IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

TIMOTHY A. HENLINE, et al., *Plaintiffs/Counter-Defendants/Appellees*,

v.

GLADSTONE E. GREGG, *Defendant/Counter-Claimant/Appellant*.

No. 1 CA-CV 16-0524
FILED 10-17-2017

Appeal from the Superior Court in Maricopa County
No. CV2015-010452
The Honorable Patricia Starr, Judge *Pro Tem*

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Justice Rebecca White Berch[1] delivered the decision of the Court, in which Presiding Judge Paul J. McMurdie and Judge Peter B. Swann joined.

B E R C H, Justice:

¶1 Gladstone E. Gregg appeals the superior court's order granting summary judgment in favor of Timothy A. and Diane R. Henline, Joseph D. Bass, Daniel J. Wiley, and Pablo Escobedo (collectively, "the Members"). The court ruled, first, that Gregg is not entitled to membership in and water services from a private utility and, second, that the Members are entitled to easements on Gregg's property. For the reasons that follow, we affirm the judgment.

BACKGROUND AND PROCEDURAL HISTORY[2]

¶2 The Members belong to a co-operative association called Hassayampa Water Co-Op (the "Co-Op") that was formed "for the purpose of acquiring and operating for [the members'] mutual use and benefit [a] water system including well, casing, pumps, storage, and distribution facilities located on [the Co-Op members'] properties." The original members were owners of an 80-acre tract of land that surrounds a well in Maricopa County. The Members acquire interests in the Co-Op proportionate to the number of acres they own, while the Co-Op itself owns the well and accompanying equipment. Members may assign their membership interests in the Co-Op to purchasers of land within the 80-acre tract.

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[1] The Honorable Rebecca White Berch, a retired Justice of the Arizona Supreme Court, has been authorized to sit in this mater pursuant to Article VI, Section 3 of the Arizona Constitution.

[2] In reviewing a motion for summary judgment, we "view the evidence in [the] light most favorable to the non-moving party and draw all justifiable inferences in its favor." *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 116, ¶ 17 (App. 2008) (citations omitted).

¶3 The Co-Op's governing agreement sets forth the purpose of the agreement and states the Co-Op's intent to operate as a private company:

> It is understood and agreed that the [the Co-Op members] are, by mutual agreement, supplying water to each of themselves, and it is the intent of the parties to operate as a cooperative. It is understood and agreed that the cooperative has no public utility franchise, nor Certificate of Public Convenience and Necessity, nor does the cooperative intend to obtain the same unless they are required by law or by majority of the cooperative's voting shares.

¶4 As of December 2015, the Co-Op had fewer than twenty-five members and fifteen service connections, qualifying it to operate as a private utility. Arizona law provides that water systems that have fifteen or more service connections or "regularly serve[] an average of at least twenty-five persons" qualify as public, not private utilities. *See* Ariz. Rev. Stat. (A.R.S.) § 49-352(B)(1)(b) (public water system is a water system that "[h]as at least fifteen service connections or regularly serves an average of at least twenty-five persons daily for at least sixty days a year").

¶5 The governing agreement also outlines the method for transferring an interest in the Co-Op. The agreement provides that "any rights thereunder shall be assignable by the shareholder without the consent of the successor and assigns of the shareholder. However, this Agreement is only assignable by the shareholder to run with the land, and assignee must meet membership requirements set forth in this Agreement."

¶6 In 2010, Gary and Kathleen Bruehl, as trustees of the Bruehl Family Trust, granted real property located within the service area of the Co-Op to Gregg through a warranty deed. Then, in 2014, William B. Malouf, L.L.C. and Bert B. Malouf, L.L.C., which had become the owner of the same tract of land, granted the property to Gregg through a quitclaim deed. The record does not indicate when the property was conveyed to Maloufs. Neither deed assigned Gregg a membership interest in the Co-Op nor has any document produced in this litigation.

¶7 The Members brought a quiet title action against Gregg in September 2015, alleging that around June 2015, Gregg erected a fence around his property that blocked the Members' access to a North/South road and an East/West road, which had allowed the Members to access to

Co-Op equipment located on the Members' property. The Members sought a temporary restraining order and preliminary and permanent injunctions enjoining Gregg from blocking the Members' access to the roads and Co-Op equipment. They also sought a declaration that they were entitled to easements along the North/South road and the East/West road. In addition to the injunctions and easement claims, the Members' sought a declaration that Gregg was not a member of the Co-Op.

¶8 Gregg answered and counterclaimed, seeking a declaration that he was entitled to water from the Co-Op. In support of his counterclaim, Gregg alleged that the Bruehl Trust was a member of the Co-Op at the time of the 2010 warranty deed, the Bruehl Trust's interests in the Co-Op's agreement were assignable without the consent of the other members, and the Co-Op membership interest "[ran] with the land." Therefore, Gregg argued he was entitled to a membership interest in the Co-Op.

¶9 The superior court held a hearing on the Members' request for a preliminary injunction. It ruled that Gregg must provide access to the Co-Op equipment upon notice and prohibited him from interfering with the equipment. After entry of the preliminary injunction, the Members moved for summary judgment on their declaratory relief claim, arguing that Gregg did not have membership rights in the Co-Op. They separately moved for summary judgment on their prescriptive easement claims, arguing that the Members have been using the North/South and East/West roadways for more than 10 years and that their use of the roads was actual, visible, and hostile. The superior court granted both summary judgment motions and awarded the Members attorneys' fees and costs.

¶10 Gregg appealed. We have jurisdiction over this appeal pursuant to A.R.S. § 12-2101(A)(1) (appellate jurisdiction over appeals from a final judgment entered in superior court).

DISCUSSION

I. Standard of Review

¶11 The court grants summary judgment if "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). We review summary judgment rulings de novo, *Desert Mountain Props. Ltd. P'Ship v. Liberty Mut. Fire Ins. Co.*, 225 Ariz. 194, 214, ¶ 87 (App. 2010), and in doing so, "view the evidence in [the] light most favorable to the non-moving party and draw all

justifiable inferences in its favor." *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 116, ¶ 17 (App. 2008) (citations omitted).

II. Prescriptive Easements

¶12 Gregg argues that the superior court should not have granted summary judgment on the Members' prescriptive easement claims because (1) portions of the North/South roadway consisted of a publicly dedicated roadway, and the Co-Op agreement contains express or implied easements for the Members to access the well, so the Members' use of the North/South roadway could not have been hostile or notorious; (2) the Members did not establish a definite location of the East/West roadway; and (3) the Members did not show that their use of either roadway was open and visible. We address each argument in turn.

A. North/South Roadway—Hostile Use

¶13 To establish a prescriptive easement, a party must show that (1) the land in question has actually and visibly been used for ten years, (2) the use began and continued under a claim of right, and (3) the use was hostile to the true owner. *Spaulding v. Pouliot*, 218 Ariz. 196, 201, ¶ 14 (App. 2008). A party's use need not be exclusive:

> A person may establish a prescriptive right even though other people, including the holder of fee title in the servient tenement, use the property in the same way that he does . . . . His use need only be exclusive in the sense that it is based upon a right that he claims as an individual rather than as a member of the general public.

Ammer v. Ariz. Water Co., 169 Ariz. 205, 209 (App. 1991). Because use need not be exclusive, the public roadway designation does not, as Gregg asserts, defeat the Members' prescriptive easement claims.

¶14 Nor does the language of the Agreement defeat the Members' prescriptive easement claims. The Agreement provides that "[a]ny rights under this Agreement so abandoned shall inure to the benefit of the remaining shareholders, and if no remaining shareholders, to the land owners upon which said improvements are located or appurtenant. However, until such time, easements necessary to secure service to shareholders shall remain in effect." This provision applies only if members withdraw from the Co-Op or otherwise abandon their interests. Therefore, we agree with the superior court that this provision does not

create an express or implied easement against a non-Member that would defeat the Members' prescriptive easement claims.

B. East/West Roadway—Definite Location

¶15 Gregg asserts that there can be no prescriptive East/West easement because Members did not specifically designate the easement's location or limits. We disagree that such precision is necessary.

¶16 A prescriptive easement is determined by the use through which it was acquired. *Inch v. McPherson*, 176 Ariz. 132, 136 (App. 1992). Although "a prescriptive easement presupposed the continued use of a definite location," *Stamatis v. Johnson*, 71 Ariz. 134, 138 (1950), the superior court need not grant an easement of an entire roadway if the party seeking the easement has not shown it has used the entire roadway and may limit the easement to any "portion of the roadway which it has determined has clearly met the requirements of obtaining an easement by prescription." *Krencicki v. Peterson*, 22 Ariz. App. 1, 3-4 (App. 1974). That is, the court has the power to determine the limits of a prescriptive easement.

¶17 Here, the Members provided evidence that they had regularly used a portion of the East/West roadway to gain access to Co-Op equipment. The use was open, apparent, and specific enough that Gregg was able to block use of the easement by placing "mound[s] and dirt piles" in the roadway to obstruct access, and he placed a fence and "padlocked gates on the East/West Roadway such that [Gregg] has blocked ingress and egress along and through the East/West Roadway." Thus the location of the easement was apparent; its lack of specificity does not preclude the superior court's award of an easement only for "the portion [of the East/West roadway] that is necessary for vehicular ingress and egress." We hold that the location of the easement was sufficiently definite.

C. Both Roadways—Open and Visible

¶18 The Members provided the superior court with evidence that they have "driven upon, used, utilized, maintained, accessed, and landscaped" both the North/South and East/West roadways "during daylight hours" for more than 10 years. Thus, the Members have not, as

Gregg asserts, "failed to produce evidence that their use of either alleged roadways was actual and visible."[3]

III. Water Rights in the Co-Op

¶19 Gregg maintains that the superior court should not have granted the Members' summary judgment motion and declared that he was not entitled to membership in the Co-Op because water rights ran with the land.[4] We reject this argument.

¶20 The Agreement provides that landowners may gain membership in the Co-Op by having land within the 80-acre parcel, receiving an assignment of an interest in the Co-Op, and constructing the equipment and gauges necessary for water service. A member may assign membership rights in the Co-Op to those who meet the other conditions without the agreement of other members, and such an assignment is binding upon successors and runs with the land.

¶21 The Members argue that Gregg cannot have an interest in the Co-Op because the warranty and quit-claim deeds conveying his parcel do not convey water rights. It is true, in general, that water rights are property rights, *Paloma Inv. Ltd. P'ship v. Jenkins*, 194 Ariz. 133, 138, ¶ 22 (App. 1998), that must be conveyed in a deed, *Neal v. Hunt*, 112 Ariz. 307, 310 (1975). Neither the Bruhel Trust warranty deed nor the Malouf quitclaim deed

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[3] Relatedly, Gregg also asserts that the location of the North/South roadway was not sufficiently precise and also that the Members' use of the North/South roadway could not have been open and visible due to overgrown vegetation. However, Gregg did not raise these points in the superior court, and thus we decline to address them. *See Lemons v. Showcase Motors, Inc.*, 207 Ariz. 537, 541 n.1 (App. 2004) (appellate court will not consider new factual theory for first time on appeal from summary judgment).

[4] Gregg also argues the superior court should not have granted the Members' summary judgment motion on their declaratory relief claim because there were questions of fact precluding summary judgment. His brief, however, does not explain what facts are in dispute or why the superior court should not have granted summary judgment based on any disputed facts. Gregg has therefore waived this argument. *See* ARCAP 13(a)(7) (appellate brief shall contain contentions concerning each issue presented for review and contain references to the record and supporting legal authority); *see, e.g., Dawson v. Withycombe*, 216 Ariz. 84, 107, ¶ 68 (App. 2007) (appellant waived argument by not providing support for it).

specifically assigned Gregg water rights. But whether Gregg has water rights at all is not at issue in this appeal, and we do not address it. The question is whether Gregg has a right to membership in the Co-Op and the provision of services by it. That right may be acquired by assignment from a prior Co-Op member (and meeting other conditions), and nothing in the Co-Op agreement requires that the assignment be made by deed.

¶22 Gregg asserts that *Kengla v. Stewart*, 82 Ariz. 365 (1957), supports his bid for membership interest in the Co-Op. In *Kengla*, an owner of 160 acres of land subdivided the land into 158 lots. 82 Ariz. at 366-67. During the owner's lifetime, he executed 13 deeds that contained the following specific language conveying water rights in a well:

> The parties of the first part hereby convey to the parties of the second part a one one-hundred-and-sixtieth (1/160) interest in the well and equipment and water system . . . upon condition, however, that the said parties of the second part, their heirs and assigns shall, when the owners of a majority of the lots in said addition shall so request, convey said one one-hundred-and-sixtieth (1/160) interest in said well and equipment and water system, to a trustee in trust for the use and benefit of all of the owners of lots in said addition . . . .

Id. at 367. The owner died before he finished subdividing the land, and the owner's two sons inherited the remaining lots. *Id*. One of the sons went bankrupt, and the bankruptcy trustee conveyed 52 of the bankrupt son's lots, through quitclaim deeds, to the defendant, and one lot to a third party. *Id*. at 367-68. The quitclaim deeds did not specifically convey the water rights the original 13 deeds conveyed. *Id*. at 368. Then, the other son purportedly sold water rights to 62 different lots, but not the lots themselves, to the defendant. *Id*.

¶23 Several years later, a majority of the lot owners entered into an agreement, pursuant to the language in the quitclaim deeds, appointing three trustees to take over the well. *Id*. at 369. The defendant refused to join in the agreement, claiming he owned the well outright. *Id*. The remaining lot purchasers sued the defendant, and after a trial, the superior court ruled that the appointed trustees were entitled to possession of the well. *Id*. On appeal, the supreme court held that although the deeds the two sons executed did not specifically convey rights in the well, but instead conveyed "all appurtenances thereto," the deficient deeds still "had the legal effect of conveying the well, water system and equipment as effectively as if the clauses originally incorporated in the deeds executed . . .

[by the original owner] had appeared in every deed executed." *Id*. at 371-72 .

¶24 Gregg contends that, in a similar way, the 2010 warranty deed's language conveying the land "[s]ubject to . . . covenants, conditions, restrictions, rights of way and easements of record" is, like the "all appurtenances" language in the deficient deeds in *Kengla*, sufficient to convey to him a membership interest in the Co-Op. We disagree.[5]

¶25 Unlike evidence that the original deeds in *Kengla* conveyed a 1/160th interest in the well, no evidence here shows that the 2010 warranty deed or 2014 quitclaim deed should have contained the conveyance of a membership interest in the Co-Op. Gregg presented no evidence that he had received an assignment of rights in the Co-Op from the Bruhel Trust.

¶26 Gregg also suggests that he should have an interest in the Co-Op because membership interests "run with the land." But this misreads the Co-Op Agreement, which provides that shares are "assignable by the shareholder to run with the land, and assignee must meet membership qualifications set forth in this Agreement." It allows members to convey interest in the Co-Op to those who purchase land within the 80 acres and obtain equipment for hook ups. The "run with the land" language appears to reflect the intent that assignments be made only to those who own land within the original parcel. More importantly, even this provision requires an assignment, and none was shown to exist here.

¶27 In sum, the 2010 warranty deed and 2014 quitclaim deed did not convey a membership interest in the Co-Op and Gregg has failed to present any evidence of an assignment. Because we conclude that the superior court properly ruled that Gregg was not entitled to a membership interest because Gregg has failed to show an assignment, we need not address Gregg's argument that the superior court improperly imposed additional membership requirements into the Agreement.

IV. Attorneys' Fees

¶28 Finally, Gregg argues that the superior court abused its discretion in awarding the Members' attorneys' fees. We conclude that such an award was within the court's discretion. *See Orfaly v. Tucson*

[5] We do not opine on whether such language might be sufficient to convey water rights.

Symphony Soc'y, 209 Ariz. 260, 265, ¶18 (App. 2004) (observing that we review an award of attorneys' fees for an abuse of discretion).

¶29 A court may award attorneys' fees in a quiet title action pursuant to A.R.S. § 12-1103(B). Factors to consider when awarding discretionary attorneys' fees include (1) whether a defense was meritorious, (2) whether litigation could have been settled, (3) whether a fee award would pose an extreme hardship, (4) whether the successful party prevailed with respect to all of the relief sought, (5) whether the case involved novel legal issues, and (6) whether the award would discourage other parties with tenable claims from litigating them. *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570 (1985).

¶30 As an initial matter, the Members remain the prevailing parties on all issues. Gregg maintains that he offered to settle by becoming a member of the Co-Op, but as the foregoing discussion shows, Gregg did not establish that he was entitled to membership. And the evidence regarding settlement is conflicting; it showed that Gregg would not agree to allow Members access to the easements in question. Finally, Gregg does not challenge any specific billing entry or otherwise explain what efforts taken by the Members' lawyers were "superfluous." Given the foregoing, we cannot say the superior court abused its discretion in awarding the Members' attorneys' fees on this record.

CONCLUSION

¶31 For the foregoing reasons, we conclude that the superior court properly granted the Members' summary judgment motions. The Members request attorneys' fees on appeal pursuant to A.R.S. 12-341.01(A) (attorneys' fees based on contract) and A.R.S. § 12-1103(B) (attorneys' fees based on quiet title action). Gregg, however, was not a party to the Agreement. Therefore, A.R.S. § 12-341.01(A) is inapplicable. Further, exercising our discretion under A.R.S. § 12-1103(B), we decline to award the Members attorneys' fees on appeal. However, as the prevailing party, we award the Members costs pursuant to A.R.S. § 12-341 contingent upon their compliance with ARCAP 21.