IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

SANTOS C. NIETO, *Plaintiff/Appellee*,

v.

JUAN C. NIETO; DANIEL C. NIETO; LINDA N. GARCIA; ANDREA N. MOLINA; JUANITA M. NIETO; and CELESTE M. NIETO,
Defendants/Appellants.

No. 1 CA-CV 12-0806
FILED 11-21-2013

Appeal from the Superior Court in Maricopa County
No. CV2010-027838
The Honorable Hugh Hegyi, Judge
The Honorable Randall Warner, Judge

AFFIRMED

COUNSEL

Martinez Law, P.L.C., Mesa
By Adam D. Martinez

Counsel for Plaintiff/Appellee

Community Legal Services, Phoenix
By David Vandeventer

Counsel for Defendants/Appellants

MEMORANDUM DECISION

Presiding Judge Maurice Portley delivered the decision of the Court, in which Judge John C. Gemmill and Judge Kent E. Cattani joined.

P O R T L E Y, Judge:

¶1 Juan Nieto, Daniel Nieto, Linda Garcia, Andrea Molina, Juanita Nieto and Celeste Nieto ("Defendants") appeal the summary judgment granted to Santos C. Nieto ("Santos"). Defendants argue that they presented evidence demonstrating a genuine issue of material fact sufficient to withstand the motion for summary judgment. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 This dispute concerns the ownership of two lots, Lots 27 and 28, Solares Addition, Guadalupe, Arizona ("the Property"). Santos is the uncle of Defendants, who are the children of Santos's deceased brother Juan C. Nieto Senior ("Juan Senior"). Santos acquired title to Lot 27 in approximately 1960 and title to Lot 28 in July 1971 from his mother and stepfather.

¶3 After their mother died intestate in 1974, Santos, Juan Senior, and a third brother, Gumero, inherited three parcels of property, Lots 23 and 24, and Lot 7. Juan Senior quitclaimed all his interest in Lots 23 and 24 to Santos in August 1984. Three days later, Santos quitclaimed all his interest in Lot 7 to Juan Senior.

¶4 The quitclaims did not, however, resolve ownership of the lots and the three brothers ended up in litigation in CV87-13053. The judgment issued by the superior court in 1989 determined that title to Lots 23 and 24 were quieted in Santos and Gumero was granted title to Lot 7 by adverse possession. The judgment also noted that Juan Senior had moved to Lot 27 in 1964 where he continued to live for more that twenty-five years, that the Property was titled in Santos's name, and that Santos had testified that he intended to deed the Property to Juan Senior at the conclusion of the litigation.

¶5 Juan Senior died in October 2009. Santos filed an action to quiet title to Lots 27 and 28 on September 24, 2010. In his complaint, Santos alleged that he owned the Property and had leased it to Juan Senior. The complaint further alleged that Santos had allowed Defendants to occupy Lot 27 as paying tenants after Juan Senior died, but Defendants refused to pay rent, refused to vacate when requested, and claimed to be the owners of the Property. Attached to the complaint were copies of the warranty deed and quitclaim deed for Lots 27 and 28, respectively, conveying the properties to Santos. The complaint was served on Defendants six days later.

¶6 Defendants had filed a lawsuit in July 2010, but did not serve it on Santos until November 2010. They later moved to consolidate their case, CV2010-095055, with Santos's lawsuit.

¶7 Santos filed a motion for summary judgment on December 15, 2010. He argued that Defendants had not alleged a viable theory by which they held title. Santos attached to the accompanying statement of facts his affidavit and avowed that he held title to the property, that he had leased the property to Juan Senior, that he sometimes allowed Juan Senior to live on the property rent free, that he always paid the property taxes on the Property, and that he never entered into any agreement to deed the Property to Juan Senior.

¶8 Defendants filed a pleading entitled "Answer to Plaintiff's Motion for Summary Judgment." They asserted that their claim was based on forty-five years of continuous occupancy through a real estate trade between Santos and Juan Senior, but that Santos had failed to execute the deed to the Property as promised. They argued that their claim to the Property was proven in their complaint in CV2010-095055, which they purported to include by reference, offering to provide a copy upon request by the court. Defendants also submitted a "Pre-Hearing Statement," which included an unsupported narrative of facts and an assertion that the case had been consolidated with CV2010-095055, and a "Notice and Request for Judicial Notice," which requested that the court take judicial notice of the 1989 judgment in CV87-13053, all pleadings in CV2010-095055, and the records of the Maricopa County Assessor.

¶9 The court held oral argument in June 2011 on Santos's motion for summary judgment. The court directed the parties to seek clarification of the status of CV2010-095055, stating that if that case was still active, the two cases should be consolidated. The court noted that Defendants had failed to properly caption their response to Santos's

motion and had failed to file a separate answer to the complaint. The court struck Defendants' "Answer to Plaintiff's Motion for Summary Judgment," "Pre-Hearing Statement," and "Notice and Request for Judicial Notice," without prejudice so that Defendants could refile a proper response and related pleadings within thirty days. The court also ordered Defendants to file a proper answer to the complaint.

¶10 Defendants subsequently filed a response to Santos's motion for summary judgment. The response, however, consisted of a number of factual, conclusory, and argumentative statements, most of which were not supported by citation to the record. The response did not indicate which specific facts in Santos's statement of facts were disputed, even though it did dispute certain statements contained in Santos's affidavit. The response appeared to assert two theories — that Defendants obtained title through adverse possession and that Santos breached an agreement with Juan Senior to trade Lots 27 and 28 for Lots 23 and 24.

¶11 Defendants claimed to have lived on the property as owners openly and continuously for forty-five years. Defendants also asserted that in 1984 Santos and Juan agreed to a property exchange, whereby Santos would transfer Lots 27 and 28 to Juan Senior, and Juan Senior would quitclaim his interest in Lots 23 and 24 to Santos. Defendants argued that Juan Senior fulfilled his part of the agreement but Santos did not. They argued that Santos conveyed his interest in Lot 7, in which they claimed he had no interest, rather than his interest in Lots 27 and 28. Thereafter, they argued, Juan Senior developed the Property, first constructing a house on Lot 27 and then constructing a house on Lot 28. They claimed that Juan Senior gave money to Santos to pay the property taxes. Attached to the response were a number of exhibits, including the affidavit of Margarita Cota, who was married to Juan Senior from September 1959 until their divorce in 1979. She stated that Juan Senior and Santos agreed to trade titles, that she and Juan Senior moved onto Lot 27 in 1963, that Juan Senior relied on Santos to "handle the property title and gave him money to pay the property taxes," that she always believed they owned the Property, and that Juan Senior had told her he had the title to the Property. She also avowed that they exercised control over the people who could enter their property and denied that Santos had leased the property to Juan Senior. The response contained exhibits, including a copy of the April 1989 judgment in CV87-13053, and copies of the deeds by which Santos gained title to Lots 27 and 28, transferred his interest in Lot 7 to Juan Senior, and obtained Juan Senior's interest in Lots 23 and 24.

¶12 Santos argued that Defendants' response did not comply with Arizona Rule of Civil Procedure ("Rule") 56(c) because it did not identify any fact in Santos's motion for summary judgment in dispute or set forth facts establishing a genuine issue of material fact. Santos asserted that many of the statements in Cota's affidavit consisted of her beliefs and hearsay, and were therefore inadmissible.

¶13 At the August 26, 2011 oral argument on Santos's motion for summary judgment, the court expressed concerns regarding Defendants' response, telling counsel:

> [T]he court . . . needs to see more statements of underlying fact, rather than conclusory facts, and needs citations contained within the brief in order for counsel and the Court to follow the arguments being made.

The court ordered Defendants to file an amended response by September 26, 2011, and indicated that it would consult with the judge in CV2010-095055 to determine if consolidation was appropriate. The court subsequently denied Santos's motion to reconsider giving Defendants another opportunity to challenge the motion.

¶14 Three days before their response was due, Defendants' counsel filed a "Withdrawal as Counsel of Record; Request for Extension of Filing Deadline," and told the court that he believed he could no longer adequately represent Defendants, that he sought assistance through the Volunteer Lawyers' Program, and that the law firm of Snell & Wilmer had agreed to represent Defendants. He asked for permission to withdraw as counsel of record and asked the court to extend the deadline for filing Defendants' amended response to the motion for summary judgment. No notice of substitution by new counsel accompanied the motion and no new counsel was identified.

¶15 Defendants did not timely obey the order to file a proper response and Santos filed a motion for summary disposition pursuant to Rule 7.1(b). Santos also objected to counsel's motion to withdraw and motion to extend the deadline.

¶16 By minute entry filed November 10, 2011, the court denied counsel's motion to withdraw without prejudice to counsel resubmitting the request within thirty days along with the signature or notice of appearance of the counsel to be substituted. The court also denied

Santos's motion for summary disposition without prejudice to Santos reurging the motion once the court determined who would be representing Defendants.

¶17 Before there was a change in lawyers, there were several more delays, which prompted two more motions for summary disposition by Santos, which the court denied. Defendants, however, filed their third response to Santos's summary judgment motion on May 2, 2012. After a discussion of the general nature of summary judgment, the response generally asserted that the factual record precluded summary judgment, but did not identify specific disputed facts. In fact, the response stated that Defendants stood "ready, willing and able to prove . . . that the title and ownership realities are in conflict," but did not indicate what evidence they would offer to prove their position or where in the record such evidence could be found.

¶18 Then, some twenty months after Santos filed his summary judgment motion, the court granted the motion. The August 2012 ruling stated:

> The amended Response neither complies with Rule 56(c) nor cures the deficiencies discussed by the court on August 26, 2011. Because of those deficiencies, there is no admissible evidence in the record sufficient to create a genuine issue of material fact.
>
> The court is loath to grant summary judgment based on a procedural deficiency. But the court gave Defendants more than adequate opportunity to come into compliance. Moreover, Plaintiff has waited over a year-and-a-half to get resolution of this matter. Having delayed Plaintiff's case while Defendants had the chance to comply with Rule 56(c)'s basic requirements, it would be unjust to now simply ignore those requirements.

¶19 Defendants filed a motion to reconsider. They argued that the verified complaint from CV2010-095055, which they attached, the affidavit of Margarita Cota, who avowed that Santos and Juan Senior had agreed to the property swap, and the judgment in CV87-13053

demonstrated an issue of fact as to whether Santos lawfully owned the Property.

¶20 The court denied the motion to reconsider, and entered judgment quieting title in Lots 27 and 28 in Santos. Defendants filed a notice of appeal, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (West 2013).[1]

DISCUSSION

¶21 Summary judgment may be granted when "there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c). A "genuine issue" is an issue "a reasonable trier of fact could decide in favor of the party adverse to summary judgment on the available evidentiary record." *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990). In reviewing a motion for summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). We view the facts and the inferences to be drawn from those facts in the light most favorable to the party against whom judgment was entered. *AROK Constr. Co. v. Indian Constr. Svcs*., 174 Ariz. 291, 293, 848 P.2d 870, 872 (App. 1993). We review the decision on the record made in the trial court. *Phx. Baptist Hosp. & Med. Ctr., Inc. v. Aiken*, 179 Ariz. 289, 292, 877 P.2d 1345, 1348 (App. 1994). We do not consider evidence that was not before the court when it ruled on the motion. *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990) (rejecting consideration of transcripts of depositions referred to but not included in the motions); *Cella Barr Assocs., Inc. v. Cohen,* 177 Ariz. 480, 487 n.1, 868 P.2d 1063, 1070 n.1 (App. 1994) (court is precluded from considering transcripts attached to a motion for reconsideration because they were not presented to the court when it ruled on the motion).

¶22 Where the party seeking summary judgment has established that no genuine issue of material fact exists and that he or she is entitled to summary judgment, the party opposing the motion may not rest on the pleadings but must file a statement identifying those facts that are disputed and specifying facts showing a genuine issue for trial. Ariz. R.

[1] We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

Civ. P. 56(c), (e); *Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, 287, ¶ 15, 17 P.3d 790, 793 (App. 2000). The party opposing summary judgment does not create a genuine issue for trial by merely contradicting the claims of the movant. *Chanay v. Chittenden*, 115 Ariz. 32, 35, 563 P.2d 287, 290 (1977). The party opposing the motion must produce competent evidence, through affidavits or otherwise, showing a disputed fact exists to justify a trial on the issue. Ariz. R. Civ. P. 56(e); *Doe v. Roe*, 191 Ariz. 313, 323, ¶ 33, 955 P.2d 951, 961 (1998); *GM Dev. Corp.*, 165 Ariz. at 5, 795 P.2d at 831. "[U]ncontroverted evidence favorable to the movant [] from which only one inference can be drawn, will be presumed to be true." *Tilley v. Delci*, 220 Ariz. 233, 237, ¶ 11, 204 P.3d 1082, 1086 (App. 2009) (quoting *Choisser v. State*, 12 Ariz. App. 259, 261, 469 P.2d 493, 495 (1970)). In ruling on the motion, the court must consider not only affidavits, but also pleadings, depositions, interrogatories, and admissions brought to the court's attention by the parties. *Nemac v. Rollo*, 114 Ariz. 589, 592, 562 P.2d 1087, 1090 (App. 1977). Factual assertions by counsel in briefs are not entitled to consideration. *Cimino v. Alway*, 18 Ariz. App. 271, 273, 501 P.2d 447, 449 (1972).

¶23 If the party opposing summary judgment fails to file a proper response, the court shall enter summary judgment in favor of the moving party only if the moving party has established that he or she is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(e)(4) (stating that, upon noncompliant response, judgment shall be entered "if appropriate"). A moving party is not entitled to summary judgment merely because the nonmoving party failed to file a compliant response. *United Bank*, 167 Ariz. at 196, 805 P.2d at 1017.

¶24 Despite several opportunities, Defendants failed to file a response to Santos's motion for summary judgment that complied with the requirements of Rule 56. Defendants did not identify which facts in Santos's statement of facts they disputed or specify portions of the record supporting their version of facts. Defendants correctly note, however, that their failure to comply with Rule 56 does not itself permit the court to enter summary judgment against them if they have demonstrated the existence of a disputed issue of material fact, which they claim to have done in their responses to Santos's motion and their verified complaint in CV2010-095055.

¶25 Santos had asserted that he held title to the Property, and he produced the deeds and a sworn affidavit stating that he owned the Property and that he had leased the Property to Juan Senior, allowing his brother to live on and benefit from the Property during Juan Senior's lifetime.

¶26 Defendants disputed that Santos had leased the Property to Juan Senior, claimed that "the family" had lived on the Property for forty-five years, and asserted that Santos was supposed to have transferred Lots 27 and 28 to Juan Senior in August 1984 in exchange for Juan Senior's ceding his interest in Lots 23 and 24, but that, unbeknownst to Juan Senior, Santos instead transferred his interest in Lot 7, in which Defendants argue he had no interest to transfer.[2]

¶27 Defendants argue on appeal that they submitted sufficient evidence to demonstrate the existence of a factual dispute as to whether the parcels were swapped and whether Santos fraudulently failed to sign over the title to Lots 27 and 28. Even assuming that such facts would present a defense to Santos's claim, the record does not show the existence of evidence to establish those facts.

¶28 Defendants rely predominantly on the verified complaint in CV2010-095055 and the judgment in CV87-13053. The verified complaint was not provided to the court until Defendants' motion to reconsider, after the court had already granted summary judgment to Santos. Because it was not part of the record at the time the court ruled on the motion, we cannot consider the complaint in CV2010-095055 in reviewing

[2] Defendants did not clearly articulate any legal theory of defense against Santos's claim of ownership. Defendants did claim to have "actually, openly, notoriously and hostilely claimed right of ownership . . . exclusively and continuously for more than ten years," which indicates a defense of adverse possession. *See* A.R.S. §§ 12-521(A)(1), -526 (West 2013) (statutes governing claims on real property). On appeal, Defendants focus on the alleged agreement between the brothers to exchange properties and appear to have abandoned the adverse possession theory. *See Torrez v. Knowlton*, 205 Ariz. 550, 552 n.1, 73 P.3d 1285, 1287 n.1 (App. 2003) (issues not argued on appeal deemed abandoned).

the court's decision granting summary judgment.[3] *GM Dev. Corp.*, 165 Ariz. at 4, 795 P.2d at 830.

¶29 Defendants also rely on the judgment in CV87-13053 and the quitclaim deeds executed by Santos and Juan Senior in August 1984 by which they transferred to each other their interests in Lot 7 and Lots 23 and 24, respectively. These documents do not constitute evidence that Santos agreed to swap title to Lots 27 and 28 for title to Lots 23 and 24, or that Santos wrongly conveyed Lot 7 as Defendants contend.

¶30 Case CV87-13053 involved an action by Juan Senior against his younger brother Gumero for partition of Lot 7, and cross-claims between Santos and Gumero, apparently over Lots 23 and 24. The judgment explained that their mother had owned the properties when she died intestate, leaving each brother with an interest in each of the properties. The judgment noted that Santos had quitclaimed any interest he might have had in Lot 7 by the quitclaim deed he executed in favor of Juan Senior in August 1984, and that Lots 23 and 24 had been quieted in Santos earlier in that same litigation. The judgment denied Juan Senior's claim to partition Lot 7, awarding title to Lot 7 to Gumero by adverse possession. The court also noted that Juan Senior had initially filed suit against Gumero on August 24, 1984, which was only a little more than a week after Santos and Juan Senior had exchanged quitclaim deeds.

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[3] Defendants note that the complaint was incorporated by reference in their first response to the motion for summary judgment. Even assuming that Defendants could, for purposes of summary judgment, incorporate by reference a document from another case, that first response as well as a subsequent request that the court take judicial notice of the pleading were stricken from the record. Defendants also note that they sought to consolidate the two actions. The court indicated consolidation would be appropriate, and also indicated that it would consult with the judge in the other action, but the court made no ruling on the motion to consolidate. The motion is therefore deemed denied. *See Ornelas v. Fry*, 151 Ariz. 324, 326, 727 P.2d 819, 821 (App. 1986).

Even if we were to consider the verified complaint in CV2010-095055, the complaint does not establish that the two defendants who verified the complaint have personal knowledge so as to be able to themselves testify to the facts alleged. The complaint shows the parties dispute the facts, but it does not demonstrate the existence of evidence to support Defendants' position so as to justify a trial.

¶31 Nothing in the facts from the 1987 lawsuit or the judgment presents evidence that Santos was to have conveyed Lots 27 and 28 to Juan Senior when executing the quitclaim deeds. Rather, when taken together, those portions of the record indicate that Santos and Juan Senior quitclaimed to each other any interest they each had in the property the other would be seeking in the future lawsuit against Gumero.

¶32 The judgment noted that Santos had testified that he intended to deed the Property to Juan Senior after the lawsuit; it does not, however, establish or recognize the existence of an agreement with Juan Senior to do so. The judgment does, however, recognize that Santos held title to the Property, although Juan Senior and his family had lived on the Property for more than twenty-five years. Consequently, as of the time of the judgment, any irregularity in the exchange of the quitclaim deeds, as now alleged, had to have been known to the parties. Juan Senior knew at that time that Santos held the title to the Property.[4] Defendants have not alleged any other transaction or agreement by which Santos was to have conveyed the Property to Juan Senior.

¶33 Most of the factual assertions by Defendants were made in briefs and memoranda written by counsel, and as such were not entitled to consideration in deciding the motion. *Cimino*, 18 Ariz. App. at 273, 501 P.2d at 449. The only affidavit Defendants submitted in support of their response to Santos's motion was the affidavit of Margarita Cota, Juan Senior's former wife and mother of five of the Defendants. She avowed, among other things, that the brothers had agreed to a land trade because Santos wanted Lots 23 and 24 and Juan Senior wanted Lots 27 and 28. The affidavit presents no underlying facts such as when, where, and on what terms the agreement was entered or how she became aware of it so as to have personal knowledge. She avowed that she and Juan Senior believed the Property belonged to them and that she believed Santos's claim to have leased the Property to Juan Senior to be false. She testified, however, that they divorced in 1979. Her information, therefore, predates by ten

[4] To the extent that Defendants' defense is based on the claimed exchange of deeds that was to have occurred in August 1984, a claim against Santos would have had to have been brought within four years of the cause of action accruing, which would have been when Juan Senior learned that the agreed-to conveyance had not occurred. A.R.S. § 12-546 ("An action for specific performance of a contract for the conveyance of real property shall be commenced within four years after the cause of action accrues, and not afterward.").

years the 1989 judgment in CV87-13053, which recognized Santos as the title holder of the Property, advising the parties of the status regardless of what may have previously occurred.

¶34 Defendants argue that the complaint in this action and in CV2010-095055, as well as the exhibits and statements in the record, created issues of fact for the fact finder. However, the only facts that they specify that are at issue involve whether the brothers had agreed to swap properties and whether Santos fraudulently failed to convey title. The record does not contain evidence creating an issue of fact justifying a trial on this point. Although the record before us suggests that a factual dispute may exist, it does not contain admissible evidence demonstrating a genuine issue of material fact for trial.

¶35 The trial court has demonstrated considerable patience and afforded Defendants every opportunity to submit admissible evidence to establish a disputed issue of fact. They, however, failed to do so.

¶36 Santos requests an award of attorneys' fees pursuant to A.R.S. § 12-341.01, which authorizes an award of reasonable attorneys' fees to the successful party in a contested action arising from a contract. A.R.S. § 12-341.01(A) (West 2013). Because this matter does not arise out of a contract, Santos is not entitled to an award of fees pursuant to the statute. *See Lange v. Lotzer*, 151 Ariz. 260, 262, 727 P.2d 38, 40 (App. 1986) (exclusive basis for an award of fees in an action to quiet title is A.R.S. § 12-1103(B)). Because Santos is the successful party, he is entitled to and awarded his costs on appeal upon compliance with ARCAP 21.

CONCLUSION

¶37 The judgment of the trial court is affirmed.

Ruth A. Willingham · Clerk of the Court
FILED: mjt