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

2 **ALLAN MELTZER and LARRY MELTZER,**
3 **as Co-Personal Representatives of the Estate**
4 **of MARTIN J. MELTZER, Deceased,**

5 Plaintiffs-Appellees,

6 v.

NO. A-1-CA-36566

7 **KERRY KRUSKAL,**

8 Defendant-Appellant.

9 **APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY**

10 **Abigail Aragon, District Judge**

11 Richard De Stefano

12 Taos, NM

13 for Appellees

14 Kerry Kruskal

15 Arroyo Seco, NM

16 Pro Se Appellant

17 **MEMORANDUM OPINION**

18 **VIGIL, Judge.**

1 {1} This case began with a complaint for release of a mortgage lien, a quiet title
2 claim, and a claim for damages. [RP 1] Judgment was granted in favor of Plaintiffs
3 Allan and Larry Meltzer (the Meltzers) in 2010 [RP 1003-07]; Defendant Kerry
4 Kruskal appealed [RP 1010-16]; and this Court affirmed the judgment in *Meltzer v.*
5 *Kruskal*, No. 30,326, mem. op. (N.M. Ct. App. Feb. 29, 2012) (non-precedential).
6 Now, Kruskal, a self-represented litigant, appeals from two orders pertaining to
7 payment of the judgment. We issued a notice of proposed disposition on November
8 2, 2017, proposing to summarily affirm. On November 20, 2017, Kruskal filed a
9 timely response, which he titled “Motion to Reconsider Proposed Summary
10 Disposition and Simplified Suppl[e]mental Response.” We have construed this
11 pleading as a timely filed memorandum in opposition (MIO), which we have duly
12 considered. Remaining unpersuaded, we affirm.

13 {2} As a prefatory matter, we note that on February 1, 2018, Kruskal filed two
14 additional pleadings: (1) a second response titled “Motion to Reconsider Proposed
15 Summary Disposition and Simplified Suppl[e]mental Response,” and (2) a pleading
16 titled “Supplemental Brief—(New Evidence)—Affidavit [o]f Kerry Kruskal.” The
17 time for filing a memorandum in opposition is twenty days from the date this Court
18 issues the notice of proposed disposition. *See* Rule 12-210(D)(3) NMRA. Given that
19 the time for Kruskal to file a memorandum in opposition had passed, these pleadings
20 were untimely. Moreover, our rules do not permit parties to file supplemental

1 memoranda in opposition. *See* Rule 12-210(D). Thus, because Kruskal’s supplemental
2 memoranda in opposition are untimely and not filings contemplated by our summary
3 calendar process, we do not consider them. Instead, we limit our review to the MIO,
4 filed November 20, 2017.

5 {3} As discussed in our notice of proposed disposition, this Court is a reviewing
6 court, and our role in this case is only to review for error in the district court’s rulings.
7 [CN 4] *See Farmers, Inc. v. Dal Mach. & Fabricating, Inc.*, 1990-NMSC-100, ¶ 8,
8 111 N.M. 6, 800 P.2d 1063 (stating that the appellate court presumes that the district
9 court is correct and the burden is on the appellant to clearly demonstrate that the
10 district court erred). We clarified that in this appeal, we are called to review the
11 district court’s final order on judgment creditors’ motion for orders and the order on
12 Kruskal’s motion to reconsider, and Kruskal bears the burden of clearly demonstrating
13 how the trial court erred. [CN 4-5] We further noted that the final order sets forth the
14 judgment balances due [RP 1878-80], and the order denying Kruskal’s motion to
15 reconsider provides that Kruskal “has failed to submit proof by a preponderance of the
16 evidence that the Judgment has been satisfied” [CN 5 (quoting RP 1914)].

17 {4} In our notice of proposed disposition, we stated that in any response Kruskal
18 wished to file, he was required to demonstrate how the district court erred with respect
19 to the two orders on appeal. [CN 5] Specifically, we instructed Kruskal to explain why
20 the judgment figures are incorrect and to plainly and simply state what evidence he

1 provided to the district court regarding payments he made toward the judgment. [CN
2 5] We advised that failure to do so would result in affirmance. [CN 5] *See State v.*
3 *Chamberlain*, 1989-NMCA-082, ¶ 11, 109 N.M. 173, 783 P.2d 483 (refusing to grant
4 relief where the defendant’s memorandum in opposition to our proposed summary
5 disposition failed to provide this Court with a summary of all the facts material to our
6 consideration of the issue raised in the docketing statement).

7 {5} In his MIO, Kruskal states that he is confused, and it is his position that the
8 district court “finds a way to rule against [him] without explanation.” [MIO PDF 3]
9 He further discusses three points of error. [MIO PDF 3-6] First, Kruskal claims that
10 he is entitled to a lien release and a refund of collection fees. [MIO PDF 3-5] Second,
11 Kruskal asserts that attorney Richard DeStefano is changing his testimony regarding
12 attorney fees. [MIO PDF 5-6] Third, Kruskal claims that the district court did not have
13 discretion to award collection fees unless it was included in the original contract with
14 regard to collections. [MIO PDF 6] Kruskal asks this Court to release the lien against
15 him, to order a refund of collection fees, and to rule that DeStefano cannot change his
16 testimony. [MIO PDF 3, 6] In the alternative, Kruskal asks this Court to clarify the
17 district court’s decision so that “he can defend the legal premise (or authority) that the
18 district court is relying on.” [MIO PDF 6]

19 {6} In support of these arguments, Kruskal claims that he “has now twice
20 demonstrated that he is entitled to a full release.” [MIO PDF 4] He proceeds to argue

1 that he was overcharged, DeStefano stole money, DeStefano was not entitled to
2 attorney fees, and the Meltzers have admitted that they were paid in full. [MIO PDF
3 4-6] These assertions and arguments are not evidence. *Cf. Muse v. Muse*, 2009-
4 NMCA-003, ¶ 51, 145 N.M. 451, 200 P.3d 104 (“It is not our practice to rely on
5 assertions of counsel unaccompanied by support in the record. The mere assertions
6 and arguments of counsel are not evidence.”).

7 {7} Despite our instructions to do so, Kruskal did not “explain why the judgment
8 figures are incorrect” or “plainly and simply state what evidence he provided to the
9 district court regarding payments he made towards the judgment.” [CN 5] Because
10 Kruskal has not met his burden on appeal, we affirm. *See Farmers, Inc.*,
11 1990-NMSC-100, ¶ 8; *Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M. 754,
12 955 P.2d 683 (“Our courts have repeatedly held that, in summary calendar cases, the
13 burden is on the party opposing the proposed disposition to clearly point out errors in
14 fact or law.”); *State v. Mondragon*, 1988-NMCA-027, ¶ 10, 107 N.M. 421, 759 P.2d
15 1003 (stating that a party responding to a summary calendar notice must come forward
16 and specifically point out errors of law and fact, and the repetition of earlier arguments
17 does not fulfill this requirement), *superseded by statute on other grounds as stated in*
18 *State v. Harris*, 2013-NMCA-031, ¶ 3, 297 P.3d 374.

19 {8} While we note Kruskal’s confusion with the legal issues in this case and his
20 request that this Court clarify the district court’s decision [MIO PDF 3, 6], that is not

1 the function of this Court. *Cf. Newsome v. Farer*, 1985-NMSC-096, ¶ 18, 103 N.M.
2 415, 708 P.2d 327 (“Although pro se pleadings are viewed with tolerance, a pro se
3 litigant, having chosen to represent himself, is held to the same standard of conduct
4 and compliance with court rules, procedures, and orders as are members of the bar.”
5 (citation omitted)).

6 {9} Accordingly, for the reasons stated in our notice of proposed disposition and
7 herein, we affirm.

8 {10} **IT IS SO ORDERED.**

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MICHAEL E. VIGIL, Judge

11 **WE CONCUR:**

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M. MONICA ZAMORA, Judge

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EMIL J. KIEHNE, Judge