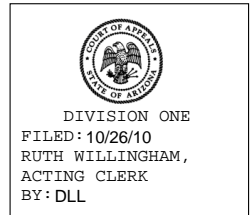


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



KENNETH KING,) 1 CA-CV 09-0770
)
Respondent/Third Party) DEPARTMENT C
Plaintiff/Appellant,)
) **MEMORANDUM DECISION**
v.)
)
JOSEPH FERMIN ESPINOZA, a single) (Not for Publication -
man,) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
Third Party Defendant/)
Appellee.)
)
_____)
)
LOWELL J. SHINN and DEBRA D.)
SHINN, as Trustees of the DEBRA)
D. SHINN LIVING TRUST DATED JUNE)
9, 1999,)
)
Third Party Defendants/)
Intervenors/Appellees.)
)
_____)

Appeal from the Superior Court in Mohave County

Cause No. DO 2007-7318

The Honorable Jill W. Davis, Judge Pro Tempore

REVERSED AND REMANDED

Kenneth L. Sondgeroth, P.C.
By Kenneth L. Sondgeroth
Attorney for Plaintiff/Appellant

Bullhead City

Joseph F. Espinoza, Appellee
In Propria Persona

Lake Havasu City

Bruno, Brooks & Goldberg, P.C.
By Robert H. Brooks
Attorneys for Defendants/Appellees
Lowell J. Shinn and Debra D. Shinn

Kingman

P O R T L E Y, Judge

¶1 Kenneth King ("King") appeals from the summary judgment granted to Joseph Espinoza and Lowell and Debra Shinn, as Trustees of the Debra D. Shinn Living Trust ("the Shinns") (collectively, "Appellees"). King argues the superior court misapplied the law when it entered summary judgment upholding the transfers of real property made by King's former wife, Betty Jean King, to Espinoza, and from Espinoza to the Shinns. For the reasons that follow, we reverse and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND¹

¶2 King was married to Betty on July 29, 1995. They purchased real property located in Mohave County in 2003. Because Betty had better credit and in order to help her qualify for a loan, the Kings signed a warranty deed in May 2004 conveying the property to Betty as her sole and separate

¹ We view the facts in the light most favorable to King as the party against whom summary judgment was entered. *Angus Med. Co. v. Digital Equip. Corp.*, 173 Ariz. 159, 162, 840 P.2d 1024, 1027 (App. 1992).

property. They also agreed that Betty would ultimately place King's name back on the title to the property.

¶13 In spite of their agreement, Betty conveyed the property to Espinoza on September 4, 2007, by quitclaim deed. King recorded a lis pendens against the property two weeks later. Betty filed a petition for divorce on November 9, 2007, and acknowledged that the property was community property.² In addition to responding to the petition, King filed a third-party complaint against Espinoza. He alleged that the transfer to Espinoza was a fraudulent conveyance. Espinoza subsequently conveyed the property to the Shinns.

¶14 The Shinns intervened and filed a counterclaim to quiet title. They subsequently filed a motion for summary judgment and argued that King had no interest in the property that they owned. Espinoza joined their motion. In his response, King argued that the issues of the fraudulent transfer to Espinosa and the transfer to the Shinns after the lis pendens had been filed were genuine issues of material fact that precluded summary judgment. The trial court granted summary

² The Kings had acquired the property as joint tenants with right of survivorship, but agreed the property was community property. See *State v. Superior Court*, 188 Ariz. 372, 373, 936 P.2d 558, 559 (App. 1997) (Married joint tenants each hold "his or her ownership interest as separate property."); *Toth v. Toth*, 190 Ariz. 218, 220, 946 P.2d 900, 902 (App. 1997) ("Joint tenancy property is separate property, not community property.").

judgment because it found no evidence of a fraudulent conveyance or that any deeds were invalid.

¶15 The Kings subsequently entered into a stipulated divorce decree, where Betty acknowledged that her failure to put King's name back on the title to the property was a result of "fraud or mistake and/or a breach of her fiduciary duty." She also admitted that she improperly transferred the property to Espinoza so that he could sell the property for her sole benefit. The Kings agreed the property was worth \$250,000 and King's interest equaled \$120,000. As a result, King was given a judgment against Betty for \$120,000 as an equalizing payment.

¶16 King appealed the summary judgment, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

¶17 Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c). We determine de novo whether any issue of material fact exists and whether the court properly applied the law. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996).

¶18 Here, there are genuine issues of material fact about whether Appellees were bona fide purchasers and whether Espinoza participated in a fraudulent conveyance.³

¶19 A bona fide purchaser refers to a person who purchases property for value without notice of another person's interest in the property. *Leveraged Land Co. L.L.C. v. Hodges*, 224 Ariz. 442, ___, ¶ 6, 232 P.3d 756, 759 (App. 2010) (quoting *First Am. Title Ins. Co. v. Action Acquisitions, LLC*, 218 Ariz. 394, 398, ¶ 12, 187 P.3d 1107, 1111 (2008)). A lis pendens, however, provides notice that a particular piece of property is the subject of litigation. *Warren v. Whitehall Income Fund 86*, 170 Ariz. 241, 244, 823 P.2d 689, 692 (App. 1991). The purpose of a lis pendens is to prevent innocent third persons from acquiring an interest in such property which, in turn, might prevent the court from granting suitable relief. *Id.*

¶10 Here, the lis pendens was recorded in September 2007, and the third-party complaint against Espinoza was filed in December 2007. King alleged that Espinoza participated in a fraudulent conveyance by obtaining the property from Betty without adequate consideration in order to deprive him of his

³ The superior court granted summary judgment based on the validity of the warranty deed conveying the property to Betty as her sole and separate property. Although King did not contest the validity of that deed, he argued that he retained a community interest in the property, which Betty did not dispute.

interest in the property.⁴ Espinoza subsequently sold the property to the Shinns despite his knowledge of King's claim to the property.⁵ The Shinns, moreover, obtained title after the *lis pendens* was recorded and, therefore, took title subject to King's claims. *Id.* at 243, 823 P.2d at 691 (a person who purchases property with actual and/or constructive knowledge of a prior claim to the property is not a bona fide purchaser); see also *Santa Fe Ridge Homeowners' Ass'n v. Bartschi*, 219 Ariz. 391, 395, ¶ 11, 199 P.3d 646, 650 (App. 2008) (a *lis pendens* provides constructive notice that a pending lawsuit may affect title to real property). Under the circumstances, summary judgment was inappropriate because there were genuine issues of material fact concerning Espinoza's conduct and whether Appellees were bona fide purchasers.

¶11 King's claims against Appellees, however, may be barred by the doctrine of accord and satisfaction. "An accord is a contract under which an obligee promises to accept a stated [substitute] performance in satisfaction of the obligor's

⁴ According to the stipulated decree, Betty received a \$20,000 loan from Espinoza when she transferred the property to him. Espinoza received \$112,508.38 in sale proceeds from the Shinns. Espinoza gave Betty the \$112,508.38, and Betty returned \$20,000 to Espinoza as repayment for the loan.

⁵ According to the Shinns, they purchased the property for \$306,418.92, which was allocated as follows: \$112,508.38 to Espinoza; \$166,000 to B.T. Investments, Inc., for the benefit of Kenneth and Betty; \$5,100 to a 401(K) plan for the benefit of Kenneth and Betty; \$15,300 for a commission to Espinoza; and the remainder for taxes, recording, title insurance, and escrow.

existing duty." Restatement (Second) of Contracts § 281(1) (1981). Satisfaction takes place, and the previously existing duty is discharged, when the accord or contract is performed. *Solar-West, Inc. v. Falk*, 141 Ariz. 414, 419-20, 687 P.2d 939, 944-45 (App. 1984). "[W]hen the parties to a pending suit compromise [or settle] the cause of action, and the terms of the compromise [or settlement] are complied with, the parties are bound by the agreement and the suit is ended." *Leschorn v. Xericos*, 121 Ariz. 77, 80, 588 P.2d 370, 373 (App. 1978).

¶12 Here, King and Betty entered into a stipulated decree, a contract, in which he agreed to be compensated \$120,000 for his interest in the property. Betty admitted King always had a community interest in the property and was, therefore, obligated to either equitably reimburse him for his interest or convey legal title to him. Because they agreed Betty would compensate King \$120,000 for his interest, the \$120,000 judgment constitutes an accord.

¶13 King's claims against Appellees are derivative of those against Betty. King alleged fraud in connection with Betty's failure to place his name back on the title to the property and her subsequent transfer of the property to Espinoza. His only damages were being deprived of a community interest in the property, and it was Betty who deprived King of that interest. Although Appellees were not parties to the

decree, they were parties to the action, and essentially third party beneficiaries of the decree. King has no separate claims against Appellees because he has no other damages. Cf. *Alford v. First Am. Title Ins. Co. of Ariz.*, 147 Ariz. 497, 498, 711 P.2d 636, 637 (App. 1985) (recovery of a portion of a claimed loss against one party is not an accord and satisfaction of a claim for additional damages against another party). Therefore, by settling his claim against Betty, King settled his claims against Appellees.

¶14 The record, however, does not indicate whether King has received the \$120,000. As a result, we cannot determine as a matter of law whether the accord has been satisfied. See *Owens v. Hunter*, 91 Ariz. 7, 10, 368 P.2d 753, 755 (1962) (When "substituted performance is rendered there is an accord and satisfaction which will bar an action on the original claim. On the other hand, if an accord is reached but the substituted performance never rendered by the debtor it is usually held that the creditor may sue on the original claim."). If King has been paid, there is an accord and satisfaction, and his claims against Appellees are barred.⁶ If, however, he has not been

⁶ Thus, even if summary judgment was improperly granted, a valid accord and satisfaction would moot the issue. See *Vinson v. Marton & Assocs.*, 159 Ariz. 1, 4, 764 P.2d 736, 739 (App. 1988) (When circumstances in a case change to the extent that a reviewing court's action would have no effect on the parties, then the issue becomes moot for purposes of appeal.).

paid, he may pursue his claims against Appellees. See *Poggi v. Kates*, 115 Ariz. 157, 160, 564 P.2d 380, 383 (1977) (an accord without satisfaction does not bar the original claim). Accordingly, we remand this matter to the trial court for a hearing to determine whether King has been paid for his interest in the property.

¶15 King requests attorneys' fees on appeal pursuant to A.R.S. § 12-341.01(A), (C) (2003). Because we are remanding the case, we will allow the trial court to consider whether King should be awarded attorneys' fees on appeal. If the accord has been satisfied, he may not be entitled to fees. If, however, the accord has not been satisfied, then the court can consider his request. We will, however, award him his appellate costs upon compliance with ARCAP 21.

CONCLUSION

¶16 Based on the foregoing, we reverse the grant of summary judgment and remand for further proceedings consistent with this decision.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Judge

/s/

PATRICIA A. OROZCO, Judge