IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

CHARLES L. BRUMFIELD AND NOLA L. BRUMFIELD, HUSBAND AND WIFE;
MARK L. BRUMFIELD AND EILEEN M. BRUMFIELD, HUSBAND AND WIFE,
Plaintiffs/Appellants,

v.

WILMINGTON SAVINGS FUND SOCIETY, FSB,
NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS TRUSTEE FOR THE
PRIMESTAR-H FUND I TRUST,
Defendant/Appellee.

No. 2 CA-CV 2015-0159
Filed February 24, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20132613
The Honorable Stephen C. Villarreal, Judge

AFFIRMED

COUNSEL

Munger Chadwick, P.L.C., Tucson
By Mark E. Chadwick
Counsel for Plaintiffs/Appellants

Ramras Legal, PLC, Phoenix
By Ari Ramras
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

H O W A R D, Presiding Judge:

¶1 Charles Brumfield, Nola Brumfield, Mark Brumfield, and Eileen Brumfield (collectively the Brumfields) appeal from the trial court's judgment dismissing their complaint alleging appellee Wilmington Savings Fund Society, FSB,[1] had filed an invalid lien against Charles's and Nola's interests in the Brumfields' real property (hereafter the "Battle Property"). They claim the court erred by finding Wilmington's deed of trust valid. Because the court did not err, we affirm.

Factual and Procedural Background

¶2 In reviewing a grant of summary judgment, we review the facts in the light most favorable to the non-moving parties. *Villa de Jardines Ass'n v. Flagstar Bank, FSB*, 227 Ariz. 91, ¶ 2, 253 P.3d 288, 291 (App. 2011). But the relevant facts here are essentially undisputed. In 1996, the Brumfields purchased the real property in question, the Battle Property, as joint tenants with right of survivorship.[2] They also executed a deed of trust to Chase

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[1]For ease of reference, Wilmington, the present trustee, will be named rather than its various predecessors or the beneficiaries.

[2]Sharlene Brumfield was one of the original purchasers, but later transferred her interest to Mark, who transferred his interest to Eileen and himself as joint tenants.

Manhattan Mortgage Corporation in the amount of $81,800. Charles and Nola provided the down payment of $14,031.01.

¶3 In 2007, Eileen borrowed $146,250 from Wilmington and signed a note for that amount. Eileen and Mark executed a deed of trust securing the loan with the Battle Property as "Borrower." As part of the transaction, the Chase deed of trust was paid off. Charles and Nola did not sign either the 2007 note or deed of trust.

¶4 After Eileen failed to make the required payments, Wilmington attempted to sell the Battle Property pursuant to the 2007 deed of trust. Charles and Nola sued Wilmington seeking to invalidate the 2007 deed of trust, quiet title, recover damages under A.R.S. § 33-420 for the filing of an invalid lien, and obtain injunctive relief. Wilmington counterclaimed against the Brumfields, seeking declaratory judgment concerning the rights and duties of the parties to the 2007 note and deed of trust, asserting claims based on ratification and equitable subrogation. Wilmington cancelled the notices of trustee's sale after the Brumfields filed their complaint.

¶5 Through a series of rulings, the trial court determined that the Wilmington deed of trust was not invalid because it either encumbered the entire Battle Property or at least Mark's and Eileen's interests in the Property. It ultimately entered summary judgment dismissing the Brumfields' complaint in a ruling with language pursuant to Rule 54(b), Ariz. R. Civ. P. The Brumfields appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Validity of Deed and Note

¶6 "Summary judgment is proper only when 'there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.'" *MacKinney v. City of Tucson*, 231 Ariz. 584, ¶ 6, 299 P.3d 1282, 1284 (App. 2013), *quoting Villa de Jardines Ass'n*, 227 Ariz. 91, ¶ 5, 253 P.3d at 292; *see also* Ariz. R. Civ. P. 56(a). "We review de novo the court's determination whether there are genuine issues of material fact and its application of law." *Villa de Jardines Ass'n*, 227 Ariz. 91, ¶ 5, 253 P.3d at 292. Because both parties agree that the facts are undisputed in this case, "the court's grant of

summary judgment was proper if it . . . correctly interpreted and applied the law." *Id.* ¶ 6.

¶7 The Brumfields first argue the trial court erred by misinterpreting previous orders entered in this case. However, the Brumfields do not explain how the alleged error results in the ultimate judgment being incorrect or otherwise prejudicing them. Accordingly, we do not need to address this issue. *See* Ariz. R. Civ. App. P. 13(a)(7) ("An 'argument' . . . must contain . . . Appellant's contentions concerning each issue presented for review, with supporting reasons for each contention, and with citations of legal authorities and appropriate references to the portions of the record on which the appellant relies."); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal).

¶8 The Brumfields next argue the trial court erred in granting summary judgment because Nola and Charles did not sign the 2007 deed of trust. "Deeds of trust may be executed as security for the performance of a contract or contracts." A.R.S. § 33-805. "'Trust property' means any legal, equitable, leasehold or other interest in real property which is capable of being transferred . . . ." A.R.S. § 33-801(9). A joint tenancy interest is capable of being transferred. *Cooley v. Veling*, 19 Ariz. App. 208, 209, 505 P.2d 1381, 1382 (1973). "'Trustor' means the person conveying trust property by a trust deed as security for the performance of a contract . . . ." A.R.S. § 33-801(11).

¶9 Mark and Eileen executed the 2007 deed of trust as trustors. They owned an undivided one-half joint tenancy interest in the Battle Property, an interest which was capable of being transferred. Therefore, the deed of trust, on its face, is not invalid, and the trial court did not err in dismissing the Brumfields' claims premised on the invalidity of the deed of trust.

¶10 The Brumfields cite *Modular Systems, Inc. v. Naisbitt*, 114 Ariz. 582, 585, 562 P.2d 1080, 1083 (App. 1977), for the proposition that an instrument must be executed by all the parties to be bound by it. But the 2007 note and deed of trust do not purport to bind Nola and Charles directly, only Mark and Eileen who executed the

documents. Thus, on their face, the documents are not invalid under *Modular Systems*.

¶11 The Brumfields next cite *Brant v. Hargrove*, 129 Ariz. 475, 478, 632 P.2d 978, 981 (App. 1981) and *Cooley*, 19 Ariz. App. at 209, 505 P.2d at 1382, for the proposition that a co-tenant cannot encumber the interest of a non-signing co-tenant. But that proposition is not adverse to the trial court's judgment. The court concluded Mark and Eileen had encumbered at least their interest when they executed the 2007 deed of trust, which accordingly was not invalid. Wilmington's claims of ratification and equitable subrogation remain to be decided, but *Brant* and *Cooley* do not address those concepts and are therefore not helpful to the Brumfields.

¶12 The Brumfields further contend the 2007 deed of trust's legal description includes the entire Battle Property, thereby encumbering Nola's and Charles's interests. But "[j]oint tenancy requires the presence of the four unities: time, title, possession, and interest." *In re Estelle's Estate*, 122 Ariz. 109, 111, 593 P.2d 663, 665 (1979). Thus, joint tenants own an undivided interest in the entire property. *Id*. at 112, 593 P.2d at 666. Mark and Eileen possess a partial interest in the entire Battle Property. Accordingly, the 2007 deed of trust is not invalid because it listed the legal description of the entire Battle Property.

¶13 The Brumfields additionally assert that Wilmington's notices of trustee's sale sought to sell the entire Battle Property, not just Mark's and Eileen's interests. But each notice lists Mark and Eileen as the trustors. The power of sale conferred on the trustee allows the trustee to sell the "trust property." A.R.S. § 33-807(A); *see also In re Krohn*, 203 Ariz. 205, ¶ 8, 52 P.3d 774, 777 (2002). The "trust property" can be any transferable interest. A.R.S. § 33-801(9). Because Mark's and Eileen's interests are transferable, the notices only encompass their interests. *See Cooley*, 19 Ariz. App. at 209, 505 P.2d at 1382. Additionally, the Brumfields have not explained how any problem in the notices would make the 2007 deed of trust invalid at the time of recording as required to support their complaint.

¶14 The Brumfields next contend that the trial court's interpretation "retroactively reformed" the 2007 deed of trust to include only Mark's and Eileen's interests, but that § 33-420 operates at the time of the recording. But, as we have concluded above, the 2007 deed of trust included only Mark's and Eileen's interests and was not invalid at the time of recording. No reformation has occurred.[3]

¶15 The Brumfields next contest the trial court's statement that the validity of the 2007 deed of trust is a separate question from whether Charles's and Nola's interests are encumbered. As we have discussed above, the 2007 deed of trust on its face does not encumber Charles's and Nola's interests. That issue remains in the trial court based on Wilmington's claims of ratification and equitable subrogation. The Brumfields' analogy to a homeowner who encumbers his neighbor's lot is inapt. Because Mark and Eileen held one-half of an undivided interest in the Battle Property, the legal description in the 2007 deed of trust was correct. *See In re Estelle's Estate*, 122 Ariz. at 112, 593 P.2d at 666.

¶16 The trial court properly concluded the 2007 deed of trust could validly encumber Mark's and Eileen's interests. Accordingly, it was not invalid when recorded, and the trial court correctly dismissed the Brumfields' causes of action which were based on its invalidity.

Compliance with A.R.S. § 25-214

¶17 The Brumfields next argue the 2007 note and deed of trust were invalid from their inception because Mark did not sign the note as required by A.R.S. § 25-214(C). That section requires

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[3]In their reply brief, the Brumfields claim Wilmington made a binding judicial admission in their answer that the deed of trust encumbered the entire Battle Property. They did not raise this issue in their opening brief, and Wilmington had no chance to respond to it. Accordingly, the issue is waived. *Flood Control Dist. of Maricopa Cty. v. Paloma Inv. Ltd. P'ship,* 237 Ariz. 322, n.8, 350 P.3d 826, 833 n.8 (App. 2015).

"joinder" of both spouses on "[a]ny transaction for the . . . encumbrance of an interest in real property," with some exceptions not relevant here. A.R.S. § 25-214(C). "Joinder" in this circumstance, generally means executing the conveyance. *Consol. Roofing & Supply Co. v. Grimm*, 140 Ariz. 452, 458, 682 P.2d 457, 463 (App. 1984). The purpose of the statute is to protect "the interests of both spouses in their community real property." *Geronimo Hotel & Lodge v. Putzi*, 151 Ariz. 477, 479, 728 P.2d 1227, 1229 (1986).

¶18 Here, even assuming the Battle Property is community property, the deed of trust encumbers Mark's and Eileen's interests in the Battle Property. Mark joined in the transaction by executing the deed of trust. He could have protected his interest in the community real property by refusing to execute the deed of trust, so the purpose of the statute was fulfilled. Mark's interest in the Battle Property is encumbered by the deed of trust. *See also In re Janis*, 151 B.R. 936, 938 (D. Ariz. 1992).

¶19 The Brumfields contend, however, that because Mark did not execute the note, and the note is the underlying obligation, Mark did not join in the transaction. But we interpret statutes according to their plain meaning and follow the statute as written. *Consol. Roofing & Supply Co.*, 140 Ariz. at 457, 682 P.2d at 462. The general rule is that each spouse can manage the community property, except that "joinder" of both spouses is required to encumber real property. A.R.S. § 25-214(B), (C). The statute did not require from Mark any action other than joining, which he did by executing the deed of trust. The Brumfields' claim that the statute requires Mark to execute both documents is unsupported by the language of the statute or any other authority. We will not impose additional requirements beyond that found in the statute.[4]

¶20 The Brumfields rely on authority that a note is an essential element to the validity of a deed of trust, but those authorities are not relevant to what is required for Mark to join in

[4]Because we have determined that Mark joined in the transaction, we need not address the Brumfields' argument that the trial court erred by finding Mark had ratified Eileen's transaction.

the transaction pursuant to § 25-214. The requirements and purpose of the joinder statute were fulfilled when Mark signed the 2007 deed of trust encumbering the Battle Property, thereby joining in the transaction. Mark could have protected his community property interest by refusing to execute that agreement.

¶21 The Brumfields finally argue that Wilmington does not have standing to seek a declaratory judgment of the rights of the parties in the original 1997 deed. Wilmington, however, claims that issue was not included in the partial final judgment and is not properly included in the appeal. In reply, the Brumfields claim they requested summary judgment on that issue, which the trial court denied. Thus, they reason, that issue became appealable on entry of the final judgment.

¶22 The issues included in the partial final judgment were the issues related to the dismissal of the Brumfields' complaint, which alleged that Wilmington's lien was invalid. Wilmington's standing to challenge the parties' position in the original deed is not included in the final judgment. Denial of a motion for summary judgment "is neither appealable nor generally subject to review on appeal from a final judgment." *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 7, 965 P.2d 47, 50 (App. 1998). Because this final judgment is a partial final judgment and the issue of whether the 2007 deed of trust encumbers Charles's and Nola's interests is still pending in the trial court, we will not review the denial of summary judgment in this appeal.

¶23 The Brumfields further claim they are entitled to summary judgment on their complaint. For the reasons given above, the 2007 deed of trust was not invalid and Charles and Nola are therefore not entitled to summary judgment.

Attorney Fees

¶24 Finally, Wilmington requests its costs and attorney fees, pursuant to A.R.S. §§ 12-341, 12-341.01, 12-342, and 12-349(a). Sections 12-341 and 12-342 provide that the successful party shall recover all taxable costs. As the successful party, we award Wilmington its costs.

¶25 Section 12-341.01 provides that the court may award attorney fees to the successful party in a contested action arising out of a contract. But the Brumfields correctly point out this court has concluded that the general attorney fees statute does not apply in quiet title actions. *Lange v. Lotzer,* 151 Ariz. 260, 262, 727 P.2d 38, 40 (App. 1986). The Brumfields further note this court has decided that actions under § 33-420 do not arise out of contract, under *Sitton v. Deutsche Bank Nat'l Tr. Co.,* 233 Ariz. 215, ¶ 35, 311 P.3d 237, 244 (App. 2013).

¶26 On the other hand, the Brumfields requested a declaratory judgment that the 2007 deed of trust was invalid as well as an injunction barring its enforcement. They have not cited any authority holding that attorney fees in a declaratory judgment action are not appropriate under § 12-341.01. *See Mountain States Tel. & Tel. Co. v. Kennedy*, 147 Ariz. 514, 515, 517, 711 P.2d 653, 654, 656 (App. 1985). And an action arises out of contract if the claim could not exist but for the breach or avoidance of the contract. *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.,* 198 Ariz. 10, ¶ 27, 6 P.3d 315, 320 (App. 2000). A defendant "is entitled to an award of its attorney's fees under § 12–341.01 if the plaintiff is not entitled to recover on the contract on which the action is based, or if the court finds that the contract on which the action is based does not exist." *Berthot v. Sec. Pac. Bank of Ariz.*, 170 Ariz. 318, 324, 823 P.2d 1326, 1332 (App. 1991), *superseded by statute on other grounds as recognized by Koss Corp. v. Am. Exp. Co.*, 233 Ariz. 74, ¶ 45, 309 P.3d 898, 912 (App. 2013). Below, the Brumfields claimed the 2007 deed of trust was invalid in its entirety. That action could not exist but for the existence of the deed of trust, and therefore the claim arose from contract. Accordingly, we award Wilmington reasonable attorney fees related to defending the declaratory judgment and injunction action in this court, upon compliance with Rule 21, Ariz. R. Civ. App. P. *See* § 12-341.01.

¶27 Wilmington also requested fees under § 12-349. Although Wilmington has prevailed completely on appeal, as the Brumfields note, it did not explain why the Brumfields' arguments met the higher standard required for an award of fees under that statute. Therefore, we deny its request for fees under § 12-349.

¶28 We deny Wilmington's request for an award of attorney fees for its work below, without prejudice to it requesting such an award from the trial court.

Disposition

¶29 For the foregoing reasons, we affirm the trial court's ruling.