IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

EASTWOOD PARK HOMEOWNERS ASSOCIATION, an Arizona nonprofit corporation, Plaintiff/Appellee, v. C. DEAN CATHEY, individually and as Trustee of the 520 Stapley Drive Trust, dated August 20, 2008, Defendant/Appellant.	No. 1 CA-CV 10-0463 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure) **FILED 12/18/2012**

Appeal from the Superior Court in Maricopa County

Cause No. CV 2009-092933

The Honorable John R. Ditsworth

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

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G E M M I L L, Judge

¶1 Defendant/Appellant C. Dean Cathey ("Cathey") appeals the grant of summary judgment in favor of Plaintiff/Appellee Eastwood Park Homeowners Association ("HOA"). For the reasons that follow, we affirm the summary judgment granted against Cathey as trustee on count one of the HOA's complaint (for foreclosure of its lien) and reverse the summary judgment granted on count two of the HOA's complaint (for personal liability on the part of Cathey). We remand for further proceedings

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In 2008, Karl Conover ("Conover") was the fee simple owner of the condominium located at 520 N. Stapley Dr., #247, Mesa, Arizona 85203 ("Property"). The Property is subject to a recorded declaration of covenants, conditions, and restrictions ("CC&Rs"). Under the CC&Rs, Conover was obligated to pay monthly maintenance, special assessments, and any fines levied against him by the HOA, but he failed to do so.

¶3 On August 20, 2008, Conover apparently intended to establish the "520 N. Stapley Drive Trust, Dated August 20, 2008" ("Trust"). On that day, Conover executed a Warranty Deed ("Deed") transferring the Property to Cathey as the purported trustee of the Trust. Conover immediately recorded the Deed.

The Deed identifies Cathey as both the trustee and a beneficiary of the Trust.

¶4 Twelve days later, on September 1, 2008, Cathey purportedly assigned the beneficial interest in the Trust, including the Property, back to Conover ("Assignment") The Assignment was not recorded.

¶5 Apparently unaware that the Property had been conveyed to the Trust, the HOA filed a lawsuit against Conover and his wife to collect unpaid assessments. On November 13, 2008, default judgment was entered in favor of the HOA and against the Conovers.

¶6 The HOA subsequently discovered that the Property had been conveyed to the Trust and filed a complaint against Cathey in August 2009. Count one was a claim for lien foreclosure against Cathey as trustee of the 520 N. Stapley Drive Trust and count two sought a money judgment against Cathey personally for the assessments reduced to judgment against the Conovers ("delinquent assessments") and subsequent assessments (collectively "unpaid assessments").

¶7 In his answer and counterclaim, Cathey disputed (1) the HOA's right to foreclose the lien; (2) the amount of the lien; and (3) the HOA's right to hold him personally liable for unpaid assessments because the Property was owned by the Trust

and Conover (not Cathey) was the beneficiary of the Trust.

¶8 The HOA filed a motion for summary judgment and a motion to dismiss Cathey's counterclaim. Cathey failed to respond to either motion, instead filing his own motion to dismiss the claim against him personally. As proof that he was no longer the beneficiary of the Trust, Cathey attached the Assignment purporting to transfer the beneficial interest in the Trust back to Conover. The Assignment was dated twelve days after the Trust was purportedly established. The trial court granted the HOA's motion for summary judgment on both counts. Subsequently, the court also granted the HOA's motion to dismiss Cathey's counterclaim.

¶9 Cathey retained an attorney who filed a Rule 7.1(e) motion for reconsideration and an objection to the proposed judgment and response to the application for fees and costs. The trial court held oral argument on Cathey's objection to the proposed judgment and award of fees but not on his motion for reconsideration. The court denied the motion for reconsideration, denied the objections to the proposed judgment, awarded attorneys' fees to the HOA, and signed the HOA's proposed judgment.

¶10 Cathey timely appeals from the final judgment granting

the HOA summary judgment and awarding attorneys' fees.[1] In his opening brief, Cathey abandoned his appeal challenging the lien foreclosure and challenges only the summary judgment in the HOA's favor holding him personally liable for unpaid assessments. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") Section 12-2101(A)(1) (Supp. 2012).[2]

ANALYSIS

¶11 Cathey maintains that the trial court erred in granting the HOA's motion for summary judgment on count two (finding him personally liable) and that summary judgment should instead be entered in his favor (finding him not personally liable). We agree the grant of summary judgment to the HOA was inappropriate, but on this record we decline Cathey's request that we remand with instructions to grant summary judgment in his favor.

Summary Judgment

¶12 Our review of the granting of summary judgment is de

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[1] Cathey also appealed from the denial of his motion to reconsider. The denial of a motion for reconsideration, however, is not an appealable order unless it meets certain requirements which do not exist here. *Arvizu v. Fernandez,* 183 Ariz. 224, 226-227, 902 P.2d 830, 832-33 (App. 1995).

[2] We cite the current version of the Arizona statutes because no revisions material to this decision have occurred since the events in question.

novo, and summary judgment is appropriate if there are no genuine issues as to any material fact. *See* Ariz. R. Civ. P. 56(c)(1); *Orme Sch. v. Reeves,* 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). We review the evidence "in the light most favorable to the party against whom summary judgment was entered" and review de novo "whether any genuine issues of material fact exist." *TWE Ret. Fund Trust v. Ream,* 198 Ariz. 268, 271, ¶ 11, 8 P.3d 1182, 1185 (App. 2000).

¶13 As noted above, Cathey did not specifically respond to the HOA's motion for summary judgment. The movant is not entitled to summary judgment, however, simply because the other party fails to file a written response or opposing affidavits. *Wells Fargo Bank, N.A. v. Allen*, 1 CA-CV 11-0572, 2012 WL 6025607, at *5, ¶ 21 (Ariz. App. Dec. 4, 2012); *Schwab v. Ames Constr.,* 207 Ariz. 56, 59, ¶ 15, 83 P.3d 56, 59 (App. 2004) (citation omitted). Rather, the trial court has a duty to ensure the moving papers establish an entitlement to judgment as a matter of law. *United Bank of Ariz. v. Allyn,* 167 Ariz. 191, 196, 805 P.2d 1012, 1017 (App. 1990). The party seeking summary judgment bears the burden of proving that he is entitled to summary judgment. *Chanay v. Chittenden,* 115 Ariz. 32, 38 563 P.2d 287, 293 (1977).

¶14 To affirm summary judgment for the HOA, we must find

undisputed evidence that Cathey owned the Property at the time assessments were levied and that Cathey expressly assumed Conover's delinquent assessments. Genuine issues of material fact, however, exist as to Cathey's ownership of the Property: for example, whether the Deed executed by Conover was ever delivered and accepted by Cathey as trustee; and if so, whether Cathey was the sole beneficiary; and the meaning and effect of the Assignment executed by Cathey twelve days after the date of the deed. The doctrine of merger may or may not apply depending on the resolution of some or all of these fact questions. Accordingly, based on our review of the record and the law, we conclude that the HOA was not entitled to summary judgment on count two, regarding Cathey's personal liability.[3]

¶15 On the basis of the Deed executed by Conover, the HOA asserted that:

> Mr. Conover named the Defendant as <u>both</u> Trustee and Trust Beneficiary of the 520 N. Stapley Trust in the Warranty Deed.

Based on that fact alone, *t*he HOA argued that:

> As both the trustee and beneficiary of the 520 N. Stapley Trust, the Defendant became the record title holder of the Property and he became obligated for the unpaid assessments and associated costs incurred by

[3] We affirm the summary judgment in favor of the HOA on count one (lien foreclosure against the Property) because Cathey abandoned his appeal of this count in his opening brief.

Mr. Conover pursuant to the Declaration.

The HOA maintains that the Deed proves that Cathey was the fee simple owner of the Property under the doctrine of merger. Under the doctrine of merger, "[i]f the legal title to the trust property and the entire beneficial interest become united in one person, the trust terminates." Restatement (Third) of Trusts § 69 (2003). A related issue is whether a trust was ever formed; that is, whether the doctrine of merger prevented the formation of the trust. We do not reach these issues, however; because before the doctrine of merger may be applied, the HOA must show that the Deed was delivered to and accepted by Cathey.

¶16 Cathey argues that the Deed alone does not establish that he was a fee simple owner of the Property. He contends that he did not have title interest in the Property and did not sign the Deed that purports to make him trustee of the Property. Cathey argues that the HOA has not cited any authority that would allow a third party to thrust ownership of property, and thus liability, onto an individual based solely on the third party's actions. Cathey asserts that the HOA has produced no evidence to prove that the Deed was delivered to Cathey or that Cathey accepted the Deed.

¶17 When a grantor intends to create a trust by a technical conveyance, the ordinary requirements of delivery and

acceptance are fully applicable just as in other conveyances. 76 Am. Jur. 2d *Trusts* § 47 (2012). In Arizona, no interest in land "shall be conveyed unless the conveyance is by an instrument in writing, subscribed and delivered by the party disposing of the estate." A.R.S. § 33-401 (Supp. 2012). A deed to real property does not vest legal title in a grantee until it is delivered and accepted. *Roosevelt Sav. Bank of City of N.Y. v. State Farm Fire & Cas. Co.,* 27 Ariz. App. 522, 524, 556 P.2d 823, 825 (1976) (citation omitted). "To establish a trust in real property where the trustee is a third party a deed of the land to the trustee must be executed and delivered to the trustee so as to pass title to him." *Hinton's Ex'r v. Hinton's Comm.,* 76 S.W.2d 8, 11 (Ky. Ct. App. 1934).

¶18 The HOA did not include in its moving papers any evidence that Cathey received and accepted the Deed. The Deed by itself does not establish that Cathey accepted the Property as trustee. The Deed purports to transfer the Property to Cathey as trustee, but it is signed by Conover and not by Cathey. The HOA's motion for summary judgment did not include any other evidence or testimony from Cathey to establish his acquiescence to the arrangement. Consequently, the HOA's motion for summary judgment was missing essential elements regarding whether the Deed was delivered and accepted by Cathey as

trustee.

¶19 Additionally, we note that the record does not include the Trust Agreement. The HOA has premised Cathey's liability on the fact that he became the owner of the Property through the doctrine of merger. This theory requires the HOA to present evidence establishing that Cathey is both the sole trustee and the sole beneficiary of the Property. *See* A.R.S. § 14-10402 (A)(5) (2012) (providing a valid trust requires that "the same person is not the sole trustee and sole beneficiary"). In its motion for summary judgment, however, the HOA attached only the Deed and alleged that Cathey is "both the trustee and the beneficiary." The Deed alone does not conclusively establish that Cathey is the *sole* trustee and *sole* beneficiary under the Trust Agreement. *See* 76 Am. Jur. 2d *Trusts* § 262 (2012) ("[t]he doctrine of merger does not apply . . . where there is more than one trustee and beneficiary"). Because the Trust Agreement is not part of the record, it cannot be conclusively determined from the Deed alone whether Cathey was the sole beneficiary.

¶20 Summary judgment should only be granted when there are no genuine issues of material fact and further inquiry is not necessary to clarify the application of the law. *Boozer v. Ariz. Cnty. Club*, 102 Ariz. 544, 548, 434 P.2d 630, 634 (1967) (citation omitted). Accordingly, we cannot on this record

affirm the trial court's grant of the HOA's motion for summary judgment regarding Cathey's personal liability.

¶21 Cathey requests on appeal that we remand to the trial court with instructions to enter summary judgment on his behalf. *See Trimmer v. Ludtke,* 105 Ariz. 260, 263, 462 P.2d 809, 812 (1969) (holding summary judgment may be entered against a moving party, even though opposing party has not filed a cross motion for summary judgment). We decline to do so on the record presented. First, Cathey did not request summary judgment at the trial court. We generally do not consider issues raised for the first time on appeal. *Sereno v. Lumbermens Mut. Cas. Co.,* 132 Ariz. 546, 549, 647 P.2d 1144, 1147 (1982). Furthermore, there are undeveloped factual and legal issues that remain regarding Cathey's liability for the HOA assessments. The Trust Agreement, which is absent from the record, may establish whether the doctrine of merger applied to vest in Cathey fee simple ownership of the Property.

¶22 The interpretation of the Assignment executed by Cathey may also impact the determination of his personal liability. The Assignment was filed by Cathey in his unsuccessful attempt to have the court dismiss count two of the HOA's complaint, and there is no indication in the record that the court considered it in granting summary judgment. On

appeal, the parties disagree regarding the intent and the meaning of the Assignment. The pertinent facts and legal interpretation of the Assignment should be developed initially in the trial court. Just as we must exercise "extreme caution" when affirming summary judgment on grounds not considered by the trial court, see *Rhoads v. Harvey Publ'ns, Inc.,* 131 Ariz. 267, 269, 640 P.2d 198, 200 (App. 1981), we must also be very cautious about granting summary judgment to the opposing party.

¶23 Given the undeveloped factual and legal issues regarding the conveyance to Cathey, the potential of merger, and the meaning and effect of the Assignment, we decline to order summary judgment in Cathey's favor.

Attorneys' Fees and Costs

¶24 Because we vacate the entry of summary judgment for the HOA as to count two of the complaint, we also vacate the attorneys' fees and costs awarded by the trial court against Cathey personally. On remand, the trial court may again consider awarding attorneys' fees to the successful party once that party has been determined.

¶25 In our discretion, we decline to award Cathey his attorneys' fees incurred at the trial court or on appeal. We also decline to award fees to the HOA on appeal. We do, however, award Cathey his taxable costs on appeal in accordance

with A.R.S. § 12-342 (2003), contingent upon his compliance with Arizona Rule of Civil Appellate Procedure 21(a).

DISPOSITION

¶26 We affirm the trial court's grant of summary judgment on count one of the HOA's complaint but reverse the summary judgment on count two, regarding Cathey's personal liability. We also vacate the award of fees and costs against Cathey personally. And we remand for further proceedings consistent with this decision.

/s/
JOHN C. GEMMILL, Judge

CONCURRING:

/s/
JON W. THOMPSON, Presiding Judge

/s/
MAURICE PORTLEY, Judge