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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ANGELO PANTELE, Trustee of the Angelo Pantele Living Trust, Plaintiff/Appellant, v. JAMES ELLIOTT and CAROL ELLIOTT, husband and wife; JIMMY L. JARNAGIN, a widower, individually and as Trustee of Jimmy L. Jarnagin Family Trust; DAVID RAY and JANE DOE RAY, husband and wife, Defendants/Appellees.	2 CA-CV 2008-0116 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20055320

Honorable Michael O. Miller, Judge

AFFIRMED

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H O W A R D, Presiding Judge.

¶1 Appellant Angelo Pantele, trustee of the Angelo Pantele Living Trust, (hereinafter "Pantele") appeals from the trial court's order granting summary judgment in favor of appellees James and Carol Elliott (hereinafter "Elliott"), David and Jane Doe Ray (hereinafter "Ray"), and Jimmy Jarnagin.[1] On appeal, Pantele contends the trial court erred in finding two of his claims barred by the applicable statutes of limitation. Alternatively, Pantele contends the court erred in determining that appellee Elliott had not breached a duty owed to Pantele. Because the trial court did not err in granting summary judgment for the defendants on any of the claims, we affirm the trial court's judgment.

Relevant Facts and Procedural Background

¶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). In

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[1]Pantele's notice of appeal also indicates that he appeals from the trial court's denial of his motion for a new trial. But Pantele's opening brief contains no argument on the issue. Therefore, the issue is waived. *See* Ariz. R. Civ. App. P. 13(a)(6) ("An argument . . . shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."); *see also Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, ¶ 50, 977 P.2d 807, 815 (App. 1998) (rejecting assertion that was "wholly without supporting argument or citation of authority").

reviewing the trial court's decision, we consider only the evidence before the trial court when it addressed the motion for summary judgment. *See Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, ¶ 8, 156 P.3d 1157, 1160 (App. 2007).

¶3 The appellees solicited a large sum of money from Pantele as an investment in a car wash. Pantele executed the contract and invested his money by October 10, 2003. Pantele filed his initial complaint against Elliott alone on September 21, 2005. The initial complaint asserted a single cause of action for negligence and argued that Elliott "negligently or intentionally" failed to timely record on Pantele's behalf a note and deed of trust securing his investment.

¶4 On October 17, 2005, Pantele filed his first amended complaint. This complaint added Jarnagin as a defendant and alleged common law fraud and material nondisclosure in the sale of securities against Jarnagin and Elliott and negligence against Elliott. On May 22, 2006, Pantele filed a second amended complaint that included his original allegation of negligence against Elliott and sought to add Ray as a defendant in Pantele's allegation of common law fraud and material nondisclosure. Pantele's second amended complaint also included a new count—"Civil RICO"[2]—against Elliott, Jarnagin, and Ray.

¶5 On April 3, 2007, Pantele filed a new lawsuit against Ray "to remedy the abatement of any action against Ray." A month later, Pantele voluntarily dismissed his

[2]Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, Title IX, § 901(a), 84 Stat. 941 (1970).

original action against Ray with prejudice. The trial court subsequently consolidated Pantele's lawsuits. Over four months later, on July 26, 2007, Pantele filed his final amended complaint in the case. This complaint added a cause of action against Elliott and Jarnagin for statutory securities fraud pursuant to A.R.S. § 44-1991.

¶6 Pantele subsequently filed a motion for partial summary judgment in the case, and the appellees all filed cross-motions for summary judgment. On March 6, 2008, Pantele withdrew his civil RICO claim. Subsequently, the trial court granted summary judgment on all counts involving Jarnagin, Elliott, and Ray. The formal written judgment contains language pursuant to Rule 54(b), Ariz. R. Civ. P., making the judgment final. Pantele filed motions for a new trial that were denied.[3] This appeal followed.

Summary Judgment

¶7 Pantele claims the trial court erred in granting summary judgment in the appellees' favor. 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

[3]Despite this court's order that it would consider the record complete in the absence of a motion to expand the record, the record does not contain the motion for new trial as to Jarnagin and Ray.

whether the trial court properly applied the law. *Brookover*, 215 Ariz. 52, ¶ 8, 156 P.3d at 1160.

Statutory Securities Fraud

¶8 Pantele first argues the trial court erred when it granted summary judgment in favor of Elliott and Jarnagin on Pantele's complaint of statutory securities fraud.[4] In granting summary judgment on the securities fraud claim, the trial court concluded the claim was time barred.

¶9 An action for securities fraud under § 44-1991 must be brought "within two years after discovery of the fraudulent practice on which the liability is based, or after the discovery should have been made by the exercise of reasonable diligence." A.R.S. § 44-2004(B). Thus Pantele had, at most, two years to assert his claim.

¶10 Pantele alleged a securities fraud violation for the first time on July 26, 2007. He stated below that "[t]he first available date when [he] would have reasonably known anything was amiss was the date he failed to receive his interest payment, May 1, 2004." And, on appeal in this court he concedes he learned about the "Woodall transaction," which forms one of the bases for his securities fraud claim, in 2004. Regardless of what specific date in 2004 the cause of action began to accrue, the date Pantele filed his statutory securities fraud complaint—July 26, 2007—was more than two years later. Accordingly, because

[4]Pantele also appears to argue the court erred in granting summary judgment on this claim in favor of appellee Ray. But Pantele's complaint only alleged statutory securities fraud violations as to Elliott, Jarnagin, and an additional defendant not included in this appeal.

Pantele did not file his claim within the applicable statute of limitation for statutory securities fraud, the trial court correctly ruled his complaint was time barred.

¶11 Pantele contends, however, that the statutory securities fraud complaint related back to the date of his original complaint, filed in September 2005, and therefore was timely. Pantele relies on Rule 15(c), Ariz. R. Civ. P., which provides that a claim in an amended pleading relates back if it "arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading."

¶12 Pantele's statutory securities fraud claim does not, within the meaning of Rule 15(c), arise from the same conduct, transaction, or occurrence as his original complaint. The original complaint asserted a single cause of action for negligence alleging that Elliott "negligently or intentionally" failed to timely record a note and deed of trust on Pantele's behalf. Pantele's statutory securities fraud complaint, on the other hand, involved allegations that the defendants failed to disclose information to Pantele about the investment. Pantele's negligence and statutory securities fraud claims arose out of entirely different conduct, transactions, and occurrences. We therefore reject Pantele's argument that the statutory securities fraud claim should relate back to the date of his original complaint. Moreover, although Pantele mentions that certain materials were not disclosed to him until July 12, 2007, he fails to explain how that supports his relation-back claim under Rule 15(c).

¶13 Pantele's statutory claim also fails to relate back to the original complaint as to Jarnagin because the original complaint was filed against a single defendant—Elliott. "An amendment changing the party against whom a claim is asserted relates back if . . . the party

to be brought in by amendment . . . knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party." Ariz. R. Civ. P. 15(c). Here, Pantele presents no evidence that Jarnagin, who was not listed as a defendant in Pantele's original complaint, knew or should have known that he might later be added as a party defendant. Accordingly, Pantele's statutory securities fraud claim also cannot relate back to include Jarnagin as a defendant. We therefore affirm the trial court's grant of summary judgment in favor of Jarnagin and Elliott on Pantele's statutory securities fraud claim.

Common Law Fraud

¶14 Pantele also argues that the trial court erred when it granted summary judgment in the appellees' favor on his claim of common law fraud. The appellees argued below that the claim was time barred and that it was unfounded because they did not have a duty to speak. In granting summary judgment on Pantele's common law fraud claim, the trial court concluded that the claim was time barred.

¶15 A claim for common law fraud must be filed "within three years after the cause of action accrues." A.R.S. § 12-543. Jarnagin and Ray contend, however, that Pantele's common law fraud claim should instead be governed by a two-year statute of limitations. According to Jarnagin and Ray, Pantele's common law fraud and statutory securities fraud claims were "essentially for the same thing, fraud in the sale of securities." They therefore argue that Pantele's common law fraud claim should fall under the two-year statute of limitations for statutory securities fraud pursuant to § 44-2004(B). *See W.J. Kroeger Co. v.*

Travelers Indem. Co., 112 Ariz. 285, 287, 541 P.2d 385, 387 (1975) (more specific statute of limitations governs over more general).

¶16 But § 44-2004(B), by its own terms, applies only to violations of article 13 of title 44. Common law fraud is not a violation of article 13. And an action for common law fraud also has elements not required in a statutory action for securities fraud. *State v. Superior Court*, 123 Ariz. 324, 331, 599 P.2d 777, 784 (1979) ("nine elements of common law fraud are not essential to establishing a violation of" § 44-1991), *overruled on other grounds by State v. Gunnison*, 127 Ariz. 110, 618 P.2d 604 (1980). Moreover, "[t]he defense of statute of limitations is never favored by the courts, and if there is doubt as to which of two limitations periods should apply, courts generally apply the longer." *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 590, 898 P.2d 964, 968 (1995). We conclude Pantele's common law fraud claim is subject to a three-year statute of limitations. *See* § 12-543.

¶17 Here, Pantele amended his complaint to add a common law fraud allegation against Jarnagin and Elliott on October 17, 2005. Assuming, arguendo, the trial court was correct that the statute of limitations for the claim began running on October 1, 2003, Pantele filed his common law fraud complaint against Elliott and Jarnagin well within the three-year statute of limitations. Accordingly, the trial court erred in finding Pantele's claim of common law fraud was time barred as to Elliott and Jarnagin.

¶18 Jarnagin, Ray, and Elliott all contend, however, that, even if the trial court did err in ruling Pantele's common law fraud claim time barred, summary judgment was still

warranted because Pantele's claim only alleged nondisclosure and did not allege any affirmative misrepresentations. A defendant in a common law fraud case involving nondisclosure is only liable if he "'is under a duty to the other [party] . . . to disclose the matter in question."' *Wells Fargo Bank v. Ariz. Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, n.22, 38 P.3d 12, 34 n.22 (2002), *quoting* Restatement (Second) of Torts § 550 (1977). The appellees argue that Pantele failed to show that they were under any such duty and, therefore, the trial court's grant of summary judgment on this claim was proper. *See Pearce v. Stone*, 149 Ariz. 567, 570, 720 P.2d 542, 545 (App. 1986) (defendant entitled to summary judgment if element missing from plaintiff's claim).

¶19 Neither Pantele's opening brief nor reply brief addresses the issue of whether the appellees had a duty to disclose anything to him.[5] When an

> appellant's opening brief fail[s] to address itself to substantial and determinative issues clearly developed and defined in the trial court, and these issues are again brought forth [as cross-issues] in the appellees' answering brief filed in this Court, a failure by the appellant to file a reply brief [on the issue] leaves this court without any assistance in analyzing and deciding the difficult issues upon which the trial court's decision could have been based and upon which appellant's hopes for reversal must depend.

Turf Irrig. and Waterworks Supply v. Mountain States Tel. & Tel. Co., 24 Ariz. App. 537, 541, 540 P.2d 156, 160 (1975). "Summary affirmance" is appropriate in such instances. *Id.*

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[5]Pantele's reply brief concerning Elliott contains just one sentence on this subject without citation of authority. The issue is waived for lack of proper argument. *See Brown*, 194 Ariz. 85, ¶ 50, 977 P.2d at 815.

¶20 Based on the foregoing, we reject Pantele's argument and affirm the trial court's grant of summary judgment in favor of appellees on the common law fraud claim. *See id*.; *State v. Morgan*, 204 Ariz. 166, ¶ 9, 61 P.3d 460, 463 (App. 2002) (failure to file reply brief on issue presented in answering brief sufficient basis for court to reject appellant's position).

Negligence

¶21 Finally, Pantele complains the trial court erred when it granted summary judgment in Elliott's favor on Pantele's claim that Elliott had negligently failed to timely record Pantele's security interest in the car wash. But Pantele's claim of negligence necessarily required a showing of damages, *see Gipson v. Kasey*, 214 Ariz. 141, ¶ 9, 150 P.3d 228, 230 (2007) (damages an element of negligence claim); *see also Clark v. New Magma Irrig. & Drainage Dist.*, 208 Ariz. 246, ¶ 8, 92 P.3d 876, 878 (App. 2004), and Pantele has suffered no damages. In his opening brief and final amended complaint, Pantele acknowledges having known that his deed of trust would have third priority should the car wash fail. When that happened and the car wash declared bankruptcy, the creditors with first and second priority consumed all of the car wash's assets. As a result, Pantele would have received nothing from the car wash even if his loan had been recorded as third in priority. Therefore, because Pantele suffered no damages, he cannot state a claim for negligence, and the trial court correctly granted summary judgment for Elliott on this claim.

Conclusion

¶22 In light of the foregoing, we affirm the trial court's grant of summary judgment as to all claims. In our discretion, we deny Jarnagin and Ray's request for attorney fees pursuant to Rule 25, Ariz. R. Civ. App. P.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PHILIP G. ESPINOSA, Judge