DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BANKERS TRUST COMPANY, in the capacity as trustee for the PHOENICIAN II LAND TRUST, Plaintiff/Appellee, v. KONDAUR CAPITAL CORPORATION, a Delaware corporation, Defendant/Appellant.	1 CA-CV 12-0426 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2011-011020

The Honorable Katherine M. Cooper, Judge

AFFIRMED IN PART; VACATED IN PART; AND REMANDED

Gallagher & Kennedy, P.A. Phoenix
By John R. Clemency
and Janel M. Glynn
and Craig S. Ganz
Attorneys for Plaintiff/Appellee

Gust Rosenfeld, P.L.C. Tucson
By Mark L. Collins
and Robert M. Savage
Attorneys for Defendant/Appellant

N O R R I S, Judge

¶1 This appeal arises out of a lawsuit filed by Plaintiff/Appellee Bankers Trust Company against Defendant/Appellant Kondaur Capital Corporation ("Kondaur") seeking declaratory relief and damages under Arizona Revised Statutes ("A.R.S.") section 33-420(A) (2007) for Kondaur's recordation of what Bankers Trust alleged was a groundless lis pendens. On appeal, Kondaur first argues that because it had previously sued Bankers Trust to quiet title, its action was unquestionably one "affecting title to real property" under A.R.S. § 12-1191(A) (Supp. 2012), and thus, as a matter of law, its lis pendens could not be groundless under A.R.S. § 33-420(A). Second, Kondaur argues it had a "colorable basis" to file the lis pendens. Third, Kondaur argues the superior court should not have entered a declaratory judgment for Bankers Trust because no justiciable controversy existed. Although we disagree with Kondaur's first and third arguments, because the record reflects a disputed issue of fact as to whether Kondaur recorded its lis pendens "knowing or having reason to know" it was groundless, we vacate the superior court's judgment in Bankers Trust's favor on its A.R.S. § 33-420 claim, and remand for further proceedings consistent with this decision.

FACTS AND PROCEDURAL BACKGROUND

¶2 Bankers Trust, as trustee for Phoenician II Land Trust, owned unit 180 in a condominium development. On July 26, 2007, Betty A. Johnson acquired a leasehold interest in the unit. Pursuant to a residential sublease agreement between Johnson and Bankers Trust, Johnson could mortgage her leasehold interest in the unit, subject to Bankers Trust's ownership. In connection with her acquisition of the leasehold interest in the unit, Johnson borrowed $512,500, and as security for the loan, executed a deed of trust with Flagstar Bank as trustee.

¶3 On September 13, 2010, Bankers Trust sent Johnson and Flagstar a notice of default for her failure to pay rent and other charges. Because neither Johnson nor Flagstar cured the default, on November 8, 2010, Bankers Trust sent them a notice terminating Johnson's sublease as well as Flagstar's interest in the unit ("notice of termination").[1] As discussed in more detail below, on January 12, 2011, Johnson paid Bankers Trust $3,000. On February 3, 2011, Bankers Trust recorded a "notice of termination" of Johnson's sublease ("recorded notice").

[1]Under the terms of the sublease, Flagstar could cure the default to preserve its interest in the unit, but because it did not do so, it forfeited its interest.

¶4 On March 9, 2011, Flagstar assigned Johnson's deed of trust to Kondaur even though, as discussed, Bankers Trust had terminated Johnson's sublease and thus, owned the unit "free and clear" of any interest Flagstar had previously held. Although Bankers Trust had recorded the notice of termination of Johnson's sublease, Kondaur asserted in the superior court it was "unaware of" the termination. Eventually, Kondaur learned of the recorded notice and contacted an agent for Bankers Trust. Bankers Trust gave Kondaur copies of the notice of default, notice of termination, and recorded notice, but according to Kondaur, "[t]he agent did not provide Kondaur with any additional information regarding any arrangements it had made with Johnson regarding the termination."

¶5 Subsequently, Kondaur contacted Johnson. According to Kondaur, "[b]ased on those communications [it] learned that [Bankers Trust] had accepted a $3,000 payment from Johnson on or about January 12, 2011, approximately one month before the [recorded notice]. Based on its communication with Johnson, it was Kondaur's understanding that the $3,000 payment had been made to reinstate" her sublease.

¶6 Relying on what it had allegedly learned from Johnson, on May 12, 2011, Kondaur filed, but did not serve, a complaint against Bankers Trust asserting claims for declaratory judgment,

quiet title, and "wrongful recording." On the same day, Kondaur recorded a notice of lis pendens that recited it was "seeking to quiet title to its interest" in the unit.

¶7 By letter dated June 14, 2011, Bankers Trust demanded Kondaur dismiss its complaint and release the lis pendens. Bankers Trust stated it had accepted Johnson's $3,000 payment as a "holdover payment," permitting her tenants to remain in possession of the unit until the end of January 2011. Bankers Trust also provided Kondaur its email correspondence with Johnson's counsel, which confirmed Bankers Trust had terminated Johnson's sublease and its acceptance of the $3,000 payment "[did] not constitute or evidence any agreement" to reinstate the sublease.

¶8 On June 28, 2011, Bankers Trust sued Kondaur, alleging, as relevant here, claims for declaratory relief, and "[r]ecordation of [i]nstrument in [v]iolation of A.R.S. § 33-420." One day later, Kondaur voluntarily dismissed its complaint and released its lis pendens. The superior court granted summary judgment in Bankers Trust's favor, and awarded it $5,000 in statutory damages and $28,677.31 in attorneys' fees and costs.

DISCUSSION

¶9 Kondaur first argues that because it had initially sued Bankers Trust to quiet title and its action against Bankers Trust was unquestionably one "affecting title to real property" under A.R.S. § 12-1191(A),[2] as a matter of law, its lis pendens could not be groundless under A.R.S. § 33-420(A).[3] We disagree.

¶10 Under Arizona case law, A.R.S. § 33-420 applies to a groundless lis pendens. *Richey v. W. Pac. Dev. Corp.,* 140 Ariz. 597, 601, 684 P.2d 169, 173 (App. 1984). If it did not, "a groundless lis pendens could be filed with impunity in a simple

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[2]As relevant here, A.R.S. § 12-1191(A) provides:

> In an action affecting title to real property, the plaintiff at the time of filing the complaint, or thereafter, and the defendant at the time of filing the defendant's pleading when affirmative relief is claimed in such pleading, or thereafter, may file in the office of the recorder of the county in which the property is situated a notice of the pendency of the action or defense.

[3]A.R.S. § 33-420(A) provides:

> A person purporting to claim an interest in . . . real property, who causes a document . . . to be recorded . . . knowing or having reason to know that the document is . . . groundless, . . . is liable to the owner . . . for the sum of not less than five thousand dollars, or for treble the actual damages caused by the recording, whichever is greater, and reasonable attorney fees and costs of the action.

money judgment action, or in any action where title to property is not actually affected." *Id.*

¶11 We agree, however, that the superior court should not have granted summary judgment on Bankers Trust's claim under A.R.S. § 33-420(A) because Kondaur presented evidence that demonstrated the existence of a genuine issue of material fact as to whether it had a "colorable basis" to contest the termination of Johnson's sublease. As noted in *Evergreen W., Inc. v. Boyd,* we equate "groundless" with "frivolous." 167 Ariz. 614, 621, 810 P.2d 612, 619 (App. 1991). A claim is frivolous if a proponent cannot present any rational argument to support it. *Id*. Accordingly, a frivolous recording is totally and completely "without merit and futile." *SWC Baseline & Crismon Investors, L.L.C. v. Augusta Ranch Ltd. P'ship*, 228 Ariz. 271, 281, ¶ 31, 265 P.3d 1070, 1080 (App. 2011) (citation omitted). A lis pendens, therefore, is groundless if it is tied to a claim that is groundless. *Santa Fe Ridge Homeowners' Ass'n v. Bartschi,* 219 Ariz. 391, 395, ¶ 11, 199 P.3d 646, 650 (App. 2008) (lis pendens is groundless when claim has "no arguable basis or is not supported by any credible evidence") (quoting *Evergreen W., Inc.*, 167 Ariz. at 621, 810 P.2d at 619).

¶12 Here, as it turned out, Johnson's $3,000 payment did not, and indeed could not have reinstated her sublease -- a point Kondaur does not controvert. Thus, Kondaur's lawsuit to quiet title was doomed to fail. But that does not mean at the time it filed its complaint and recorded its lis pendens, it knew or should have known its claim, and therefore its lis pendens, were groundless.

¶13 Even if a lis pendens turns out to be groundless, as Kondaur argues, the recording party is not liable unless it recorded the lis pendens "knowingly or having reason to know" it was groundless. *Coventry Homes, Inc. v. Scottscom P'ship,* 155 Ariz. 215, 219, 745 P.2d 962, 966 (App. 1987) (to prevail on claim for wrongful recording, plaintiff must establish defendant knew or had reason to know its lis pendens was groundless). We have applied the Restatement (Second) of Torts § 12(1) (1965) to define "knowing or having reason to know" under A.R.S. § 33-420(A). *Coventry Homes,* 155 Ariz. at 219, 745 P.2d at 966. Reason to know means "the actor has information from which a person of reasonable intelligence . . . would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists." *Id.* (quoting Restatement (Second) of Torts).

¶14 On appeal from summary judgment, we view the evidence in a light most favorable to Kondaur as the non-moving party. Kondaur. *Id*. Here, Kondaur provided evidence that after its representative spoke to an agent of Bankers Trust, *see supra* ¶ 4, and before it filed its quiet title complaint, it contacted Johnson, and, relying on information from her, believed she had reinstated her sublease by paying Bankers Trust the $3,000. If this had been true, Bankers Trust would not have been entitled to terminate Johnson's sublease, the recorded notice would not have accurately described the situation, and Kondaur would still have had an interest in the unit.

¶15 Although Bankers Trust argues its recorded notice was constructive notice to Kondaur that Flagstar's assignment to it was ineffective, and thus Kondaur knew or should have known it had no interest in the unit, rendering its lis pendens groundless, the recorded notice in and of itself was not conclusive. Kondaur was still entitled to challenge the legality of the termination of the sublease. Accordingly, we vacate the superior court's judgment for Bankers Trust on its claim under A.R.S. § 33-420(A).

¶16 Kondaur finally argues the court should not have entered a declaratory judgment that Bankers Trust owned the unit. It argues no controversy existed because it had already

voluntarily dismissed its complaint, released its lis pendens, and alleged in its answer that it was "not asserting any interest" in the unit. We disagree.

¶17 When Bankers Trust's sued Kondaur, a bona fide controversy existed between the parties. *See Ariz. State Bd. of Dir. for Junior Colleges v. Phoenix Union High Sch. Dist. of Maricopa Cnty*, 102 Ariz. 69, 73, 424 P.2d 819, 823 (1967) (declaratory relief is based on existing facts; if bona fide controversy exists at time of lawsuit, declaratory judgment is proper). Further, a party "cannot by its own voluntary conduct 'moot' a case and deprive a court of jurisdiction." *Tom Mulcaire Contracting, LLC v. City of Cottonwood*, 227 Ariz. 533, 536, 260 P.3d 1098, 1101 (App. 2011) (citations omitted). Moreover, Flagstar had recorded its assignment of Johnson's deed of trust to Kondaur, thus clouding Bankers Trust's title to the unit. Under these circumstances, Bankers Trust was entitled to a declaration that it owned the unit.

CONCLUSION

¶18 For the foregoing reasons, we vacate the superior court's judgment in favor of Bankers Trust on its claim under A.R.S. § 33-420(A) and remand for further proceedings consistent with this decision. Accordingly, we also vacate the court's award of statutory damages, attorneys' fees, and costs to

Bankers Trust. We affirm, however, the superior court's judgment declaring that Bankers Trust owns the unit. As the prevailing party on appeal, we award Kondaur its costs on appeal. A.R.S. § 12-341 (2003).

/s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
ANDREW W. GOULD, Judge

/s/
RANDALL M. HOWE, Judge