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DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PHILIP G. URRY, CLERK
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DAVID R. KINZENBAW,)	No. 1 CA-CV 07-0516
)	
Plaintiff/Appellant,)	DEPARTMENT D
)	
v.)	MEMORANDUM DECISION
)	
BERNARD J. MACCORA; NANCY)	(Not for Publication -
MCBRIDE,)	Rule 28, Arizona Rules of
)	Civil Appellate Procedure)
Defendants/Appellees.)	
)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2005-052364

The Honorable Paul Katz, Judge

AFFIRMED

David Kinzenbaw Phoenix
In Propria Persona

Berk & Moskowitz, P.C. Scottsdale
By Kent S. Berk
Daphne J. Reaume
Attorneys for Defendants/Appellees

J O H N S E N, Judge

¶1 David Kinzenbaw appeals the judgment entered against him after the superior court denied his motion to set aside or reconsider summary judgment in favor of Bernard MacCora. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 MacCora and Nancy McBride own a home in Phoenix. On or about August 12, 2004, Kinzenbaw, who had rented the home since July 2001, and MacCora entered into two written contracts. The first was a Residential Rental Agreement (the "Rental Agreement"); the second was a Residential Resale Real Estate Purchase Contract expiring August 15, 2005 (the "Purchase Option").¹

¶3 The Rental Agreement provided for monthly rent payments of \$1,517 and also included the following purchase provision: "12 month lease/option to purchase @ \$137,500.00 on August 15, 2005 or before with one month prepayment penalty fee. No portion of monthly rental amount of \$1,517.00 will be a rent credit towards down payment. Tenant is responsible for all repairs and maintenance to Property." Additionally, the Purchase Option provided that if Kinzenbaw exercised the option he would receive a \$23,400.00 credit from his past rent payments. The Rental Agreement specifically provided, "all notices herein shall be in writing and shall be delivered to Landlord . . . and shall be sent by registered or certified mail, or personally delivered, or as otherwise provided in

¹ According to MacCora, Nancy McBride, the Property's co-owner, gave MacCora oral authority to act on her behalf.

A.R.S. § 33-1313." The Rental Agreement further provided that time was of the essence.

¶4 Kinzenbaw filed an unverified complaint against MacCora on September 27, 2005, alleging breach of contract and seeking specific performance, based on his contention that he "had funds available to purchase the subject property" on August 15, 2005, but that MacCora had refused to perform. Kinzenbaw contended that when he attempted to exercise the option, MacCora responded that the house was worth more than the stated purchase price and that he would not sell it to him until it had been re-appraised. On November 17, 2005, Kinzenbaw filed an unverified first amended complaint ("Complaint"), asserting breach of contract, unjust enrichment, intentional misrepresentation, negligent misrepresentation and consumer fraud.

¶5 On February 5, 2007, MacCora moved for summary judgment on each of Kinzenbaw's claims. MacCora's motion was supported by his affidavit, which stated that Kinzenbaw "never gave me any written notice (either before, on or after August 15, 2005) that he was exercising his option to purchase the property" and that "[t]o this day, Plaintiff never tendered the purchase price under the Agreement." Kinzenbaw, who was self-represented, did not respond to the motion. On March 20, 2007, after MacCora requested summary disposition of his motion, the

superior court entered summary judgment in favor of MacCora. On April 6, 2007, through counsel, Kinzenbaw filed a Motion to Set Aside or Alternatively Reconsider the grant of summary judgment (the "Motion to Set Aside"), explaining that his failure to respond to the summary judgment motion was excusable neglect. The motion was supported by Kinzebaw's affidavit.

¶6 On May 23, 2007, the superior court denied Kinzenbaw's Motion to Set Aside. A formal written judgment was entered, and Kinzenbaw timely appealed.

DISCUSSION

A. Standard of Review.

¶7 We review a superior court's grant of summary judgment *de novo*. *Schwab v. Ames Constr.*, 207 Ariz. 56, 60, ¶ 17, 83 P.3d 56, 60 (App. 2004). We draw all inferences and view all evidence in a light most favorable to the non-moving party. *Sanchez v. City of Tucson*, 191 Ariz. 128, 130, ¶ 7, 953 P.2d 168, 170 (1998).

B. The Superior Court Did Not Err in Granting MacCora's Motion for Summary Judgment.

¶8 Pursuant to Arizona Rule of Civil Procedure ("Rule") 56(c)(1), a court may enter a summary judgment in favor of the moving party if the record "show(s) that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "[T]he burden of

showing no genuine issue of material fact exists . . . rests with the party seeking summary judgment." *Chanay v. Chittenden*, 115 Ariz. 32, 38, 563 P.2d 287, 293 (1977).

¶9 Generally, whenever a motion is filed, the party opposing the motion must file a written response. *Choisser v. State ex rel. Herman*, 12 Ariz. App. 259, 260, 469 P.2d 493, 494 (1970); Ariz. R. Civ. P. 56(c).² If the party opposing the motion does not respond in writing, it is within the trial court's discretion to dispose of the motion summarily. *Choisser*, 12 Ariz. App. at 260, 469 P.2d at 494; Ariz. R. Civ. P. 7.1(b), 56(e). However, an opposing party's failure to respond to a summary judgment motion, by itself, may be insufficient to entitle the moving party to summary judgment. *Schwab*, 207 Ariz. at 59, ¶ 15, 83 P.3d at 59.

¶10 An option must be exercised and performed in strict accordance with its terms. Arizona law is "crystal clear that an option agreement must be strictly construed, in that it must be exercised in exact accord with its terms and conditions." *Rogers v. Jones*, 126 Ariz. 180, 182, 613 P.2d 844, 846 (App. 1980).

² Rule 56(c) provides that a party opposing a summary judgment motion "must file affidavits, memoranda or both within 30 days after service of the motion."

¶11 The Rental Agreement required that all notices be in writing delivered either by registered or certified mail or in person. To exercise the option, Kinzenbaw was obligated to give written notice no later than August 15, 2005. According to MacCora's affidavit, however, Kinzenbaw never delivered written notice that he was exercising the option and never tendered the purchase price for the home. Thus, under the uncontroverted facts before the superior court on MacCora's motion for summary judgment, MacCora did not breach the contract by failing to sell the home to Kinzenbaw pursuant to the option. See *Esplendido Apartments v. Olsson*, 144 Ariz. 355, 361, 697 P.2d 1105, 1111 (App. 1984) (one party cannot place the other in breach for failure to perform without first either offering to or actually tendering its own performance). Because there was no evidence that MacCora breached the agreement, Kinzenbaw was not entitled to specific performance, see *Rogers*, 126 Ariz. at 182, 613 P.2d at 846 (specific performance will not lie where the "integral part of the option" is not satisfied), and was not entitled to monetary damages.

¶12 MacCora's motion also demonstrated that as a matter of law, MacCora was not unjustly enriched. A claim for unjust enrichment may not be brought when a contract governs the relationship of the parties. See *Trustmark Ins. Co. v. Bank*

One, Ariz., NA, 202 Ariz. 535, 542, ¶ 34, 48 P.3d 485, 492 (App. 2002). Additionally, MacCora was entitled to judgment as a matter of law on Kinzenbaw's claims for intentional misrepresentation, negligent misrepresentation and consumer fraud. Those claims were based on MacCora's original position that Kinzenbaw's claims were barred by the statute of frauds (because MacCora's co-owner, McBride, had not signed the operative agreements). Because MacCora subsequently abandoned that argument, Kinzenbaw's misrepresentation and fraud claims became moot.

¶13 Although Rule 56(e) permits the grant of motion for summary judgment in the absence of a response from a non-moving party, this is true only to the extent that the moving party has presented evidence entitling it to judgment as a matter of law. *Schwab*, 207 Ariz. at 60, ¶ 16, 83 P.3d at 60. MacCora's motion met his initial burden of demonstrating that no genuine issue of material fact existed and summary judgment was appropriate as a matter of law. Because Kinzenbaw failed to controvert the facts MacCora offered in support of his motion, we affirm the superior court's grant of summary judgment.

C. The Superior Court Did Not Abuse Its Discretion in Denying Kinzenbaw's Motion to Set Aside.

¶14 The superior court's order denying Kinzenbaw's Motion to Set Aside did not state whether it treated the motion as a

motion for reconsideration, pursuant to Rule 7.1(e), or a motion for relief pursuant to Rule 60(c). We review a superior court's denial of either motion for abuse of discretion. *McGovern v. McGovern*, 201 Ariz. 172, 175, ¶ 6, 33 P.3d 506, 509 (App. 2001) (motion for reconsideration); *Lennar Corp. v. Auto-Owners Ins. Co.*, 214 Ariz. 255, 268, ¶ 51, 151 P.3d 538, 551 (App. 2007) (motion pursuant to Rule 60(c)).

¶15 Kinzenbaw's motion argued he promptly sought relief from summary judgment, his failure to respond to the motion for summary judgment was excusable neglect, and his claims were meritorious. The Motion to Set Aside was supported by Kinzenbaw's affidavit, in which he swore that on July 26, 2005, he notified MacCora by phone that he intended to exercise the option, and that he prepared a written notice to give to MacCora but despite setting several appointments, MacCora failed to show up each time. He stated that when he and a witness and MacCora finally met on August 15, he "tendered a written notice of exercising the option and a check for the purchase payment. [MacCora] pushed these back to . . . Kinzenbaw and instead offered him a new rental agreement and purchase option agreement that were at a higher price." Kinzenbaw further explained that he had failed to respond to the motion for summary judgment

because he was "not an attorney and [was] not familiar with court procedures or filing deadlines."

¶16 Kinzenbaw also attached to his motion an affidavit from a third party who averred that he had agreed to loan Kinzenbaw \$114,000 to close escrow on the home prior to August 15, 2005, and that he had funds available to do so. Kinzenbaw did not, however, attach a copy of the writing by which he asserted he had given notice of his intent to exercise the option; nor did he offer any explanation for his failure to offer the writing. He also failed to specify the manner in which he had "tendered performance" on August 15.

¶17 Upon direction from the court, MacCora responded to Kinzenbaw's motion. Among other things, he asserted that in discovery, Kinzenbaw had produced an uncanceled check numbered 1030 dated August 1, 2005, made out to MacCora in the amount of \$114,100, which, MacCora alleged, Kinzenbaw contended was his tender of the option purchase price. MacCora denied receiving any such check and argued that the check could not have constituted Kinzenbaw's tender of performance because Kinzenbaw had not ordered numbered checks from his bank until (according to the bank statement) August 23, 2005, and other checks numbered prior to check 1030 did not clear the bank (according to the bank statement) until October 18 or 20 of 2006.

¶18 On the record presented us, we cannot conclude that the court abused its discretion in declining to grant Kinzenbaw's motion. Kinzenbaw argued that, pursuant to Rule 60(c)(1), his failure to respond to MacCora's motion for summary judgment was excusable neglect. The facts that he did not have an attorney and did not know he had to respond to MacCora's motion, however, do not constitute "a sufficient showing of excusable neglect." *Counterman v. Counterman*, 6 Ariz. App. 454, 457-58, 433 P.2d 307, 310-11 (1967). Kinzenbaw also argues that although he communicated with MacCora's counsel on a handful of matters at or around the time of the motion for summary judgment, counsel failed to alert him to the fact that his response date was approaching. We know of no authority, however, for the proposition that a party may rely on opposing counsel to apprise him of an approaching deadline.

CONCLUSION

¶19. We affirm the judgment in favor of MacCora.

Diane M. Johnsen

DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

Jon W. Thompson

JON W. THOMPSON, Judge

Ann A. Scott Timmer

ANN A. SCOTT TIMMER, Judge