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1           **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **BYZ ENTERPRISES, LLC,**  
3 **assignee of Zions Credit Corporation,**  
4 **substituted Plaintiff for**  
5 **ZIONS CREDIT CORPORATION,**

6           Plaintiff/Counterdefendant-Appellee,

7 v.

**NO. 34,241**

8 **DUSTY ERVEN d/b/a ERVEN**  
9 **ENTERPRISES,**

10           Defendant/Counterclaimant-Appellant.

11 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

12 **Alan M. Malott, District Judge**

13 Rhodes & Salmon, P.C.

14 Mark M. Rhodes

15 Albuquerque, NM

16 for Appellee

17 Dusty Erven

18 Albuquerque, NM

19 Pro se Appellant

1 **MEMORANDUM OPINION**

2 **WECHSLER, Judge.**

3 {1} Defendant/Counterclaimant Dusty Erven (Mr. Erven), in a self-represented  
4 capacity, appeals from the district court’s orders consolidating cases and granting  
5 summary judgment in both cases in favor of Plaintiff/Counterdefendant BYZ  
6 Enterprises, LLC (BYZ). This Court issued a calendar notice proposing to affirm. Mr.  
7 Erven has filed a memorandum in opposition, which we duly considered.<sup>1</sup>  
8 Unpersuaded, we affirm.

9 {2} In this Court’s calendar notice, we noted that “[t]o preserve an issue for review  
10 on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the  
11 same grounds argued in the appellate court.” *Benz v. Town Ctr. Land, LLC*, 2013-  
12 NMCA-111, ¶ 24, 314 P.3d 688 (internal quotation marks and citation omitted). [CN  
13 3] We pointed out that Mr. Erven neither objected to consolidation of the cases, nor  
14 filed a motion to reconsider below. In response, Mr. Erven argues that his due process

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18 <sup>1</sup> We note that BYZ filed a response to Mr. Erven’s memorandum in  
19 opposition. Because such responses are not permitted by our rules, we did not  
20 consider it. *See* Rule 12-210(b) NMRA.

1 rights were violated when the cases were consolidated without a hearing and that the  
2 claims were improperly consolidated. [MIO 2] Mr. Erven does not, however, cite to  
3 the record to demonstrate how the issue was preserved or provide any explanation or  
4 authority showing how the district court’s consolidation without a hearing amounts  
5 to a due process violation. *See In re Norwest Bank of N.M., N.A.*, 2003-NMCA-128,  
6 ¶ 30, 134 N.M. 516, 80 P.3d 98 (stating that this Court will not search the record for  
7 evidence of preservation); *ITT Educ. Servs., Inc. v. Taxation & Revenue Dep’t*, 1998-  
8 NMCA-078, ¶ 10, 125 N.M. 244, 959 P.2d 969 (holding that this Court will not  
9 consider propositions that are unsupported by citation to authority). Therefore, we  
10 decline to address Mr. Erven’s contention that the cases were improperly consolidated.

11 {3} In addressing Mr. Erven’s challenge to the order granting summary judgment  
12 in favor of Plaintiff, we explained that “[s]ummary judgment is appropriate where  
13 there are no genuine issues of material fact and the movant is entitled to judgment as  
14 a matter of law.” *Bank of N.Y. Mellon v. Lopes*, 2014-NMCA-097, ¶ 6, 336 P.3d 443  
15 (internal quotation marks and citation omitted). “[T]he party opposing summary  
16 judgment has the burden to demonstrate the existence of specific evidentiary facts  
17 which would require trial on the merits.” *Horne v. Los Alamos Nat’l Sec., L.L.C.*,  
18 2013-NMSC-004, ¶ 15, 296 P.3d 478 (internal quotation marks and citations omitted).

1 {4} In his memorandum in opposition, Mr. Erven again argues that an unsigned,  
2 draft of a settlement agreement sent to him by BYZ’s attorney and attached to Mr.  
3 Erven’s response to BYZ’s motion for summary judgment [RP 300–11] raises a  
4 genuine issue of material fact as to the existence of a valid, enforceable settlement  
5 agreement. [MIO 3] Mr. Erven asserts that the settlement agreement need not include  
6 every potential provision it could contain to be enforceable. [MIO 3] However, Mr.  
7 Erven does not show how the existence of a draft settlement agreement upon which  
8 neither party had agreed raises a genuine issue of material fact that the parties had  
9 entered into a valid, enforceable settlement agreement and that BYZ was not entitled  
10 to judgment as a matter of law, nor does he cite any authority in which a draft  
11 settlement agreement was construed as enforceable. This Court will not consider  
12 propositions that are unsupported by citation to authority. *See ITT Educ. Servs.*, 1998-  
13 NMCA-078, ¶ 10. Moreover, we note that Mr. Erven’s contention on appeal that an  
14 enforceable settlement agreement exists between the parties is in direct conflict with  
15 his answer below, in which he states he has “attempted to negotiate a dispute  
16 settlement. . . for over two years to no avail.” [RP 149] We note that inaccurate factual  
17 statements or omissions in a docketing statement are grounds for contempt and we  
18 caution Mr. Erven to exercise candor in any further dealings with this Court. *See State*  
19 *v. Fulton*, 1983-NMCA-010, ¶ 13, 99 N.M. 348, 657 P.2d 1197 (holding that an

1 untimely appeal and inaccurate factual assertions in the docketing statement that  
2 amounted to omissions were grounds for an order to show cause). Accordingly, we  
3 conclude that Mr. Erven has failed to demonstrate the district court's order was  
4 erroneously granted.

5 {5} We next address a second appeal that Mr. Erven filed, Case No. 34,435 (Case  
6 #2), which is also based on district court Case No. D-202-2012-09749. We note that  
7 the first two issues raised in the docketing statement in Case #2 are identical to the  
8 issues raised in this appeal. Mr. Erven raises two additional issues in Case #2: (1)  
9 whether the trial court erred in allowing BYZ to file its complaint in the present case,  
10 and (2) whether the trial court erred in setting a supersedeas bond. Because these  
11 matters should have been filed in this pending appeal, rather than in a second appeal,  
12 these matters have been transferred from Case #2 to this case, and Case #2 has been  
13 closed.

14 {6} We construe Mr. Erven's first issue in Case #2 as a motion to amend the  
15 docketing statement in the present case pursuant to Rule 12-208(E) NMRA. The  
16 essential requirements to show good cause for our allowance of an amendment to an  
17 appellant's docketing statement are: (1) that the motion be timely, (2) that the new  
18 issue sought to be raised was either (a) properly preserved below or (b) allowed to be  
19 raised for the first time on appeal, and (3) the issues raised are viable. *See State v.*

1 *Moore*, 1989-NMCA-073, ¶ 42, 109 N.M. 119, 782 P.2d 91, *overruled on other*  
2 *grounds by State v. Salgado*, 1991-NMCA-044, 112 N.M. 537, 817 P.2d 730. For the  
3 reasons that follow, we deny Mr. Erven’s motion to amend the docketing statement  
4 on the ground that the issues raised are not viable appellate issues.

5 {7} We understand Mr. Erven’s first issue in Case #2 to argue that the district court  
6 erred in allowing BYZ to file its complaint in the present case based on rulings Mr.  
7 Erven asserts were made in a separate district court case that is not the subject of  
8 either this case or Case #2. “Matters outside the record present no issue for review.”  
9 *Kepler v. Slade*, 1995-NMSC-035, ¶ 13, 119 N.M. 802, 896 P.2d 482 (internal  
10 quotation marks and citation omitted). Because the issues Mr. Erven raises are outside  
11 the record of this case and present no issue for review, we conclude his motion to  
12 amend is not viable. Therefore, his motion to amend the docketing statement is denied.

13 {8} We construe Mr. Erven’s second issue in Case #2, which seeks review of the  
14 supersedeas bond set by the district court, as a motion pursuant to Rule 12-207  
15 NMRA, which provides that “[a] motion for review of the district court’s action may  
16 be made to the appellate court . . .” Because, we affirm the district court’s  
17 consolidation of the cases and summary judgment in favor of BYZ, Mr. Erven’s  
18 motion to review the supersedeas bond is denied as moot. *See State v. Favela*, 2013-

1 NMCA-102, ¶ 13, 311 P.3d 1213 (“[A] reviewing court generally does not decide  
2 academic or moot questions[.]” (internal quotation marks and citation omitted)).

3 {9} Consequently, for the reasons stated above and in this Court’s notice of  
4 proposed disposition, we affirm.

5 {10} **IT IS SO ORDERED.**

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**JAMES J. WECHSLER, Judge**

8 **WE CONCUR:**

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**CYNTHIA A. FRY, Judge**

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**M. MONICA ZAMORA, Judge**