FILED BY CLERK
JUL 28 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| JOSEPH BRASLAWSCE and ELLEN BRASLAWSCE, as TRUSTEES of the BRASLAWSCE FAMILY TRUST DATED JUNE 25, 2004; JOHN T. BURROUGHS, a single man; JORGE CUEVAS and ELIZABETH CUEVAS, husband and wife; DOUGLAS MILTON CURRIE and LINDA D. CURRIE, husband and wife; JOE DELAVEGA aka JOSE N. DELAVEGA, a married man dealing with his sole and separate property; SALVATORE GATTO PARTNERS, L.P., an Arizona limited partnership; PETER B. GRAY, a married man dealing with his sole and separate property; GARY L. HURBAN and JOAN A. HURBAN, husband and wife; CYNTHIA R. JONES, a married woman dealing with her sole and separate property; THOMAS J. MANDARINO, a married man dealing with his sole and separate property; THOMAS D. MAPLE, a married man dealing with his sole and separate property; GERALD LLOYD MAUST and MARGO DENISE MAUST, husband and wife; MICHAEL MESSER and NANCY ANN MESSER, husband and wife; MARGARET L. NEISENT, a single woman; THOMAS E. O'BRIEN, a single man; DANA MARIE OLDANI, a married woman dealing with her sole and separate property; BRUCE SPROULL as SOLE HEIR and PERSONAL REPRESENTATIVE of the ESTATE OF GEORGE B. READE | 2 CA-CV 2009-0146<br>DEPARTMENT A<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 28, Rules of Civil Appellate Procedure |

and MARY E. READE; DENNIS L. RAUSCH, an unmarried man; PATSY FLOREZ REZAC, an unmarried woman; GARY L. STONE, an individual; CLARENCE L. STONE, an individual; EDWARD E. VINES and PATRICIA K. VINES, husband and wife; BETTY L. BILLINGS, as EXECUTRIX of the ESTATE OF LOUISE EVA WALCOTT; ROSEMARIE ZAFFINA aka ROSEMARY ZAFFINA, as PERSONAL REPRESENTATIVE of the ESTATE OF YOLANDA M. ZAFFINA; THOMAS C. ROSE and PAMELA K. ROSE, husband and wife; ASHOK K. SINGH and JOHANNA SINGH, husband and wife; DONALD F. COONAN and CAROLINE E. COONAN, husband and wife; JAN L. GRAVINO, as EXECUTRIX of the ESTATE OF GEORGE W. CARTER and MARJORIE A. CARTER; HOWARD H. WEST, JR. and MARILYN A. WEST, husband and wife; GEORGE CAMILLERI and ROSE MARIE CAMILLERI, husband and wife; LOYAL L. MEFFERD, a single man; JERRY D. LARSON and DOROTHY M. LARSON, husband and wife; ROBERT L. VALEU and MARJORIE A. VALEU, husband and wife; DENNIS N. KANNENBERG and CAROLYN A. KANNENBERG, husband and wife; JOSEPH M. MORSE, a married man as his sole and separate property; INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL, a California non-profit corporation; JOHN H. DAVIDSON, a married man as his sole and separate property; NANCY SUE

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| BONEWITZ, as SUCCESSOR TRUSTEE of the FULTON JOINT REVOCABLE TRUST DATED AUGUST 13, 1986; ANN MARIE SIMMS, an individual; SECUNDINO JOSE COCA and ROSA R. COCA, husband and wife; and ARLINE H. ZIENTARA, an individual, | ) |
| Plaintiffs/Appellees, | ) |
| v. | ) |
| CRAIG RANCH GOLF COURSE, L.L.C., a Nevada limited liability company; C.A.K. LIMITED PARTNERSHIP, a Nevada limited partnership; DESERT CARMEL, L.L.C., an Arizona limited liability company; BLS 1 ARIZONA, L.L.C., an Arizona limited liability company; AMERICAN LAND HOLDINGS, L.L.C., a Nevada limited liability company; AMERICAN LAND, L.L.C., a Nevada limited liability company; AYMET ROMAN PEREZ; CASA GRANDE WEST II, L.L.C., a Nevada limited liability company; THE LAND SPECIALIST GROUP, L.LC., a Nevada limited liability company; and LAS VEGAS GAMING INVESTMENTS, L.L.C., a Nevada limited liability company, | ) |
| Defendants/Appellants. | ) |

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200702617

Honorable Robert Carter Olson, Judge

AFFIRMED

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Cheifetz Iannitelli Marcolini, P.C.
By Steven W. Cheifetz, Melanie C. McKeddie and Sheleen D. Brewer — Phoenix
Attorneys for Plaintiffs/Appellees

Thomas Schern Richardson PLLC
By Richard R. Thomas and Michael A. Schern — Mesa
Attorneys for Defendants/Appellants

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B R A M M E R, Presiding Judge.

**¶1** Appellants, owners of the majority of parcels in a developed community (collectively, the majority owners),[1] appeal from the trial court's order appointing a receiver to take control of the development's homeowners' association. They assert the court erred by failing to conduct an evidentiary hearing and that the factors the court found to support its decision do not. We affirm.

**Factual and Procedural Background**

**¶2** We view the evidence in the light most favorable to sustaining the trial court's ruling. *See Inch v. McPherson*, 176 Ariz. 132, 136, 859 P.2d 755, 759 (App. 1992). In 2007, a group of owners of parcels in the Desert Carmel Community housing development (collectively, the minority owners) sued the majority owners; Desert Carmel's homeowners' association, the DC Lot Owners Association (the Association);

[1]Respectively, C.A.K. Limited Partnership; The Land Specialist Group, LLC; Desert Carmel, LLC; BLS 1 Arizona, LLC; American Land, LLC; Aymet Roman Perez; Casa Grande West II, LLC; American Land Holdings, LLC; Las Vegas Gaming Investments, LLC; Craig Ranch Golf Course, LLC.

and the directors and employees of the Association (collectively, the directors). In their complaint, the minority owners alleged breach of fiduciary duty, breach of contract, and racketeering, and also requested the trial court to appoint a receiver to conduct a "complete forensic accounting of the Association's books and financial records."

**¶3** The minority owners also filed an emergency motion requesting the appointment of a receiver to take control of the Association and conduct a forensic accounting. After argument on that motion, the minority owners withdrew it without prejudice pursuant to the parties' stipulation for the appointment of a special master "to perform an independent audit of the books and records" of the Association.

**¶4** Approximately seventeen months later, before the special master submitted his reports, the minority owners renewed their application to appoint a receiver, asserting the directors had continued to mismanage the Association to the minority owners' detriment by failing either to collect assessments owed by the majority owners or to maintain or improve the community, and by improperly expending Association funds. The minority owners also asserted the Association's president had "embezzled funds before and after the filing of this lawsuit" by withdrawing funds improperly from the Association's bank account, although the minority owners acknowledged the president had characterized those withdrawals as accidental and had returned at least most of the funds. At oral argument, the directors and majority owners requested that the trial court conduct an evidentiary hearing on the minority owners' claims. The court refused to do so, concluding the undisputed facts justified the appointment of a receiver.

**¶5** The trial court first determined the parties had agreed that approximately $665,000 had been removed improperly from the Association's bank account, including withdrawals made after the court had appointed the special master. The court found that, even if the withdrawals were accidental, "the parties controlling [the Association] were grossly negligent in failing to protect, preserve or detect these withdrawals." The court stated the withdrawals alone "justif[y] the appointment of a receiver," irrespective of the court's other findings.

**¶6** Second, the trial court found there was no dispute the directors or majority owners had "expended little on the maintenance or improvement of the community, while expending hundreds of thousands of dollars on counsel, despite [trial counsel's] avowing that an insurance carrier is compensating his firm for their defense of the Association." The court expressed a "substantial and immediate concern" that the Association's assets were "being actively diverted (without considering disputed allegations concerning other disbursements), to the detriment of all lot owners, which alone justifies the appointment of a receiver."

**¶7** Third, the trial court determined one of the directors had approved a settlement agreement between the Association and the majority owners regarding unpaid assessments, acting "as a board of one, during an executive session from which the other interested parties were excluded and not given notice." The court further found the interests of the majority and minority owners concerning the settlement agreement were "diametrically opposed." The court also observed that, despite the directors' and majority owners' explanations regarding the settlement, the agreement abandoned the

collection of assessments owed by the majority owners as well as a "substantial claim for late fees," postponed the receipt of needed funds by the Association, and prevented the Association from pursuing other remedies. The court concluded it was necessary to appoint a receiver immediately who could "either affirm or avoid this agreement; and if appropriate, seek other remedies" and thereby prevent potential "irreparable injury" to the Association and the minority owners. The court did so and ordered him to "assume general control" over the Association, including "the responsibility to take control of this litigation, on behalf of the Association." This appeal followed.

**Discussion**

**¶8** We have jurisdiction to review a trial court's appointment of a receiver pursuant to A.R.S. § 12-2101(F)(2), and do so for an abuse of discretion. *See Gravel Resources of Ariz. v. Hills*, 217 Ariz. 33, ¶ 6, 170 P.3d 282, 285 (App. 2007). But, to the extent the court's ruling rests upon questions of law, we review those determinations de novo. *Id* ¶ 7. The majority owners first assert the trial court should have conducted an evidentiary hearing on the minority owners' application for a receiver. Nothing in Rule 66, Ariz. R. Civ. P., or A.R.S. § 12-1241 requires a court to conduct such a hearing before appointing a receiver. And, although we agree a court should hold an evidentiary hearing when necessary to resolve disputed questions of fact, the majority owners cite no authority, and we find none, suggesting they otherwise are entitled to an evidentiary hearing when the court's ruling is based on uncontested facts. *Cf. State v. Tarkington*, 157 Ariz. 556, 558-59, 760 P.2d 556, 558-59 (App. 1988) (no error when court decides

motion based on uncontested facts). All parties submitted exhibits supporting their positions on the minority owners' application.

**¶9** The trial court acknowledged the existence of disputed factual issues, but confined its findings to facts it determined to be uncontested and granted the minority owners' application based solely upon those facts. It noted the directors' and majority owners' "offers of proof would, at most, eliminate cumulative grounds argued by [the minority owners], not justify the denial of the Application." The majority owners do not argue that conclusion was unwarranted, nor do they explain what facts relevant to the court's determination are disputed, identify any exhibits disputing those facts, or assert they could have submitted evidence disputing them. In these circumstances, we find no error in the court's decision to grant the minority owners' application for a receiver without conducting an evidentiary hearing.[2] *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."); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal).

[2]To the extent the majority owners argue they had a due process right to an evidentiary hearing, this underdeveloped argument is made for the first time in their reply brief. Accordingly, we do not address it further. *See Romero v. Sw. Ambulance*, 211 Ariz. 200, n.3, 119 P.3d 467, 471 n.3 (App. 2005) (issue raised for first time in reply brief waived on appeal); *Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393 n.2 (appellant's failure to develop and support argument waives issue on appeal).

**¶10** The majority owners next assert the trial court improperly "ignored the parties' prior compromise of [the minority owners'] receivership application." They assert that, because the minority owners stated in their renewed application that they had agreed to appoint a special master to conduct an audit "in lieu of a receiver," the minority owners' renewed application was premature because the special master had not yet filed his reports. But nothing in the stipulation suggests the minority owners had agreed to postpone any future receivership application once the 120-day stay explicitly provided for in that agreement had expired. Notably, the stay had expired approximately one year before the minority owners filed their renewed application. Indeed, the stipulation provided that the minority owners had withdrawn their initial application "without prejudice." Moreover, even if we agreed the renewed application was premature, the majority owners have not explained how they were prejudiced by the court's consideration of the application. The special master's reports were available to the parties before the court held argument on the renewed application, and neither the directors nor majority owners appear to have filed any objection to those reports.

**¶11** The majority owners next assert the trial court erred in appointing a receiver because there was "no evidence of the severe, immediate, and irreparable harm required for appointment of a receiver." They cite no authority supporting this standard, *see* Ariz. R. Civ. App. P. 13(a)(6), which, in any event, has been rejected by Division One of this court in *Gravel Resources*, 217 Ariz. 33, ¶¶ 10-11, 170 P.3d at 286. "In Arizona, . . . a petitioner need not show irreparable harm or lack of an adequate legal remedy to obtain the appointment of a receiver." *Id.* ¶ 10. Instead, "[t]he statute simply

requires the trial court to determine that the property or the rights of the parties need protection." *Id.* ¶ 11.

**¶12** The majority owners devote substantial argument to the concerns raised by the minority owners' application, rather than directly addressing the bases of the trial court's ruling. For example, although the majority owners assert they were "[u]niformly [c]ollecting [a]ssessments," they do not discuss the trial court's finding that the settlement agreement between them and the Association limited the Association's ability to collect substantial sums owed in assessments and late fees from them, as well as its ability to pursue further legal remedies against them for unpaid assessments. They neither contest these findings, nor explain why the findings do not support the court's conclusion that the settlement agreement could be harmful to the Association's and minority owners' interests, warranting appointment of a receiver.

**¶13** The trial court also concluded the interests of the minority owners regarding that agreement were "diametrically opposed" to the interests of the majority owners. *See Gravel Resources*, 217 Ariz. 33, ¶ 14, 170 P.3d at 287 (not error to appoint receiver when record demonstrates parties' interests are opposed). Although the majority owners broadly assert this finding was error, they cite no supporting authority or evidence, nor otherwise develop this argument in any meaningful way. Accordingly, we conclude the majority owners have waived on appeal any argument that the court's conclusions regarding the settlement agreement were unwarranted. *See* Ariz. R. Civ. App. P. 13(a)(6); *Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393-94 n.2.

**¶14** We conclude that in the absence of any relevant or adequately developed argument, the trial court did not abuse its discretion when it found the director's approval of the settlement agreement with the majority owners justified appointment of a receiver to protect the Association's and the minority owners' interests. Because the court determined this factor alone justified the appointment of a receiver, and the majority owners do not argue otherwise, we need not address the remaining bases for the court's order.[3]

**Disposition**

**¶15** For the reasons stated, we affirm the trial court's order appointing a receiver. We grant the minority owners' request for attorney fees on appeal pursuant to A.R.S. § 12-341.01, pending their compliance with Rule 21, Ariz. R. Civ. App. P.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Joseph W. Howard

[3]Because the majority owners do not argue the receiver should have been appointed for the limited purpose of evaluating the settlement agreement, we do not address the question.

JOSEPH W. HOWARD, Chief Judge