IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

SUN CITY GOLF RESORT LLC, *Plaintiff/Appellee*,

v.

GEORGE A LOEGERING, *Defendant/Appellant,*

AMERICAN REGENT IV LLC, *Intervenor/Appellee.*

No. 1 CA-CV 17-0106
FILED 3-20-2018

Appeal from the Superior Court in Maricopa County
No. CV2013-054385
The Honorable Susan M. Brnovich, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Kenton D. Jones and Judge James B. Morse Jr. joined.

H O W E, Judge:

¶1 George Loegering[1] appeals the trial court's granting of partial summary judgment to Sun City Golf Resort, LLC ("SCGR") holding that his deed of trust ("DOT") was extinguished through his subsequent execution of a deed of release and reconveyance. George also appeals the trial court's denial of his Arizona Rules of Civil Procedure 50 and 59 motions and the trial court's attorneys' fees award to SCGR. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In 2007, George and his brother, Thomas Loegering, Sr. ("Tom"), agreed to purchase Sun City Country Club together. The brothers, along with American Regent IV, LLC—an already-existing entity that Tom's son, Thomas Loegering, Jr. ("TJ"), controlled—formed SCGR to own and operate the golf resort. With SCGR formed, the parties purchased the club. Under SCGR's operating agreement, SCGR's two members were George, as a 15% member, and American Regent, as an 85% member. Tom was SCGR's manager but did not have an ownership interest in it.

¶3 Almost immediately, SCGR struggled financially. To keep SCGR afloat, George contributed capital contributions above his 15% ownership requirement. To reflect George's additional contributions, the operating agreement was amended three times, increasing George's membership interest from 15% to 35% and decreasing American Regent's membership interest from 85% to 65%. In July 2008, George lent SCGR $285,000, evidenced by a promissory note and secured by the DOT. The promissory note provided that SCGR would make monthly payments at a 6% interest rate. Tom, on SCGR's behalf, TJ, on American Regent's behalf, and George, individually, all signed the promissory note.

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[1] Because the individuals in this case all share the same last name, we refer to each of the Loegerings by their first name or initials.

¶4 The following month, George signed and delivered to SCGR a deed of release and reconveyance of the DOT, although no payments had been made on the loan. The deed of release and reconveyance stated that George "releas[ed] and convey[ed] to the person or persons legally entitled thereto, without covenant or warranty, express or implied, all the estate title and interest acquired by [him] under said Deed of Trust." Shortly thereafter, George recorded the DOT in Maricopa County.

¶5 From 2008 to 2010, SCGR made no payments on the $285,000 loan. In April 2010, American Regent sold property in California. After the sale, Tom, TJ, and George signed a memorandum of understanding ("MOU") that stated "American Regent[] is providing a disbursement of $285,000 from the above escrow as part repayment for loans to American Regent[] from George A[.] Loegering including a note secured by a recorded trust deed."

¶6 SCGR continued having financial difficulties and never made a profit over the next several years. George became unhappy with Tom's management of SCGR and attempted to have him removed as manager. In May 2013, George sent SCGR a copy of the promissory note from 2008 with a handwritten message that stated he would foreclose on the note and "only want[ed] the business [and] us to succeed but your actions prevent[ed] that." George then alleged that SCGR had breached the promissory note and DOT by failing to pay the monthly payments and that the total amount due on the promissory note with interest was $386,344.30. George also had the trustee under the DOT file a notice of trustee's sale, which was scheduled for September 2013.

¶7 American Regent reminded George that the sale of the California property had satisfied the 2008 promissory note in full and requested that he rescind the notice of trustee's sale. George refused and subsequently notified SCGR club members—who also held individual deeds of trust—that he would conduct a trustee's sale on the golf course.

¶8 In September 2013, SCGR sued George and sought a temporary restraining order and preliminary injunction of the trustee's sale scheduled for later that month. The trial court granted the injunction. In lieu of having an evidentiary hearing on the injunction, both parties agreed to stay the trustee's sale pending litigation. That same month, American Regent moved to intervene in the pending litigation, which the trial court granted. American Regent then brought claims against George, alleging breach of his fiduciary duty and the covenant of good faith and fair dealing.

¶9 In November 2013, Tom found the deed of release and reconveyance that George had executed and delivered to SCGR in 2008 and recorded it in Maricopa County. SCGR subsequently amended its complaint to allege: (1) breach of contract and the implied covenant of good faith and fair dealing, (2) recording a false document under A.R.S. § 33–420, (3) slander of title, (4) tortious interference with contractual relations, and (5) breach of fiduciary duty. SCGR also sought a declaratory judgment that the promissory note was paid in full and the DOT was unenforceable and sought to quiet title to the property secured by the DOT.

¶10 In March 2015, SCGR and American Regent separately moved for partial summary judgment. SCGR sought summary judgment on whether the promissory note was paid in full and the deed of release and reconveyance was valid. American Regent requested summary judgment on whether George breached the covenant of good faith and fair dealing. George responded that material issues of fact existed that precluded summary judgment and that although he executed and delivered to SCGR a deed of release and reconveyance, he intended it to be held by "a third party and only to be recorded upon mutual instructions from the parties." The court found that material issues of fact had existed about whether the $285,000 loan was paid in full and denied summary judgment on that issue. The court also found, however, that George executed and delivered the deed of release and reconveyance to SCGR and that "[George's] unsupported assertion that there was an understanding that it would be held by a third party and only recorded upon mutual instructions is insufficient to create a genuine issue as to the validity of the Deed of Release and Reconveyance." As such, the court granted summary judgment and held that the deed of release and reconveyance extinguished the DOT. The court denied, however, American Regent's motion for partial summary judgment on whether George breached the covenant of good faith and fair dealing because that issue was a question of fact for the jury to decide.

¶11 The court held a jury trial in April 2016. As pertinent here, TJ, Tom, and George testified about payment of the $285,000 promissory note and the MOU. George denied that the $285,000 payment from American Regent extinguished the promissory note because (1) the MOU stated that the payment was for "loans," not "loan"; and (2) he had lent more than $285,000 to SCGR at the time he received the $285,000 payment. TJ and Tom both testified that the sale of the property in California was done in part to repay George the $285,000 outstanding under the promissory note. Tom testified that after George filed the notice of trustee's sale in 2013, every golf club member received notice that George was foreclosing. According to Tom, 19 golf club members then requested to cancel their membership,

resulting in an almost $14,000 obligation per member for a total obligation of $260,000 to $265,000. Tom also testified that three club members foreclosed on their individual deeds of trust and that SCGR had to borrow approximately $27,600 to pay those three club members. When asked why he had filed the notice of trustee's sale, George stated that he did so only to get Tom to negotiate and not because SCGR failed to pay the promissory note. According to George, Tom was mismanaging SCGR and he could only get Tom to negotiate with him by initiating a trustee's sale.

¶12 George and Tom also testified about the deed of release and reconveyance. Tom testified that he wanted assurance that George would not foreclose under the DOT, so he and George agreed that George would sign the deed of release and reconveyance. Tom also testified that George delivered the deed of release and reconveyance to him but that he forgot about it until after the notice of trustee's sale was recorded. George admitted to signing the deed of release and reconveyance but stated that SCGR's general manager, Anne Inman, who notarized the deed, was supposed to hold it as a third party until both parties instructed her that the promissory note was paid in full. At the end of SCGR's case, George moved to vacate the partial summary judgment regarding the deed of release and reconveyance extinguishing the DOT, arguing that the differing testimonies created a factual issue for the jury to decide. The trial court denied his motion.

¶13 George moved for judgment as a matter of law under Rule 50, which the trial court denied. The trial court then gave the final jury instructions before releasing the jury for deliberations. Before the court read the jurors the instructions on SCGR's slander of title and recording a false document claims, it advised the jury that it had already found as a matter of law that George executed and delivered the deed of release and reconveyance and that the deed of release and reconveyance extinguished the DOT. After deliberations, the jury found in SCGR's favor on its claims of tortious interference with contractual relations, recording a false document, and slander of title. But the jury found in George's favor on SCGR's claims of breach of contract, breach of duty of good faith and fair dealing, and breach of fiduciary duty. The jury also found in George's favor on American Regent's claims for breach of fiduciary duty and breach of duty of good faith and fair dealing.

¶14 After trial ended, SCGR requested its attorneys' fees under A.R.S. § 12–341.01 because the claims arose out of contract and under A.R.S. § 33–420(A) because a person who violates the statute is "liable" to the other party for attorneys' fees and costs. SCGR claimed that it was the prevailing

party because it accomplished the result sought in the litigation: halting the foreclosure; extinguishing the DOT; and obtaining jury verdicts for three of its allegations. George also requested his attorneys' fees and claimed to be the prevailing party. He contended that he prevailed on all counts American Regent brought and three of the six SCGR brought. He also contended that because the jury awarded no damages for the tortious interference with contractual relations and slander of title claims, SCGR was not the prevailing party for those counts. The trial court found that when considering the issues already decided in granting the partial motion for summary judgment with SCGR's prevailing on three of the six claims the jury decided, SCGR was the prevailing party under A.R.S. § 12–341.01. The court also found that SCGR was entitled to attorneys' fees under A.R.S. § 33–420. As such, the court awarded SCGR $77,414.59 in attorneys' fees. Although George was the successful party against American Regent, the trial court denied his attorneys' fees request because George "made no attempt to separate out fees for defending [American Regent's] claims versus defending [SCGR's] claims."

¶15 George moved for a new trial under Rule 59, which the trial court denied. George timely appealed.

DISCUSSION

1. Deed of Release and Reconveyance

¶16 George argues that the trial court erred by granting partial summary judgment to SCGR on the deed of release and reconveyance issue. He contends that material issues of fact existed at the time of the partial motion for summary judgment that precluded the court from granting the motion. We review a grant of summary judgment de novo and view the facts in the light most favorable to the non-moving party. *Wickham v. Hopkins*, 226 Ariz. 468, 470 ¶ 7 (App. 2011). The trial court shall grant summary judgment when "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). When the moving party supports its motion with specific facts, the party opposing the motion must also set forth specific facts showing a genuine issue for trial. Ariz. R. Civ. P. 56(c)(3)(B). Because no genuine issue of material fact existed regarding the deed of release and reconveyance, the trial court did not err by granting SCGR summary judgment on that issue.

¶17 No one disputes that George signed and executed the deed of release and reconveyance in 2008 after SCGR provided him with the DOT.

The deed of release and reconveyance stated that George "releas[ed] and convey[ed] to the person or persons legally entitled thereto, without covenant or warranty, express or implied, all the estate, title, and interest acquired by [him] under said Deed of Trust." Viewing the facts in the light most favorable to George, everyone agreed he executed the deed of release and reconveyance and delivered it to SCGR's general manager at the time. SCGR possessed the deed from the moment that George executed it. As such, the trial court did not err by finding that the deed of release and reconveyance George delivered to SCGR extinguished the DOT.

¶18 George's argument that SCGR's general manager acted as a third party is insufficient to create a genuine issue of material fact and is irrelevant to our consideration. George relies on cases that hold when a deed is executed but delivered to a third party instead of the grantee, the deed is not deemed delivered. *See Roosevelt Sav. Bank of City of N.Y. v. State Farm Fire & Cas. Co.*, 27 Ariz. App. 522, 524 (1976) (bank's holding deed in escrow until satisfaction of conditions not delivered until recordation). Even assuming *Roosevelt Savings* applies to deeds of release and reconveyance, the deed of release and reconveyance here was not delivered to a third party—it was delivered to SCGR by way of its general manager. Because the deed of release and reconveyance clearly stated that George was releasing and reconvening the property back to SCGR, the trial court did not err by granting SCGR summary judgment on that issue.

¶19 George also argues that the trial court erred by denying his motion to vacate the partial summary judgment ruling. He contends that because contradictory testimony regarding the deed of release and reconveyance was presented at trial, the deed's validity became a question of fact for the jury to decide. But George provides no legal authority—and we find none—for his proposition that the parties' contradicting testimony turned the validity of the deed of release and reconveyance into a question of fact for the jury to decide. When George admitted having executed the deed of release and reconveyance and delivered it to SCGR's general manager, the question was no longer a question of fact, but instead, a question of law. Therefore, the trial court did not err by declining to vacate the grant of partial summary judgment.

2. Rule 50 Motion

¶20 George next argues that the trial court erred by denying his Rule 50 motion for judgment as a matter of law on SCGR's claims because each claim relied on the "factually unsupportable assumption that [SCGR] had already paid back all of the loan and interest" owed to him under the

promissory note. On appeal, George contests only the trial court's denial of his Rule 50 motion pertaining to the claims of recording a false document, tortious interference with contractual relations, and slander of title. We review the denial of a motion for judgment as a matter of law under Rule 50 de novo. *Goodman v. Physical Res. Eng'g, Inc.*, 229 Ariz. 25, 27 ¶ 6 (App. 2011). "We will uphold the ruling unless the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Id.* at 28 ¶ 6. Because SCGR provided sufficient evidence from which the jury could have found in its favor, the trial court did not err by denying the Rule 50 motion.

2a. Recording a False Document Claim

¶21 The evidence presented at trial was sufficient to support a claim for recording a false document. In pertinent part, a claim for recording a false document requires proof that a person purporting to claim an interest in real property caused a document asserting the claim to be recorded and did so knowing or having reason to know that the document contained a material misstatement or false claim or was otherwise invalid. A.R.S. § 33–420. No party disputes that George claimed an interest in the golf course through the DOT and had executed a deed of release and reconveyance on that interest, thereby releasing SCGR from any claim thereunder, but then filed a notice of trustee's sale anyway. Therefore, by attempting to foreclose on a debt George knew he had released, the first element is met. Next, SCGR presented sufficient evidence for the jury to conclude that George knew or should have known that the document contained a "material misstatement or false claim or was otherwise invalid." During trial, TJ testified that American Regent sold property in California and paid George $285,000 to fulfill its requirement under the promissory note. Additionally, Tom testified that George executed, signed, and delivered to him a deed of release and reconveyance in 2008. Viewing the evidence in the light most favorable to SCGR, *see Dawson v. Withycombe*, 216 Ariz. 84, 95 ¶ 25 (App. 2007), George knew that he had fully executed and delivered the deed of release and reconveyance and yet filed the notice of trustee's sale anyway. Because the deed of release and reconveyance extinguished the DOT, the notice of trustee's sale contained a false claim, i.e., that the DOT was still valid. Therefore, the trial court correctly denied George's Rule 50 motion on the recording a false document claim.

2b. Tortious Interference with Contractual Relations Claim

¶22 The evidence at trial was also sufficient to support SCGR's tortious interference with contractual relations claim. As relevant here, SCGR's tortious interference with a contract claim required evidence that: (1) SCGR had a contract or business expectancy with its club members and George knew it, (2) George intentionally interfered with SCGR's contractual relationship or business expectancy with the club members that caused a breach or termination of that relationship or expectancy to be realized, (3) George had an improper motive, and (4) SCGR suffered damage caused by the breach or termination of SCGR's contractual relationship or business expectancy with its members. *See Neonatology Assocs., Ltd. v. Phx. Perinatal Assocs. Inc.*, 216 Ariz. 185, 187 ¶ 7 (App. 2007).

¶23 George does not argue that SCGR did not have a contract with its club members or deny that he interfered with that contract; instead, he argues only that he acted properly and that SCGR did not provide sufficient evidence that his actions damaged it. The testimony at trial showed otherwise, however. George executed and delivered the deed of release and reconveyance to SCGR, thereby extinguishing the DOT. Although George contends that "there was nothing improper in sending the Notice [of trustee's sale] since it was the statutory procedure," the underlying DOT for which the notice of trustee's sale was filed had been extinguished when George executed and delivered the deed of release and reconveyance to SCGR. Having already provided the deed of release and reconveyance, George's initiation of foreclosure proceedings served only to scare club members into leaving the club and taking their invested sums with them. Therefore, sending a notice of trustee's sale on the extinguished DOT was improper. Additionally, George testified that he filed the notice of trustee's sale not because the promissory note had gone unpaid, but only to get Tom to negotiate. This is sufficient evidence for the jury to conclude that George had an improper motive for filing the notice of trustee's sale. *See ABCDW LLC v. Banning*, 241 Ariz. 427, 437 ¶ 42 (App. 2016) ("To be liable for tortious interference with a contract, the defendant's actions must be improper as to motive or means.").

¶24 The record shows that SCGR provided sufficient evidence for a jury to conclude it sustained damages. Tom testified that all golf club members received notice of the scheduled trustee's sale. Tom also stated that after the notice was delivered, 19 members requested to cancel their membership with SCGR. According to Tom, SCGR had to borrow $27,600 to pay three club members who foreclosed on their individual deeds of

trust. On this record, viewing the evidence in the light most favorable to SCGR, we cannot say that the damages evidence was insufficient for the jury to find in SCGR's favor. Consequently, no error occurred.

2c. Slander of Title Claim

¶25 George next argues that the evidence at trial was insufficient as a matter of law to support SCGR's slander of title claim. "Slander of title requires proof of the uttering and publication of the slanderous words by the defendant, the falsity of the words, malice and special damages." *SWC Baseline & Crismon Inv'rs, L.L.C. v. Augusta Ranch Ltd. P'ship*, 228 Ariz. 271, 287 ¶ 63 (App. 2011). Malice means acting from improper motives. *Id.* "In an action for slander of title, the recording of an unfounded claim is actionable only where the defendant's act is malicious, that is, where it is done from improper motives or without reasonable belief in the efficacy of the claim." *Barnett v. Hitching Post Lodge, Inc.*, 101 Ariz. 488, 493 (1966). Because George filed a groundless notice of trustee's sale with an improper motive, the trial court did not err by denying his Rule 50 motion on this claim.

¶26 Here, the evidence showed that George knew he had executed and delivered to SCGR the deed of release and reconveyance. As such, he knew that a foreclosure action on the extinguished DOT was groundless. Additionally, golf club members indisputably received notice of the trustee's sale. George acted with malice because he had an improper motive for filing the notice of trustee's sale. *See supra* ¶ 23. Finally, Tom provided testimony that SCGR suffered damages because of George's actions in filing the notice of trustee's sale, namely, when club members foreclosed on their individual deeds of trust. *See supra* ¶ 24. Thus, SCGR provided sufficient evidence on its slander of title claim.

3. Rule 59 Motion

¶27 George contends that the trial court erred by denying his Rule 59 post-trial motion. "The trial court has broad discretion in deciding whether to grant or deny a motion for new trial . . . and we will not overturn that decision absent a clear abuse of discretion." *Pullen v. Pullen*, 223 Ariz. 293, 296 ¶ 10 (App. 2009). We do not reweigh the evidence and will resolve every conflict in the evidence to support the trial court's order. *State v. Fischer*, 242 Ariz. 44, 52 ¶ 28 (2017).

¶28 George argues that he was denied a fair trial on the tortious interference with contractual relations, slander of title, and recording a false document claims. To support his assertion, George contends that the court

erred by granting partial summary judgment on the deed of release and reconveyance's validity. Having already found that the trial court did not err by granting partial summary judgment on the deed of release and reconveyance issue, we reject this argument. *See supra* section 1. George also argues that the court should have granted his Rule 59 motion because the parties' contradicting testimony at trial turned the validity of the deed of release and reconveyance into a question of fact for the jury to decide. As previously stated, *see supra* ¶ 19, George provides no legal authority for the proposition that testifying about an issue previously decided in a motion for summary judgment, but still intertwined with other claims properly before the jury, turns the issue into a question of fact for the jury to decide.

¶29 George's next argument, that the trial court erred by giving the jury the peremptory instruction regarding the deed of release and reconveyance extinguishing the DOT, is also without merit. "A trial court must give a requested jury instruction if: (1) the evidence presented supports the instruction, (2) the instruction is proper under the law, and (3) the instruction pertains to an important issue, and the gist of the instruction is not given in any other instructions." *Brethauer v. Gen. Motors Corp.*, 221 Ariz. 192, 198 ¶ 24 (App. 2009). We review the trial court's decision to include a requested jury instruction for an abuse of discretion, "but we will not reverse on this basis absent resulting prejudice." *Id.*

¶30 The record supports the trial court's decision to give the peremptory jury instruction. The evidence at trial supported the trial court's grant of partial summary judgment finding that the deed of release and reconveyance was delivered to SCGR and extinguished the DOT. George himself testified that he executed the deed of release and reconveyance and delivered it to SCGR's general manager at the time. Tom testified that SCGR possessed the deed of release and reconveyance from the time George executed it in 2008. Because the court properly found, as a matter of law, that the deed of release and reconveyance extinguished the DOT, the instruction informing the jury of that finding was proper. Finally, the instruction regarding the deed of release and reconveyance pertained to important issues given the claims SCGR alleged against George and the elements it had to prove to establish its claims. Therefore, no abuse of discretion occurred.

¶31 Relying on *Am. Sur. Co. of N.Y. v. Duvall*, 22 Ariz. 261, 265 (1921), George counters that "only where there is a total lack of evidence, or where the evidence so greatly preponderates one way that there can be no question as to what the verdict should be," should the court give such a directed peremptory instruction. But the peremptory instructions in that

case are distinguishable from the peremptory instruction given here. In *American Surety*, the trial court gave jury instructions that specifically instructed the jury who its verdict should be for. *Id.* at 265. Here, the court did not instruct the jury to enter its verdict for SCGR. Instead, it stated that it found as a matter of law that George had executed and delivered the deed of release and reconveyance, which extinguished the DOT. The court then provided the jury with the elements required to satisfy the claims alleged. On this record, the trial court did not abuse its discretion by denying George's Rule 59 post-trial motion.

4. Attorneys' Fees

¶32 George argues finally that the trial court erred by awarding SCGR its attorneys' fees. The trial court awarded SCGR attorneys' fees under A.R.S. § 12–341.01 and A.R.S. § 33–420.[2] "An award of attorney fees is left to the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion." *Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, 265 ¶ 18 (App. 2004). "We will not disturb the trial court's discretionary award of fees if there is any reasonable basis for it." *Id.* Because the record supports awarding attorneys' fees to SCGR as the prevailing party at trial, no abuse of discretion occurred.

¶33 To determine the successful party under A.R.S. § 12–341.01(A) when a case involves multiple claims and varied success, "the trial court may use a percentage of success factor or a totality of the litigation rubric to determine which party prevailed." *Murphy Farrell Dev., LLLP v. Sourant*, 229 Ariz. 124, 134 ¶ 36 (App. 2012). The trial court's determination of who the successful party is will not be reversed absent an abuse of discretion. *Nataros v. Fine Arts Gallery of Scottsdale, Inc.*, 126 Ariz. 44, 49 (App. 1980).

¶34 The record supports the trial court's determination that SCGR was the successful party and thus entitled to its attorneys' fees. The court found that of the six claims SCGR brought, the jury found George at fault on three of them. Additionally, the court took into consideration that it had already decided two issues in SCGR's favor at the partial summary judgment stage. Finally, the court noted that SCGR was successful on the issues that were the catalyst for the litigation in the first place—halting the trustee's sale and stopping George from foreclosing on the extinguished

[2] Because we hold that the trial court properly awarded SCGR attorneys' fees under A.R.S. § 12–341.01, we do not determine whether fees were appropriate under A.R.S. § 33–420.

DOT. George counters that because the jury awarded no damages to SCGR on its claims of tortious interference with contractual relations and slander of title, SCGR did not prevail on those counts. George is incorrect and provides no authority for the proposition that not awarding damages negates the jury's finding that SCGR prevailed against him. On this record, we cannot say that the trial court abused its discretion by determining that SCGR was the successful party and thus awarding it attorneys' fees.

CONCLUSION

¶35 For the foregoing reasons, we affirm. SCGR requests its attorneys' fees on appeal under A.R.S. § 12–341.01. In our discretion, we deny SCGR's request. As the prevailing party on appeal, however, SCGR is entitled to its taxable costs upon its compliance with Arizona Rule of Civil Appellate Procedure 21.

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