IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JENNIFER C. WALES, *Appellant*,

v.

CEDARWOOD-YOUNG COMPANY, *Appellee*.

No. 1 CA-CV 19-0469
FILED 4-23-2020

Appeal from the Superior Court in Maricopa County
No. CV2017-015556
The Honorable David W. Garbarino, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Moyes Sellers & Hendricks Ltd., Phoenix
By Scott R. Goldberg
Counsel for Appellant

Shein Phanse Adkins, P.C., Scottsdale
By Todd M. Adkins, Erik D. Smith
Counsel for Appellee

MEMORANDUM DECISION

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Randall M. Howe and Chief Judge Peter B. Swann joined.

T H U M M A, Judge:

¶1 This case turns on which claimant has the right to the excess proceeds from a September 2017 trustee's sale of a house owned by Todd Wales. The superior court found that appellee Cedarwood-Young Company, doing business as Allan Company (Allan Co.), has the right to those funds while appellant Jennifer Wales, Todd's ex-wife, does not. Because Todd owned the house as his sole and separate property, and Jennifer expressly disclaimed any interest in the house, the court properly found Allan Co. had the right to the excess proceeds. Accordingly, the judgment is affirmed.

FACTS AND PROCEDURAL HISTORY

¶2 Jennifer and Todd were married from 2004 until 2017. For a time, the couple and their children lived in a house purchased in 2012. Todd purchased the house, in his name alone, and Pinnacle Bank financed the purchase, secured by a deed of trust. Because Todd bought the house while he was married, Pinnacle Bank asked Jennifer to sign a disclaimer of interest to the house and she did so.

¶3 The Disclaimer stated that (1) Todd purchased the house with his "separate funds" and held title to the house as "sole and separate property;" (2) Jennifer had "no past or present right, title, interest, claim or lien of any kind or nature whatsoever in, to or against said property;" and (3) it was being signed "not for the purpose of making a gift to [Todd], but solely for the purpose of clearly showing of record that [Jennifer] has and claims no interest in and to said property." The Disclaimer concluded:

> NOW THEREFORE, in consideration of the premises, [Jennifer] does hereby disclaim, remise, release, and quit-claim unto [Todd] and to the heirs and assigns of [Todd] forever, all right, title, interest, claim and demand which

> the undersigned might appear to have in and to the above described property.

The Disclaimer was timely recorded, has never been challenged, modified or rescinded and was not released until after the September 2017 trustee's sale.

¶4 The family lived in the house for a time, until Jennifer and the children moved out in May 2015. In December 2015, Jennifer filed for divorce. By that time, Todd and Allan Co.'s principal Stephen Young had been business and personal associates for some time. In June 2015, Allan Co. had lent Todd $35,000 secured by a deed of trust on the house. Before providing the loan, Allan Co. confirmed that the house was Todd's sole and separate property. Jennifer apparently had no involvement with, or contemporary knowledge of, that loan.

¶5 In July 2016, Allan Co. made another loan to Todd secured by another recorded deed of trust on the house, resulting in Todd owing Allan Co. a total of $81,000. Before funding this second loan, Allan Co. obtained a title report confirming the house was Todd's sole and separate property and that the only encumbrances of record were for the Pinnacle Peak and Allan Co. loans. The title report did not reveal the Disclaimer, which Allan Co. apparently was unaware of in making these two loans. Jennifer apparently had no involvement with, or contemporary knowledge of, this second loan.

¶6 In October 2016, Allan Co. made a third loan to Todd for an additional $18,392 secured by another recorded deed of trust on the house. Jennifer apparently had no involvement with, or contemporary knowledge of, this third loan. Young and Allan Co. apparently were unaware of the divorce proceedings until 2017. By the time of the Pinnacle Peak trustee's sale of the house in September 2017, Todd owed Allan Co. nearly $150,000 in principal, interest and fees on the loans.

¶7 Meanwhile, in the divorce proceeding, Jennifer and Todd stipulated to a decree of dissolution that the superior court entered in January 2017. The Decree required the sale of the house and granted Jennifer a $98,250 community property lien on the proceeds. The Decree, however, expressly acknowledged that it did not resolve the rights of non-parties and "that it can in no way adversely affect or alter rights of third-party creditors in the absence of independent action by such third-party creditors." Jennifer had the Decree recorded in February 2017.

¶8 In April 2017, the superior court issued an unsigned minute entry stating that Jennifer's community property lien "shall be held in priority over other deeds of trust liens that have been filed or recorded." The Allan Co. deeds of trust apparently were not presented to the superior court; Allan Co. was not a party in the family court matter and Jennifer did not raise the priority of the Allan Co. liens with the superior court. Although Allan Co. and Young learned of this April 2017 minute entry soon after it issued, they took no action in superior court in response.

¶9 Pinnacle Bank foreclosed on its deed of trust, resulting in a September 2017 trustee's sale of the house for $660,000. After satisfying the debt to Pinnacle Bank, this sale resulted in $106,600.95 in excess proceeds. Pinnacle Bank deposited these excess proceeds and filed this action pursuant to Arizona Revised Statutes (A.R.S.) section 33-812 (2020),[1] serving the complaint on Allan Co. and Jennifer. Citing public records and a title company guarantee, the complaint identified Allan Co. as having a superior claim to the excess proceeds.

¶10 Jennifer filed an application seeking $98,250 of the excess proceeds while Allan Co. filed an application seeking the entire amount. After briefing and oral argument, the superior court issued a May 2019 ruling releasing the proceeds to Allan Co. That ruling found (1) the recorded Disclaimer showing Jennifer had no interest in the house, along with no other recorded documents to the contrary, relieved Allan Co. from investigating whether Jennifer had any interest in the house; (2) the Disclaimer rebutted Jennifer's argument that Allan Co. should have known that she had an interest in the property; and (3) the superior court lacked jurisdiction to determine Allan Co.'s rights because Allan Co. was not a party to the superior court matter.

¶11 Following entry of a final judgment, Ariz. R. Civ. P. 54(c), Jennifer appealed. This court has appellate jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

[1] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

DISCUSSION

¶12 Jennifer makes a variety of arguments that can be summarized as asserting that (1) the Disclaimer did not preclude her from having an interest in the house; (2) Allan Co. had notice of her interest in the house and (3) the court in this case lacked jurisdiction to issue its order given the superior court rulings. Each of these arguments fails.

¶13 The Disclaimer unequivocally states that Todd owned the house as his sole and separate property, that it was purchased with Todd's separate funds and that Jennifer had "no past or present right, title, interest, claim or lien of any kind or nature whatsoever in, to or against said property." Jennifer has not challenged or sought to set aside this Disclaimer, which was recorded soon after it was signed and remained in place at all times relevant here. Other than pointing to the Decree and the unsigned minute entry, Jennifer offers no basis for how she had any interest in the house that would contradict the recorded Disclaimer. Lacking any cognizable interest in the house defeats any claim Jennifer seeks to press to the excess proceeds.

¶14 Jennifer takes issue with the superior court's reliance on *Bender v. Bender*, 123 Ariz. 90 (App. 1979). Jennifer is correct that *Bender* involved a dispute between a divorcing husband and wife, not with a third party. *Id*. at 91-92. But that distinction does not negate the force of *Bender* that (1) the status of property as community, or sole or separate, "is established at the time of its acquisition;" (2) the house (as established by the Disclaimer and other documents) was acquired by Todd as his sole and separate property and (3) the Disclaimer provided clear and convincing evidence to rebut the presumption that the house was community property. *Bender*, 123 Ariz. at 92-94. Accordingly, Jennifer has shown no error in the superior court's reliance on *Bender*.

¶15 In her reply on appeal, Jennifer argues the superior court erred in finding Allan Co. relied on the Disclaimer when making the loans, arguing, instead, that Allan Co. relied on title reports, not the Disclaimer itself. By failing to raise this issue until her reply on appeal, it is waived. *See Romero v. Sw. Ambulance*, 211 Ariz. 200, 204 ¶ 7 n.3 (App. 2005). But even on the merits, it is the recorded Disclaimer itself (in which Jennifer disavows any interest in the house), not Allan Co.'s reliance on the recorded Disclaimer, that is dispositive. Without a cognizable ownership interest in

the house, Jennifer has no claim to the excess proceeds. For these reasons, Jennifer's arguments addressing reliance and good faith purchaser fail.[2]

¶16 Jennifer cites several cases for the proposition set forth by the Arizona Supreme Court in *Tucson Federal Savings & Loan Association v. Sundell*:

> [I]f a prospective mortgagee has the notice, or knowledge . . . of rights in the mortgaged property, adverse, prior, or superior to the right or title of the mortgagor, and then advances money, it does so at its peril, and subject to any such superior rights or title.

106 Ariz. 137, 142 (1970) (quoting *Rance v. Gaddis*, 226 Iowa 531, 538 (1939)); *see also 3502 Lending LLC v. CTC Real Estate Servs*., 224 Ariz. 274 (2010); *Hall v. World Sav. & Loan Ass'n*, 189 Ariz. 495 (1997); *Hunnicutt Const., Inc. v. Stewart Title & Tr. No. 3496*, 187 Ariz. 301 (1996). But this is not a case where Allan Co. lacked knowledge of a prior recorded lien (*3502 Lending*) or prior unrecorded lien (*Hunnicutt*). Nor is this a case involving a claimed fraud (*Hall*) or where a party had actual notice and physical possession of documented competing interests in real property before making a loan (*Sundell*). Instead, as between Jennifer and Allan Co., it is undisputed that the Disclaimer where Jennifer disavowed any interest in the house was recorded before Allan Co. made each of its three loans. The last Allan Co. loan was made (and lien was recorded) six months before the superior court entered the Decree and nearly a year before it entered the April 2017 unsigned minute entry.

¶17 Jennifer also argues the superior court in this case lacked subject matter jurisdiction to award the excess proceeds to Allan Co. because the court in the divorce matter previously found that Jennifer had a priority community property lien in the proceedings from the sale of the house. The Decree itself, however, states that it did not address claims by third parties. Moreover, Jennifer did not present the Allan Co. liens to the superior court. But more importantly, Jennifer has not shown how the superior court had jurisdiction to issue any order that would impact or preclude Allan Co.'s rights to the excess proceeds. Although criticizing Allan Co. for failing to seek relief in superior court, Allan Co. was not a

[2]Jennifer's argument that Allan Co. failed to act in a commercially reasonable manner fails for this reason as well, and because she fails to provide any legal or factual support for the argument. *See* Ariz. R. Civ. P. 8.

party to the divorce and Jennifer made no attempt to join it as a party. Accordingly, the court in the divorce matter lacked jurisdiction to issue any order that would prioritize, diminish or eliminate Allan Co.'s rights to the excess proceeds. *See, e.g.*, *State ex rel. Thomas v. Grant,* 222 Ariz. 197, 201 ¶ 12 (App. 2009) ("The general rule is that a court order does not bind a non-party to the litigation in which the order is entered.")

¶18 Jennifer concedes that a decision is void if a court lacks jurisdiction to issue it. Jennifer has provided no authority that the family court had jurisdiction to issue any order that defeated the rights of Allan Co., a nonparty to that proceeding. Instead, the one court that did have jurisdiction over all the claimants to the excess proceeds was the superior court in this proceeding, A.R.S. § 33-812(j), which ruled for Allan Co. Jennifer has shown no error in that ruling.[3]

CONCLUSION

¶19 The superior court's ruling is affirmed, and Allan Co. is awarded its taxable costs on appeal, contingent upon compliance with Arizona Rules of Civil Appellate Procedure 21.

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

[3] This conclusion does not mean that Jennifer lacks a remedy as to Todd, if he has not paid money owed under the Decree. Such a remedy, however, would be to seek relief in the family court proceeding as to Todd, which is not at issue in this appeal.