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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JAMES L. CRISSEY, Plaintiff/Appellant, v. ELITE PERFORMANCE, L.L.C., Defendant/Appellee.	2 CA-CV 2007-0018 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20052214

Honorable Deborah Bernini, Judge

AFFIRMED

Law Office of Ethan Steele, P.C.
By Ethan Steele — Tucson
Attorney for Plaintiff/Appellant

Laney & Jaszewski
By Jerry L. Laney — Tucson
Attorney for Defendant/Appellee

H O W A R D, Presiding Judge.

¶1 James Crissey appeals the trial court's grant of summary judgment in favor of appellee Elite Performance, L.L.C. Because the trial court did not err, we affirm.

Facts

¶2 We view the facts in the light most favorable to the party opposing summary judgment and draw all reasonable inferences arising from the evidence in favor of that party. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996). Crissey is a real estate broker who sued Elite Performance, L.L.C. alleging Elite failed to pay Crissey a broker commission that was due under a listing agreement to sell a certain property. At the time Crissey entered into the listing agreement, title to the property was held by Fidelity Trust No. 30214. The beneficial interest in the property was held by Vail Verde Estates, L.L.C. ("VVE"). Christopher Thomas and Gregory Seifert were the managing members of VVE and each held a 49.5 percent interest in the company. Harvey Nevins was the only other member of VVE and held a one percent interest in the company. The operating agreement for VVE provided that Seifert and Thomas would make all decisions regarding VVE's conduct.

¶3 Harvey Nevins also owned Elite Performance, L.L.C. as well as another company, Holden Enterprises, Inc. Holden loaned money to VVE and in exchange VVE executed a promissory note to Holden for $1,001,000. When the due date for payment on the note drew near, Thomas approached Crissey about marketing the property for sale. Crissey provided a form, which Thomas signed, called an "Exclusive Right to Sell Agreement" (hereinafter "listing agreement").

¶4 VVE later assigned its beneficial interest in the property to Elite. Seifert then withdrew as a member of VVE and was released from a personal guaranty he had given on the note on the property. A few months later, a "mutual release" was executed in which

Holden and Elite released Thomas from his personal guaranty and released VVE from the promissory note.

¶5 Subsequently, Elite and Trust No. 30214 used a different broker to sell the subject property to a company called AmericaBuilt. Crissey then sued Elite alleging it should have paid him a commission for that sale under the terms of the original listing agreement. Both Elite and Crissey filed cross-motions for summary judgment. The trial court determined that the listing agreement violated the Statute of Frauds and was unenforceable and that Elite was not a party to it and was not bound by it in any event. The court therefore granted Elite's motion and denied Crissey's motion. Crissey now appeals.

Discussion

¶6 Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). A court should grant summary judgment "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). We review de novo whether there are any genuine issues of material fact and whether the trial court applied the law properly. *Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, ¶ 8, 156 P.3d 1157, 1160 (App. 2007).

¶7 Crissey contends the trial court erred in finding the listing agreement was not valid and enforceable against VVE and in finding that Elite was not bound by it. If Elite is not bound by the agreement, we need not determine whether the agreement would be

enforceable against VVE. Therefore, we first address whether Elite is bound by the agreement.

¶8 Crissey asserts that because Nevins had notice of VVE's obligation to Crissey at the time Elite acquired the beneficial interest in the property, and because Elite is Nevins' alter ego, Elite is subject to that obligation. As a general rule, a corporation that acquires the assets of another corporation is not liable as a successor for the obligations of its predecessor. *Warne Invs., Ltd. v. Higgins*, 219 Ariz. 186, ¶ 16, 195 P.3d 645, 650 (App. 2008). And Crissey cites only one Arizona case in support of his claim that Elite should be bound, *Nutter v. Bechtel*, 6 Ariz. App. 501, 433 P.2d 993 (1967).[1] *Nutter* involved a real estate broker who revived a defunct corporation for the sole purpose of purchasing a specific property, secretly defeating another broker's claim to a share of the commission pursuant to a prior commission sharing agreement. *Id.* at 503-04, 433 P.2d at 995-96. The court found that the revived corporation was the alter ego of the defendant broker and that the plaintiff broker was entitled to receive his share of the commission. *Id.* at 505, 433 P.2d at 997. *Nutter* did not involve the transfer of assets from one corporation to another and has no bearing on the resolution of this case.

¶9 In addition to citing *Nutter*, Crissey contends a "clear connection" existed between VVE and Elite and he recites Nevins' relationship to the two entities. But the

[1]This court has no quarrel with the use of out-of-state authority properly argued in the absence of controlling Arizona authority. *See, e.g.*, *Ass'n Aviation Underwriters v. Wood*, 209 Ariz. 137, ¶ 149, 98 P.3d 572, 614-15 (App. 2004). But Crissey has failed to cite existing, relevant Arizona authority in his opening brief and has failed to properly argue based on the out-of-state cases he cites.

uncontroverted evidence also showed clear differences between the entities at the relevant times. Thomas and Siefert each owned 49.5 percent of VVE and were the managers; Nevins owned one percent and was not a manager. Nevins however did own Elite. More importantly, Crissey does not define "alter ego" and has not provided this court with any authority explaining what level of clear connection must exist before the court will disregard a corporate structure and hold a successor corporation liable for pre-existing debts. Accordingly, he has failed to convince this court that this situation should not be covered by the general rule and we will not address this argument further. *See* Ariz. R. Civ. App. P. 13(a)(6) (arguments shall be presented with citation to authorities); *Dawson v. Withycombe*, 216 Ariz. 84, n.10, 163 P.3d 1034, 1049 n.10 (App. 2007) (issue rejected for failure to cite authority); *In re 1996 Nissan Sentra*, 201 Ariz. 114, ¶ 15, 32 P.3d 39, 43-44 (App. 2001) (issue rejected for failure to provide supporting argument or authority).

¶10 In his reply brief, Crissey cites *A.R. Teeters & Assocs., Inc. v. Eastman Kodak Co.*, 172 Ariz. 324, 329, 836 P.2d 1034, 1039 (App. 1992), and indirectly suggests that two exceptions to the general rule against successor liability might be applicable. But arguments raised for the first time in a reply brief are waived. *See In Re Marriage of Pownall*, 197 Ariz. 577, n.5, 5 P.3d 911, 917 n.5 (App. 2000). Moreover, Crissey fails to adequately develop any argument regarding these exceptions even in his reply brief. *See* Ariz. R. Civ. App. P. 13(a)(6); *1996 Nissan Sentra*, 201 Ariz. 114, ¶ 15, 32 P.3d at 43-44.

¶11 In sum, Crissey has not articulated a legally cognizable reason to impose liability on Elite and has failed to show any material issue of fact that would preclude application of the general rule that a successor corporation is not liable for the obligations

of its predecessor. *See Warne Invs.*, 219 Ariz. 186, ¶ 16, 195 P.3d at 650. Therefore, the trial court properly granted summary judgment in favor of Elite and properly denied Crissey's cross-motion for summary judgment.[2]

Conclusion

¶12 In light of the foregoing, we affirm the trial court's judgment. Pursuant to A.R.S. § 12-341.01(A), we also grant Elite's request for attorney fees and costs on appeal, in an amount to be determined upon compliance with Rule 21, Ariz. R. Civ. App. P.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

_____
JOHN PELANDER, Chief Judge

_____
PHILIP G. ESPINOSA, Judge

[2]Because we are affirming on the ground that the listing agreement is not enforceable against Elite, we need not address any other arguments on appeal. *See Hawkins v. State*, 183 Ariz. 100, 103, 900 P.2d 1236, 1239 (App. 1995) (trial court's ruling affirmed if correct for any reason).