

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

SHIRLEY WASHBURN, a widow; DOUG FRANZ, a married man dealing
with his sole and separate property, *Plaintiffs/Appellees*,

v.

WAYNE M. DAVIS, a married man dealing with his sole and separate
property; AMANDA L. DAVIS, his wife, *Defendants/Appellants*.

No. 1 CA-CV 15-0481
FILED 12-6-2016

Appeal from the Superior Court in Maricopa County
No. CV2013-011133
The Honorable James T. Blomo, Judge

AFFIRMED

COUNSEL

Amanda L. Davis, Wayne M. Davis, Mesa
Defendants/Appellants

Quindry Koniuszy Follett & Styskal, LLP, Mesa
By Stephen W. Follett, Thomas E. Koniuszy
Counsel for Plaintiffs/Appellees

WASHBURN v. DAVIS
Decision of the Court

MEMORANDUM DECISION

Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Lawrence F. Winthrop joined.

T H U M M A, Judge:

¶1 Defendants Wayne and Amanda Davis appeal the superior court's entry of partial summary judgment against them and subsequent partial final judgment quieting title to Mesa real estate in favor of plaintiff Shirley Washburn. Because defendants have shown no disputed issue of material fact or legal error, the partial final judgment is affirmed.

FACTS¹ AND PROCEDURAL HISTORY

¶2 As of early January 2013, Shirley and her late husband Robert Washburn owned the property as joint tenants. On January 14, 2013, the Washburns transferred, in a warranty deed, fee simple title in the property to Doug Franz. Also on January 14, 2013, Franz transferred fee simple title in the property to Shirley as the sole owner in a warranty deed. Although the Washburns-to-Franz deed was recorded on January 16, 2013, it is undisputed that the Franz-to-Shirley deed was never recorded.

¶3 In April 2013, Shirley's grandson Wayne Davis asked Shirley to transfer title to the property to him. According to Shirley, "at the insistence [of] and under pressure from" Davis, she removed the front page of the Franz-to-Shirley deed, replaced it with a different first page naming Davis as grantee, and attached this new cover to the signature page bearing Franz' January 14, 2013 signature. A Franz-to-Davis document was recorded on April 19, 2013.

¹ This court "view[s] the evidence and reasonable inferences in the light most favorable to the party opposing the motion," *Andrews v. Blake*, 205 Ariz. 236, 240 ¶ 12 (2003), to determine "whether any genuine issues of material fact exist," *Brookover v. Roberts Enter., Inc.*, 215 Ariz. 52, 55 ¶ 8 (App. 2007).

WASHBURN v. DAVIS
Decision of the Court

¶4 In August 2013, Shirley and Franz filed this quiet title action in superior court, alleging there was never a legally binding conveyance of the property to Davis and that defendants had no cognizable claim to the property. In October 2014, Shirley and Franz moved for partial summary judgment regarding Shirley's ownership of the property arguing, among other things, that Franz "never signed or acknowledged a deed to Wayne Davis and never delivered title to the property to him." This motion was supported by sworn affidavits by Shirley and Franz stating they "did not sign or deliver" the document recorded on April 19, 2013. Franz' affidavit added he had "never signed or delivered a deed conveying" the property to Davis "or to any other person than Shirley;" Shirley's affidavit added she never "signed a deed conveying" the property to Davis "or to any other person."

¶5 Defendants' response attached written statements from various individuals but not from either Wayne or Amanda Davis. Although defendants' response and controverting statement of facts were "sworn, upon oath" by defendants as true, based on personal knowledge, neither filing provided evidence contradicting the showing by Shirley and Franz that they never delivered to defendants a deed conveying the property to Wayne or Amanda Davis.

¶6 After full briefing, the superior court granted plaintiffs' motion for partial summary judgment, finding the evidence presented did not show the property was validly conveyed to Wayne. Defendants concede on appeal "the conveyance of the deed" was the superior court's "main concern." Defendants moved to reconsider, alleging Shirley "delivered" a deed for the property to Wayne in or after January 2013 that Shirley and Wayne later recorded "together." However, unlike their response and controverting statement of facts addressing plaintiffs' motion for summary judgment, this motion to reconsider was not "sworn, upon oath" by defendants as true, based on personal knowledge. And although making reference to testimony and other evidence that could be "obtained," the motion did not provide or include such evidence. The superior court summarily denied defendants' motion to reconsider. In May 2015, the court entered a partial final judgment naming Shirley the sole owner of the property. *See* Ariz. R. Civ. P. 54(b)(2016).² Defendants timely appealed, and this court has jurisdiction under Arizona Revised Statutes (A.R.S.) sections 12-2101(A)(1) and 12-120.21(A)(1).

² Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

WASHBURN v. DAVIS
Decision of the Court

DISCUSSION

¶7 Summary judgment should be granted “if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.” Ariz. R. Civ. P. 56(a). The party opposing a properly-supported motion for summary judgment has the burden to “set forth specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment, if appropriate, shall be entered against that party.” Ariz. R. Civ. P. 56(e)(4). When uncontroverted, “facts alleged by affidavits attached to a motion for summary judgment may be considered as true.” *Portonova v. Wilkinson*, 128 Ariz. 501, 502 (1981). This court reviews de novo whether a genuine issue of material fact is in dispute and whether the superior court properly applied the law. *See Chaurasia v. General Motors Corp.*, 212 Ariz. 18, 21 ¶ 5 (App. 2006).

¶8 In their appellate briefs, and in briefing their motion to reconsider on appeal, defendants argue the facts alleged in their response to plaintiffs’ motion for summary judgment and controverting statement of facts, and motion to reconsider the grant of summary judgment for plaintiffs, were sufficient to show a genuine dispute of material fact as to the ownership of the property. Before the superior court, defendants argued that “a deed becomes effective when signed by the Grantor in front of a Notary.” As this court has stated, however, “[a] valid transfer of real property in this state is required to be by an instrument in writing, signed, acknowledged, and delivered.” *Hardine v. Pioneer Nat. Title Ins.*, 145 Ariz. 83, 84 (App. 1985) (emphasis added; citing A.R.S. § 33-401). Plaintiffs’ motion for summary judgment was supported by sworn affidavits stating neither Franz nor Shirley signed a deed conveying the property to Davis. *See* A.R.S. § 33-401(A) (outlining formal requirements for conveyance of a deed). Plaintiffs also presented evidence that Franz had conveyed a valid deed to Shirley. *See id.* Even more significantly, plaintiffs’ motion was supported by sworn affidavits stating neither Franz nor Shirley delivered to either defendant a deed conveying the property to either of them.

¶9 Defendants’ response to plaintiffs’ properly supported motion for summary judgment did not attach affidavits from defendants or admissible unsworn declarations, subscribed as true under penalty of perjury, from defendants. *See* Ariz. R. Civ. P. 80(i). Although defendants’ response attached written statements from various individuals, those statements did not relate to whether the recorded Franz-to-Davis deed was valid or delivered and also were not admissible unsworn declarations, subscribed as true under penalty of perjury. *Id.* And although defendants’

WASHBURN v. DAVIS
Decision of the Court

response and controverting statement of facts appears to have complied with Rule 80(i), it did not include evidence stating Franz or Shirley delivered to either defendant a deed conveying the property to either of them. *See Hardine*, 145 Ariz. at 84.

¶10 Although defendants' motion to reconsider filed with the superior court did allege delivery of such a deed, that filing did not comply with Rule 80(i). Accordingly, the allegations in that motion are not evidence; they are merely "statements of facts which the pleader must prove unless admitted by the opposing party." *Bank of Yuma v. Arrow Const. Co.*, 106 Ariz. 582, 585 (1971); *see also State v. Grounds*, 128 Ariz. 14, 15 (1981) (noting "[a]rgument of counsel is not evidence;" evidence consists of "sworn affidavits, stipulated facts, depositions, and oral testimony"). As relevant here, plaintiffs did not admit the facts alleged by defendants and, accordingly, did not relieve defendants of their burden to prove those alleged facts. *Bank of Yuma*, 106 Ariz. at 585. As a result, defendants failed to produce evidence sufficient to create a genuine issue of disputed material fact regarding delivery. *See Ariz. R. Civ. P. 56(e)(1)* (noting party seeking to dispute facts asserted in support of motion for summary judgment must do so in a form "that would be admissible in evidence"). Moreover, defendants have not argued or shown on appeal that the superior court erred in its application of the law.³ As a result, based on plaintiffs' key uncontroverted factual showing that they never delivered a deed conveying the property to either defendant, the superior court did not err in granting plaintiffs' motion for partial summary judgment and by entering a partial final judgment in favor of plaintiffs.

³ Nor have defendants shown how A.R.S. § 33-437, cited on appeal for the first time in their reply, would alter the result reflected in the partial final judgment. *See also Nelson v. Rice*, 198 Ariz. 563, 567 ¶ 11 n.3 (App. 2000) (noting arguments not raised in opening brief are waived and cannot be raised for first time in reply brief).

WASHBURN v. DAVIS
Decision of the Court

¶11 In the court's discretion, plaintiffs' application for attorneys' fees incurred on appeal pursuant to A.R.S. § 12-349 is denied. Plaintiffs are, however, awarded their taxable costs contingent upon their compliance with Ariz. R. Civ. App. P. 21.

CONCLUSION

¶12 The partial final judgment is affirmed.



AMY M. WOOD • Clerk of the Court
FILED: AA