

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-006568

02/16/2012

HONORABLE GEORGE H. FOSTER, JR.

CLERK OF THE COURT
J. Polanco
Deputy

CANICO CAPITAL GROUP L L C

LANCE R BROBERG

v.

OLYMPIC 2000 INVESTMENTS GROUP L L C, FRANKLYN D JEANS
et al.

COURT ADMIN-CIVIL-CCC

RULING
CASE ON INACTIVE CALENDAR

East Court Building – Courtroom 811

2:03 p.m. This is the time set for Oral Argument on Plaintiff's Motion for Summary Judgment, electronically filed on October 24, 2011; and Fair Market Value Hearing. Plaintiff is represented by counsel, Lance R. Broberg with party representative George Eshaghian also present. Defendants Olympic 2000 Investments Group, LLC and Avraham Hassid are represented by counsel, Franklyn D. Jeans and Cassandra H. Ayres.

Court Reporter, Amy Weaver, is present.

The Court notes the Defendants' Motion for Continuance of Fair Market Value Hearing, which was electronically filed February 15, 2012. Discussion is held regarding same.

Argument is presented to the Court.

For the reasons set forth on the record,

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IT IS ORDERED granting Plaintiff's Motion for Summary Judgment. Plaintiff's counsel shall file an appropriate form of Judgment for the Court's review within **twenty (20) days** of today's date. Plaintiff's form of Judgment shall include specific language that Defendants failed to submit any evidence to controvert Plaintiff's evidence of the fair market value.

12:23 p.m. Matter concludes.

LATER:

On October 24th, 2011, Plaintiff Canico Capital Group, LLC, filed a Motion for Summary Judgment against Defendants, Olympic 2000 Investments Group and Avraham Hassid. The Court held oral argument on Plaintiff's Motion. At the time of the hearing, Defendants had substituted new counsel who have appeared and requested a continuance. The Court finds no good cause for a continuance appears in the record. This is not the fault of new counsel. The Defendants have failed to disclose in any disclosure statement or discovery response, any evidence to controvert any factual allegation in Plaintiff's Motion for Summary Judgment. The Defendants request a 30-45 day continuance to see if they can commission an appraisal to controvert Plaintiff's evidence. The time for having done so has passed. Any further delay would be to the prejudice of the Plaintiff. The Court having considered the motion and the attachments thereto, as well as the relevant portions of the record in the matter, finds as follows.

The Defendants have failed to file a Response to the Motion for Summary Judgment. "When a party moving for summary judgment makes a prima facie showing that no genuine issue of material fact exists, the burden shifts to the opposing party to produce sufficient competent evidence to show that an issue exists." See *Kelly v. Nations Banc Mortgage Corp.*, 199 Ariz. 284, 287, 17 P.3d 790, 793 (App.2000) citing *GM Dev. Corp. v. Cmtv. Am. Mortgage Corp.*, 165 Ariz. 1, 5, 795 P.2d 827,831 (App. 1990)

Rule 56(e) provides that "an adverse party may not rest upon the mere allegations or denials of [its] pleading," and that if the party does not respond, summary judgment shall be entered against the party "if appropriate." Choisser, 12 Ariz.App. at 261, 469 P.2d at 495 (quoting Ariz. R. Civ. P. 56(e)). This is another way of saying that the moving party is entitled to summary judgment if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1); Markel v. Transamerica Title Ins. Co., 103 Ariz. 353, 358, 442 P.2d 97, 102 (1968), overruled on other grounds by Burch & Cracchiolo v. Pugliani, 144 Ariz. 281, 288, 697 P.2d 674, 681 (1985). The burden of showing that no genuine issue of material fact exists rests with the party seeking summary judgment. Chanay, 115 Ariz. at 38, 563 P.2d at 293.

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The admonition in Rule 56(e) simply means that a nonmoving party who fails to respond does so at his peril because the trial court will presume that any uncontroverted evidence favorable to the movant, and from which only one inference can be drawn, is true. Choisser, 12 Ariz.App. at 261, 469 P.2d at 495. If that uncontroverted evidence would entitle the movant to a judgment as a matter of law, then the trial court must grant the summary judgment motion. *Id.* However, if a moving party's summary judgment motion fails to show an entitlement to judgment, the nonmoving party need not respond to controvert the motion. See United Bank of Ariz. v. Allyn, 167 Ariz. 191, 196, 805 P.2d 1012, 1017 (App.1990) (citing Chanay, 115 Ariz. at 38, 563 P.2d at 293); see also Zimmerman v. Shakman, 204 Ariz. 231, 237, ¶ 21, 62 P.3d 976, 982 (App.2003) (stating that Rule 7.1(b) "is not mandatory, and the failure to respond does not in and of itself authorize a judgment against the nonmoving party if the motion fails to demonstrate the movant's entitlement to the requested relief").

By failing to file a Response to the Motion, the Defendants have waived any procedural or evidentiary arguments or objections that could have been made in response to the motion. *Johnson by Johnson v. Svidergol, 157 Ariz. 333, 335 (App. 1988)*. According to A.R.S. Rules of Civil Procedure, Rule 56(c), "A party opposing the motion must file affidavits, memoranda or both within 30 days after service of the motion." The effect of non-compliance to Rules 56(c) and (e) Ariz. R. Civ. Pro. may be deemed as consent to the denial or granting of the motion, and the court may dispose of the motion summarily, if appropriate.

Generally, if a party merely rests on his pleadings when the movant supports his motion for summary judgment with an affidavit alleging specific facts, the non-moving party risks finding by court that facts stated in affidavits negate existence of genuine material factual dispute and that summary judgment is appropriate. Insurance Agencies Co. v. Weaver (1979) 124 Ariz. 327, 604 P.2d 258. In this case, the Plaintiff's have produced evidence of admissions by the Defendants agreeing to the amount of the deficiency. There is no question of material fact.

Based on the matters presented,

THE COURT FINDS the movant is entitled to summary judgment as a matter of law and there is no dispute as to any material fact.

IT IS ORDERED granting the Motion for Summary Judgment filed by the Plaintiff Canico Capital Group, LLC.

IT IS FURTHER ORDERED moving party to file a Form of Judgment within 20 days of this Order.

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IT IS FURTHER ORDERED the Plaintiff is entitled to its attorney's fees and costs pursuant to ARS§ 12-341.01 or 12-349 and shall submit an Application for the award of such fees and costs within 30 days of this date.

IT IS FURTHER ORDERED this matter will be placed on the Inactive Calendar for 90 days following this Order.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.