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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DANIEL A. WOOD and MONICA WOOD, husband and wife, Plaintiffs/Appellees, v. DONALD L. FITZ-SIMMONS, as Trustee of the FITZ-SIMMONS 1991 TRUST, Defendant/Appellant.	2 CA-CV 2010-0070 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CV200700219

Honorable Charles A. Irwin, Judge

AFFIRMED

Firm of Dennis M. Breen III, PLC
By Dennis M. Breen III — Tucson
Attorneys for Plaintiffs/Appellees

Donald L. Fitz-Simmons — Phoenix
In Propria Persona

E C K E R S T R O M, Judge.

¶1 Defendant/appellant Donald Fitz-Simmons, a trustee of the Fitz-Simmons 1991 Trust ("the Trust"), appeals from the trial court's order denying his motion to set aside the judgment previously entered against him in favor of plaintiffs/appellees Daniel and Monica Wood. Fitz-Simmons argues the court abused its discretion in denying the motion as "both untimely and not supported by either law or the facts of th[e] case." Finding no abuse of discretion, we affirm the ruling.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to upholding the trial court's ruling." *See Hammoudeh v. Jada*, 222 Ariz. 570, ¶ 2, 218 P.3d 1027, 1028 (App. 2009). In 1993, Daniel Wood and the Trust entered into a real estate transaction involving several parcels of real property in Cochise County. As part of that transaction, Wood executed a promissory note secured by a deed of trust on the parcels and named the Trust as beneficiary. Wood failed to fully meet his monthly payment obligation on the note, and in 2000, the Trust filed a lawsuit against him, alleging he was in default on the note and the Trust was entitled to the balance due pursuant to the deed of trust's optional acceleration clause. The case was dismissed in 2002 for failure to prosecute because the Trust took no further action after Wood filed his answer to the complaint.

¶3 The Woods filed an action to quiet title to the parcels in 2007, alleging in part that "the indebtedness [wa]s time barred" by the six-year limitations period for actions for debt based on a written contract. In February 2008, the trial court granted summary judgment in favor of the Woods on that ground, extinguishing the note and deed of trust encumbering the property and ordering that the Trust be "forever barred and

estopped from asserting any claims against the [Woods] or the property in regard to this indebtedness." After its motion for reconsideration was denied, the Trust appealed that judgment. We then concluded the court had not erred when it granted summary judgment in favor of Wood because the Trust had not sought to collect on the debt until after the action was barred by the six-year statute of limitations. *Wood v. Fitz-Simmons*, No. 2 CA-CV 2008-0041, ¶ 9 (memorandum decision filed Mar. 6, 2009).

¶4 In December 2009, Fitz-Simmons, acting pro se, filed a motion to set aside the judgment pursuant to Rule 60(c)(3), Ariz. R. Civ. P. The trial court denied the motion, finding it untimely because it had not been filed within six months of the entry of summary judgment as required by Rule 60(c). The court also found Fitz-Simmons's claims were "not supported by . . . law or the facts." He has now appealed that ruling.

Discussion

¶5 Fitz-Simmons argues the trial court abused its discretion when the court denied his motion to set aside the judgment. We review a court's ruling on a Rule 60(c) motion for an abuse of discretion. *See R.A.J. v. L.B.V.*, 169 Ariz. 92, 94, 817 P.2d 37, 39 (App. 1991). Rule 60(c) provides in relevant part:

> On motion and upon such terms as are just the court may relieve a party . . . from a final judgment, order or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be filed within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment or order was entered or proceeding was taken.

¶6 Pursuant to Rule 60(c)(3), Fitz-Simmons argued the judgment had been "procured through the fraud, misrepresentation and other misconduct of the [Woods]." The rule required such motion to be filed within six months "after the judgment or order was entered." Ariz. R. Civ. P. 60(c). Fitz-Simmons contends its motion, which was filed within six months of this court's mandate, was timely, emphasizing that the issuance of the mandate makes a judgment final. However, Rule 60(c) does not require a motion to be filed within six months after the judgment is final, but rather within six months after the clerk of the court files the judgment. *See* Ariz. R. Civ. P. 58(a) (filing with clerk of court constitutes entry of judgment). Thus, the motion should have been filed within six months after the entry of summary judgment in February 2008, and Fitz-Simmons filed it in December 2009. The trial court did not abuse its discretion in finding the motion had not been timely filed.

¶7 Fitz-Simmons now argues for the first time on appeal that the catch-all provision in Rule 60(c)(6) applies to the claims in his motion and a motion brought under that provision is not subject to the six-month deadline, but rather must "be filed within a reasonable time." However, apart from the fact we generally do not consider arguments raised for the first time on appeal, *see Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, ¶ 17, 158 P.3d 232, 238-39 (App. 2007), the catch-all provision of Rule 60(c)(6) only applies when one of the other five "mutually exclusive" grounds under Rule 60(c) does not provide a basis for setting aside the judgment. *Panzino v. City of Phoenix*, 196 Ariz. 442, ¶ 12, 999 P.2d 198, 202 (2000). Here, Fitz-Simmons argued the judgment should be set aside based on fraud, one of the enumerated grounds in Rule

60(c). *See* Ariz. R. Civ. P. 60(c)(3). Thus, even had he made this argument below, it would not have been an abuse of the trial court's discretion to find the catch-all provision inapplicable.

¶8 Finally, Fitz-Simmons vaguely asserts the six-month limitation does not apply because his motion was "based on fraud of the court," referring to the next to last sentence of Rule 60(c), which states, "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, . . . or to set aside a judgment for fraud upon the court." But Fitz-Simmons has not challenged the alleged "fraud of the court" in an independent action. *See Andrew R. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 453, ¶ 22, 224 P.3d 950, 956 (App. 2010) (finding mother's motion under Rule 60(c) "did not constitute an independent action for extrinsic fraud"); *In re Estate of Travers*, 192 Ariz. 333, ¶¶ 17, 26, 28, 965 P.2d 67, 69, 71 (App. 1998) (rejecting argument that "petition for enforcement of . . . right to present a claim" against estate, which trial court treated as Rule 60(c) motion, constituted "independent action" as specified in rule). Rather, Fitz-Simmons made his challenge under Rule 60(c)(3) in the same proceeding in which the judgment had been rendered, and accordingly, the time limits of the rule apply. The trial court did not abuse its discretion when it denied Fitz-Simmons's motion for relief from the judgment.

¶9 The Woods seek their attorney fees and costs incurred on appeal and in the trial court pursuant to A.R.S. §§ 12-341.01(A) and 12-349(A)(1). But this case originated as a quiet title action, and the basis for attorney fees in such actions is found in A.R.S. § 12-1103, not § 12-341.01(A), which governs actions arising out of contract.

Lange v. Lotzer, 151 Ariz. 260, 262, 727 P.2d 38, 40 (App. 1986). Thus, the Woods are not entitled to their attorney fees pursuant to § 12-341.01(A).

¶10 Section 12-349(A)(1) requires a court to assess attorney fees and costs against a party who "[b]rings . . . a claim without substantial justification." To be entitled to an award of fees and costs under this provision, the Woods were required to show, by a preponderance of the evidence, that Fitz-Simmons's claims constituted harassment, were groundless, and were not made in good faith. § 12-349(F); *In re Estate of Stephenson*, 217 Ariz. 284, ¶ 28, 173 P.3d 448, 453 (App. 2007). The Woods have not met their burden, and because they have not provided any other basis on which they would be entitled to their fees and costs, we deny their request.

Disposition

¶11 The trial court's ruling is affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge