IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JACE FRANK EDEN, *Plaintiff/Appellant*,

v.

FIDELITY NATIONAL TITLE INS. CO., and LAWYERS TITLE INS. CORP., *Defendants/Appellees*.

No. 1 CA-CV 15-0162
FILED 4-12-16
AMENDED PER ORDER FILED 4-19-16

Appeal from the Superior Court in Navajo County
No. S0900CV201400436
The Honorable Donna J. Grimsley, Judge *Retired*

AFFIRMED

COUNSEL

Jace Frank Eden, Florence
Plaintiff/Appellant

Fidelity National Law Group, Phoenix
By Brian J. Cosper
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge Kenton D. Jones joined.

H O W E, Judge:

¶1 Jace Frank Eden appeals the trial court's order dismissing his complaint[1] against Fidelity National Title Insurance Company and Lawyers Title Insurance Corporation (collectively, "title insurance companies") and denying his motion to amend the complaint. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Eden is the managing member of B.I.S.H. LLC and Branding Iron Plaza, LLC. In 2006, Branding Iron Plaza purchased a restaurant from Geraldine Deublein—trustee of the Geraldine A. Deublein Trust ("Deublein Trust")—financing the purchase through a loan from the Deublein Trust secured by a deed of trust to the property. Transnation Title Insurance Company—the title insurance companies' predecessor—issued a policy listing Eden as the insured. But on that same day, Eden conveyed his interest in that policy to the Deublein Trust in connection with the deed of trust used to secure the loan to finance the purchase, thereby forfeiting his interest in the policy. Transnation then issued a title insurance policy consistent with this arrangement, listing itself as trustee, Eden as trustor, and Deublein as beneficiary and the insured party ("the Deublein policy"). Later that year, B.I.S.H. purchased several properties adjoining the restaurant, for which Transnation issued a title insurance policy listing B.I.S.H. as the insured party ("the B.I.S.H. policy").

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[1] The complaint also listed Addie Bethoon and Walter Bethoon as plaintiffs. However, only Eden signed the notice of appeal. As a non-attorney, Eden cannot bring an appeal on behalf of other plaintiffs. *See Haberkorn v. Sears, Roebuck & Co.*, 5 Ariz. App. 397, 399, 427 P.2d 378, 380 (App. 1967) (providing that persons not admitted to practice law in Arizona may not represent another individual); *Ramada Inns, Inc. v. Lane & Bird Adver., Inc.*, 102 Ariz. 127, 128, 426 P.2d 395, 396 (1967) (providing the same regarding representation of corporations). Thus, Eden is the only appellant in this appeal.

¶3 Eden constructed a patio on one of B.I.S.H.'s adjoining properties, blocking access to the back of the restaurant's property. Then in 2012, Eden defaulted on the loan used to purchase the restaurant from the Deublein Trust and the property consequently reverted to the trust. Deublein then sought a preliminary injunction to enforce the use of an easement at the rear of the property that she had previously used for deliveries, but had been blocked by the construction of the back patio. Around that same time, the City of Show Low notified Eden that the back patio blocked the city's access to its utilities easement and asked that he remove the patio. The trial court issued an injunction that required that the patio be torn down.

¶4 Eden sued the title insurance companies, alleging that they breached the Deublein and B.I.S.H. policies by not recording the driveway and utilities easements, resulting in the patio's removal, restricted use of the property, and frustration of Eden's other plans for the land. Pursuant to Arizona Rule of Civil Procedure 12(b)(6), the title insurance companies moved to dismiss the complaint for failure to state a claim upon which relief could be granted, arguing that Eden lacked standing because he was not a party to either policy. In response, Eden moved for default judgment, claiming the title insurance companies' motion to dismiss was not a proper answer to his complaint, but the trial court denied Eden's motion. In an unsigned notice, the trial court granted the motion to dismiss, finding that Eden was not a party to either policy and could not bring a breach of contract claim. Eden later moved to amend the complaint under Arizona Rule of Civil Procedure 15 to clarify his claims, but did not provide the specific proposed amendments. Ten days later, and without leave of court, Eden filed an amended complaint, which the title insurance companies moved to strike. The trial court subsequently dismissed the complaint, denied Eden's motion to amend as moot, and granted the motion to strike. Eden timely appealed.

DISCUSSION

1. Motion to Dismiss

¶5 Eden argues that the trial court erred in granting the title insurance companies' motion to dismiss because he was a party to the policies. We review the trial court's dismissal of a complaint for failure to state a claim de novo, accepting all factual allegations as true and resolving all inferences in favor of the plaintiff. *See Coleman v. City of Mesa*, 230 Ariz. 352, 355 ¶ 7, 284 P.3d 863, 866 (2012); *Castle v. Barret-Jackson Auction Co., LLC*, 229 Ariz. 471, 473 ¶ 8, 276 P.3d 540, 542 (App. 2012). Because Eden was

not a party to either contract that he alleges the title insurance companies breached, the trial court properly dismissed his complaint.

¶6 As a preliminary matter, Eden argues that the title insurance companies' motion to dismiss was procedurally defective because they did not first file a notice of appearance or an answer to his complaint. He argues that as a result, the trial court should have granted his application for default judgment. But Arizona Rule of Civil Procedure 55(a)(4) provides that the trial court can only enter default if the "party against whom relief is sought has failed to plead *or otherwise defend*." (emphasis added). Although a motion to dismiss is not a pleading, *see* Ariz. R. Civ. P. 7(a), it has long been recognized as satisfying a party's need to "otherwise defend," *see Prutch v. Town of Quartzite*, 231 Ariz. 431, 436 ¶ 17, 296 P.3d 94, 99 (App. 2013). Eden also argues that the motion was untimely because the title insurance companies did not file it within the twenty days of service. But because Arizona Rule of Civil Procedure 12(b) requires that a motion be made "before pleading if a further pleading is permitted" and the trial court did not enter default judgment against the companies, further pleading was permitted and the motion was not untimely. Accordingly, the motion to dismiss was not procedurally defective and the court did not err in denying Eden's motion for default judgment.

¶7 On the merits, the trial court did not err in dismissing Eden's complaint because he was not a party to the Deublein policy. The policy clearly stated that the Deublein Trust's trustee was the insured party and beneficiary under the policy. Eden counters that as the trustor he was a party to the Deublein policy. But Eden's argument misunderstands the purpose of title insurance. Under a title insurance policy, "the insurer agrees to indemnify the insured for losses caused by claims arising from encumbrances not identified in the insurer's commitment." *Centennial Dev. Grp., LLC v. Lawyer's Title Ins. Corp.*, 233 Ariz. 147, 149 ¶ 6, 310 P.3d 23, 25 (App. 2013). Eden was neither the insured nor the insurer of this policy, and thus he cannot personally sustain a claim seeking to enforce the insured's contractual benefits.

¶8 Likewise, the court did not err in finding that Eden was not a party to the B.I.S.H. policy. The policy listed B.I.S.H., a limited liability company, as the insured party. Again, Eden was neither the insured nor the insurer. Eden counters that even though B.I.S.H. is the listed insured, he was the equitable owner as evidenced by B.I.S.H.'s profits and losses flowing through his tax returns. But unlike trusts, which split legal interests and equitable interests between the trustee and beneficiary, *see* RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. F (1959), no such separation of

interests is recognized in limited liability companies. Instead, limited liability companies are separate legal entities distinct from their members and may own real and personal property in their own name. *See* A.R.S. § 29–610(A)(2); *see also Deutsche Credit Corp. v. Case Power & Equip. Co.*, 179 Ariz. 155, 160, 876 P.2d 1190, 1195 (App. 1994). B.I.S.H. therefore had both the legal and equitable interests in the contract with the title insurance companies. Eden did not have an equitable interest in the contract. Rather, as a member of B.I.S.H. he was limited to his personal property interest in the company itself; that is, a "share of the profits and losses . . . and the right to receive distributions of limited liability company assets." *See* A.R.S. §§ 29–601(13) (defining "member's interest") and –732(A) (providing that interest in a limited liability company is personal property).

¶9 Eden further counters that B.I.S.H. was only the "adopted name" he uses to conduct business, and that he held equitable ownership over B.I.S.H. contracts. Although the limited liability company may have reserved to itself the right to use "B.I.S.H." as its business name pursuant to A.R.S. § 29–603, Eden did not adopt the name as an alias. Holding otherwise would ignore that a limited liability company is a separate and distinct legal entity. Accordingly, Eden's complaint failed to state a claim upon which relief can be granted because his claim attempted to enforce the company's rights, not his rights.

2. Motion to Amend Complaint

¶10 Eden next argues that the trial court erred in denying his motion to amend his complaint. We review the denial of a motion to amend for an abuse of discretion. *Timmons v. Ross Dress For Less, Inc.*, 234 Ariz. 569, 572 ¶ 17, 324 P.3d 855, 858 (App. 2014). "A court does not abuse its discretion in denying a motion for leave to amend if the amendment would be futile." *Elm Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, 292 ¶ 26, 246 P.3d 938, 943 (App. 2010).

¶11 Because any amendments to Eden's complaint would have been futile, the trial court not did err. Eden's amended complaint did not add any new claims against the title insurance companies, but simply restated the claims made in his original complaint in a different manner. Nor could any amendments cure the fact that Eden lacked the rights he sought to enforce under the policies because he was not the insured party under either title insurance contract. Additionally, although Eden requests for the first time in his reply brief that he be allowed to represent the interests of B.I.S.H. on appeal, we do not consider arguments raised for the first time in a reply brief. *See Dawson v. Withycombe*, 216 Ariz. 84, 111 ¶ 91,

163 P.3d 1034, 1061 (App. 2007). Regardless, a separate legal entity like a corporation or limited liability company must be represented by a lawyer. *See Boydston v. Strole Dev. Co.*, 193 Ariz. 47, 49 ¶ 7, 969 P.2d 653, 655 (1998). Accordingly, the trial court did not abuse its discretion in denying Eden's motion to amend.

3. Attorneys' Fees

¶12 Eden requests costs under A.R.S. § 12–341. Because he did not prevail, we deny his request. The title insurance companies request attorneys' fees and costs under A.R.S. §§ 12–341 and –341.01. Although Eden was not a party to the title insurance contracts, this action nonetheless arises out of contract for purposes of awarding fees under A.R.S. § 12–341.01. *See Nolan v. Starlight Pines Homeowners Ass'n*, 216 Ariz. 482, 490 ¶ 36, 167 P.3d 1277, 1285 (App. 2007) (providing that a court may award fees to a defendant in a contract action if the defendant prevails on the basis that no contract between the parties exists). Accordingly, we grant the title insurance companies' request. Additionally, as the prevailing party, the title insurance companies are entitled to their costs upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶13 For the foregoing reasons, we affirm.