NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 10/25/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

HARRIET JOHNSON,	)	1 CA-CV 12-0119
	)	
Plaintiff/Appellant,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	
DIANE GIOVANELLI,	)	(Not for Publication –
	)	Rule 28, Arizona Rules of
Defendant/Appellee.	)	Civil Appellate Procedure)
	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-032404

The Honorable Hugh E. Hegyi, Judge

AFFIRMED

Harriet Johnson — Wisconsin
In Propria Persona
Plaintiff/Appellant

The Frutkin Law Firm, PLC — Phoenix
By C. Adam Buck
Attorneys for Defendant/Appellee

K E S S L E R, Judge

¶1 Plaintiff/Appellant Harriett Johnson ("Mother") appeals the superior court's summary judgment for

Defendant/Appellee Diane Giovanelli ("Daughter") on Mother's claim to quiet title. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 This case involves a dispute over title to real property located in Sun City (the "Property"). Mother resides at the Property during the winter months and lives in Wisconsin during the remainder of the year. Daughter lives in Wisconsin.

¶3 On November 16, 1999, Mother executed a warranty deed conveying the Property to herself and Daughter "as joint tenants with right of survivorship." The warranty deed indicates D. Lawrence Jefferson notarized Mother's signature in Maricopa County. Daughter accepted and approved the warranty deed on November 22, 1999, and her signature was notarized in Kenosha, Wisconsin. Thereafter, the Jefferson Law Offices of Surprise, Arizona, recorded the warranty deed with the Maricopa County Recorder.

¶4 On November 15, 2010, Mother filed a complaint to quiet title to the Property in her name. Mother alleged she executed the warranty deed under a mistake of law because she only intended to convey a beneficiary interest in the Property to Daughter, not a present interest. In addition, Mother asked the court to enforce Daughter's alleged oral agreement to convey her interest in the Property to Mother. The court dismissed the

complaint without prejudice on the grounds it failed to state a claim.

¶5 Mother then filed an amended complaint in which she alleged she had not intended to convey a present interest in the Property to Daughter, but only to execute a revocable beneficiary deed. She also asserted the warranty deed was invalid because she was coerced to sign a document that differed from her intent. In addition, she alleged Daughter had requested Mother remove Daughter's name from the title to the Property, but then refused to execute the quit claim deed Mother presented.

¶6 Daughter moved for summary judgment on the grounds Mother's alleged mistake of law was an insufficient basis to reform the validly executed warranty deed. She also argued the statute of frauds barred enforcement of any alleged oral agreement to re-convey her interest in the Property to Mother.

¶7 Mother asserted she was entitled to reform the warranty deed based on her unilateral mistake, and claimed a material question of fact existed regarding the circumstances surrounding the execution of the warranty deed, including Mother's lack of donative intent and alleged coercion. In addition, she asked the court to deny Daughter's motion pursuant to Arizona Rule of Civil Procedure 56(f) because the Jefferson

Law Offices were no longer in business and she could not obtain evidence from them to support her case.

¶8 In support of her response, Mother filed an affidavit in which she averred that immediately after she acquired the Property she contacted a paralegal named Mr. Jackson and asked him to make arrangements for Daughter to receive the Property upon Mother's death. She asserted she could not verify whether Mr. Jackson worked for the Jefferson Law Offices because she could not locate the law office at the address listed on the warranty deed. She claimed she understood the warranty deed accomplished her intention and stated, as relevant: "At no time was I told that I would be conveying any interest in the [P]roperty prior to my death or that I could not revoke it . . . ." Mother stated she had not intended to transfer a present interest in the Property to Daughter because she believed certain age restrictions prohibited Daughter from owning an interest in the Property.

¶9 The court granted Daughter's motion for summary judgment and awarded her attorneys' fees and costs. Mother timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (Supp. 2011).

ISSUES

¶10 Mother contends the superior court erred in granting Daughter's motion for summary judgment because genuine issues of

material fact existed regarding the creation, signing, and recording of the warranty deed. She also argues the court erred in denying her Rule 56(f) request for additional time to obtain evidence necessary to justify her opposition to Daughter's motion for summary judgment. Further, Mother contends the court erred by allowing Daughter to communicate with it ex parte and by failing to take any action when Daughter did not properly answer the complaint.

DISCUSSION

A. No Genuine Issues of Material Fact Precluded Summary Judgment for Daughter

¶11 Mother argues the superior court erred by granting Daughter's motion for summary judgment because genuine issues of material fact existed regarding the creation, signing, and recording of the warranty deed.

¶12 "[W]e view the evidence in the light most favorable to the party against whom judgment was entered, and determine *de novo* whether there are any genuine issues of material fact and whether the trial court erred in its application of the law." *Unique Equip. Co. v. TRW Vehicle Safety Sys., Inc.*, 197 Ariz. 50, 52, ¶ 5, 3 P.3d 970, 972 (App. 1999). We will affirm the entry of summary judgment if it is correct for any reason. *Hawkins v. State*, 183 Ariz. 100, 103, 900 P.2d 1236, 1239 (App. 1995).

¶13 Mother did not present any evidence that the warranty deed was invalid on its face. *See Boone v. Grier*, 142 Ariz. 178, 182, 688 P.2d 1070, 1074 (App. 1984) ("There is a rebuttable presumption that record title accurately reflects the ownership interest in real property."). She contends, however, that she raised material questions of fact regarding the validity of the warranty deed because the deed does not reflect her intent to confer a revocable beneficiary interest, rather than transfer a present interest in the Property. Accepting, as we must, Mother's evidence regarding the creation of the warranty deed and assuming the deed does not reflect her intent, we nevertheless determine her claim to quiet title failed as a matter of law because Mother's misunderstanding of the legal effect of the warranty deed is not a legitimate basis on which to invalidate the deed. *See id.* (rejecting argument that factual issues regarding parties' intent at conveyance precluded judgment as a matter of law; evidence only suggested unilateral mistake of law, which was not proper grounds for reformation).

¶14 Mother argues, in the alternative, that she was unduly influenced or fraudulently induced to sign the warranty deed. She presented no evidence, however, that Daughter participated in any such misconduct. *See id.* (noting a court in equity may reform a deed when: "(1) the instrument failed to conform to what both parties intended, (2) the complaining party was

mistaken as to the factual content of the deed *and the other party*, knowing of this mistake, kept silent, or (3) the claiming party was mistaken as to the factual content of the deed because of fraudulent affirmative behavior *of the other party*." (emphasis added)). The superior court properly granted summary judgment for Daughter.

B. The Court did not Abuse its Discretion by Denying Mother's Request for a Rule 56(f) Continuance

¶15 Mother asked the court to deny Daughter's motion for summary judgment pursuant to Rule 56(f) because the Jefferson Law Offices were no longer in business and she could not obtain evidence from them to support her case.[1] By granting the motion, the superior court implicitly denied Mother's Rule 56(f) request for additional time to obtain evidence necessary to justify a good faith opposition to Daughter's motion. We review the denial of a request for a continuance pursuant to Rule 56(f) for an abuse of discretion. *Maricopa Cnty. v. Kinko's Inc.*, 203 Ariz. 496, 501, ¶ 19, 56 P.3d 70, 75 (App. 2002); *see also Bobo v. John W. Lattimore, Contractor*, 12 Ariz. App. 137, 141, 468 P.2d 404, 408 (1970).

[1] Although Mother asked the court to *deny* Daughter's motion pursuant to Rule 56(f), that rule allows the court to *postpone* a ruling to allow the non-movant to obtain evidence necessary to oppose summary judgment. We therefore regard Mother's request as one for additional time to undertake additional discovery before responding to Daughter's motion for summary judgment.

¶16 To succeed under Rule 56(f), the moving party must present an affidavit informing the court of: (1) the particular evidence beyond the party's control, (2) the location of the evidence, (3) what the party believes the evidence will reveal, (4) the methods to be used to obtain it, and (5) an estimate of the amount of time the additional discovery will require. *Bobo*, 12 Ariz. App. at 141, 468 P.2d at 408; *see also Magellan S. Mountain Ltd. v. Maricopa Cnty.*, 192 Ariz. 499, 502, ¶ 10, 968 P.2d 103, 106 (App. 1998) (stating a vague summary is insufficient under Rule 56(f)). Mother's affidavit did not satisfy these requirements as it only stated Mother could not locate the Jefferson Law Offices at the address listed on the warranty deed and did not set forth the particular evidence she sought from the Jefferson Law Offices, what she believed it would show, or how and when she intended to discover it. Accordingly, the superior court did not abuse its discretion by denying Mother's Rule 56(f) request.

C. Ex Parte Communications and Award of Attorneys' Fees

¶17 Mother next asserts the court abused its discretion by allowing Daughter to communicate with it ex parte. Daughter filed her reply in support of the motion for summary judgment on June 7, 2011, and the certificate of mailing indicates she sent it to the Property. Thereafter, on June 21, 2011, Mother asserted she had not received a copy of the reply and asked the

court to require Daughter to serve it in accordance with the Arizona Rules of Civil Procedure. Daughter responded that she had mailed the reply to Mother's Arizona address (at the Property) and, apparently in response to Mother's June 21 request, mailed additional copies to Mother's Wisconsin address. Mother then filed an affidavit in which she avowed that mail sent to the Property was forwarded by the United States Postal Service, but she had not received Daughter's reply to the motion for summary judgment. She also alleged she had not received the additional copies Daughter claimed to have sent directly to Wisconsin. The superior court denied Mother's request that it compel Daughter to comply with the Arizona Rules of Civil Procedure regarding the service of documents, noting Mother had not demonstrated that Daughter had failed to comply with the rules.

¶18 Arizona Rules of Civil Procedure 5(c) permits service of pleadings and other papers on a party who has appeared in an action by mailing the document via U.S. mail to the party's last known address. Ariz. R. Civ. P. 5(a), (c)(2)(C). The party effecting service must note the date and manner of service on the original document or a separate certificate of mailing. Ariz. R. Civ. P. 5(c)(3). Although Rule 5(c) specifies service is complete upon mailing, the "trial court has discretion to entertain evidence of non-receipt and to relieve a party of the

consequences of its failure to respond to a document that the party *proves* it did not receive." *McEvoy v. Aerotek, Inc.*, 201 Ariz. 300, 304, ¶¶ 19-20, 34 P.3d 979, 983 (App. 2001). Daughter included a certificate of mailing with her reply indicating she served Mother with that document via U.S. mail. Although Mother claimed she had not received the reply, it was not error for the superior court to determine that avowal was insufficient to carry Mother's burden. Further, Mother's claim that she had to purchase a copy of the reply from the superior court clerk in order to prepare for oral argument is not an adequate demonstration of prejudice.

¶19 Mother also contends she did not receive copies of Daughter's motion for attorneys' fees and costs and proposed form of judgment. She argues it was improper for the court to deem her failure to respond to Daughter's request for attorneys' fees and costs as consent to the motion because Mother had earlier informed the court that she did not receive the motion.

¶20 Daughter included a certificate of mailing with the motion for attorneys' fees and costs that indicated she mailed the motion to Mother at both her Arizona and Wisconsin addresses. However, even accepting Mother's avowal that she did not receive the motion at either address, she admitted to the court she had actual knowledge of the pleading in her November 1, 2011 affidavit. Moreover, Mother does not argue she would

have opposed Daughter's request for attorneys' fees and costs or that the award was improper in any way. Accordingly, we find no error in the superior court's award of attorneys' fees and costs to Daughter.

D. Answer

¶21 Finally, Mother argues Daughter failed to properly answer the complaint, and the court erred by not entering a default judgment. Mother did not move for default judgment in the superior court or otherwise preserve this issue for appellate review. *See Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) ("Because a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects before error may be raised on appeal, absent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal."). Nevertheless, we find no defect in Daughter's pleadings.

¶22 Although Mother's argument is less than clear, she appears to contend Daughter erred by filing a motion to dismiss the original complaint rather than an "answer" or "response" in accordance with the instructions in the court's summons. However, the record contains no evidence regarding the instructions set forth in the summons because it is not attached to the affidavit supporting out-of-state service filed on Mother's behalf on December 13, 2010. Moreover, the Arizona

Rules of Civil Procedure permit a defendant to file either an answer *or* a motion to dismiss for failure to state a claim. Ariz. R. Civ. P. 12(a), (b)(6).

¶23 Mother further suggests Daughter's motion to dismiss was untimely. The record indicates Daughter's motion, dated December 17, 2010, was filed with the court on January 3, 2011, the same date Daughter filed her reply in support of the motion to dismiss. However, Mother filed a response to the motion to dismiss on December 22, 2010. Despite this incongruity, and even assuming Daughter did not timely file her motion to dismiss, the court did not err by failing to enter a default judgment against Daughter, as Mother did not file an application for entry of default in accordance with Arizona Rule of Civil Procedure 55(a).

CONCLUSION

¶24 For the foregoing reasons, we affirm. Daughter requests an award of attorneys' fees and costs on appeal pursuant to A.R.S. § 12-341.01(A) and (C) (2003). Section 12-341.01(A) provides for a discretionary award of fees to the successful party in an action arising out of a contract. Because section 12-341.01 does not apply in a quiet title action, we deny Daughter's request. *Lange v. Lotzer*, 151 Ariz. 260, 262, 727 P.2d 38, 40 (App. 1986) (holding A.R.S. § 12-341.01(A) does not apply to quiet title actions). Section 12-

341.01(C) allows a court to award reasonable attorneys' fees in a civil action when there is "clear and convincing evidence that the claim or defense constitutes harassment, is groundless and is not made in good faith." In the exercise of our discretion, we deny Daughter's request for an award of attorneys' fees pursuant to this provision. We award Daughter her appellate costs upon compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Presiding Judge

/s/
ANDREW W. GOULD, Judge