of the Court

(1979) (declining to consider issues raised for first time in reply brief); *Miller v. Boeger*, 1 Ariz. App. 554, 559 (1965) (too late to raise issue on appeal for first time in reply brief). Furthermore, Maricopoly's opportunity to raise those grounds was in the initial proceedings in the trial court before the first appeal. See *BMO Harris Bank N.A. v. Espiau*, 251 Ariz. 588, ¶ 25 (App. 2021) ("[L]egal theories must be presented timely to the trial court so that the court may have an opportunity to address all issues on their merits." (quoting *Cont'l Lighting & Contracting, Inc. v. Premier Grading & Utilities, LLC*, 227 Ariz. 382, ¶ 12 (App. 2011))).

¶9 Notwithstanding waiver, to the extent Maricopoly contends it would have raised different arguments if given the chance to file a response to AZ Home's motion, the record belies that assertion. Maricopoly asserts in its reply that it could have raised an argument that there was an "automatic[]" subrogation to the senior lienholder's rights. But on remand, Maricopoly acknowledged to the trial court that "[t]his case was only remanded to address concerns regarding the equitable assignment" and claimed it intended to provide evidence "relating to whether Maricopoly received an assignment from the senior lienholder." Moreover, even assuming Maricopoly's argument can be construed to have been an assertion that excess proceeds from the foreclosure sale of a junior lien automatically flow up to the senior lienholder when the senior lien has not been extinguished by the foreclosure, such an argument would have been unavailing. See *Tortosa Homeowners Ass'n v. Garcia*, No. 2 CA-CV 2021-0114, ¶ 11, 2022 WL 3023211 (Ariz. Ct. App. Aug. 1, 2022).

¶10 In sum, because Maricopoly was not prejudiced by the premature ruling on AZ Home's motion, we find no reversible error. See *Volk v. Brame*, 235 Ariz. 462, ¶ 26 (App. 2014) (due process errors require reversal only if they prejudice complaining party); *Creach v. Angulo*, 189 Ariz. 212, 214-15 (1997) (for error to justify reversal, it must have been prejudicial to complaining party's substantial rights under facts of case).

Costs on Appeal

¶11 Maricopoly requests an award of its costs on appeal. Because Maricopoly is not the successful party, see A.R.S. § 12-341, we deny its

was granted. We initially deferred "a ruling on the motion to strike, including whether to accept the sur-reply brief, to the panel that considers this appeal on the merits." We now deny AZ Home's motion to strike and deny consideration of the sur-reply brief and Maricopoly's attendant response brief as unnecessary to our determination of this appeal.

TRAILS AT AMBER RIDGE HOMEOWNERS ASS'N v. MACIAS
Decision of the Court

request. Although AZ Home does not request its costs on appeal, it is entitled to recover them upon compliance with Rule 21, Ariz. R. Civ. App. P. *See id.*

Disposition

¶12 We affirm the trial court's orders granting AZ Home's application for release of the excess proceeds and denying Maricopoly's motion to set aside.