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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

MELISSA A. ORR, *Plaintiff/Appellant*,

v.

MADELINE A. OLSEN, *Defendant/Appellee*.

No. 1 CA-CV 20-0339
FILED 5-4-2021

Appeal from the Superior Court in Maricopa County
No. CV2019-054013
The Honorable Lisa Daniel Flores, Judge *Retired*

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

COUNSEL

Melissa A. Orr, Glendale
Plaintiff/Appellant

Jennings Strouss & Salmon, PLC, Peoria
By Garrett J. Olexa, Danielle Constant
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge Kent E. Cattani delivered the decision of the Court, in which Judge Samuel A. Thumma and Judge Brian Y. Furuya joined.

C A T T A N I, Judge:

¶1 Melissa Orr appeals from a judgment and award of attorney's fees against her on her claim to quiet title based on adverse possession. For reasons that follow, we affirm the judgment on the merits but vacate and remand the attorney's fees award.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 1995, Madeline Olsen took title to a residential property in Phoenix. Olsen's daughter Orr moved into the property and lived there for the next 25 years. Orr paid Olsen monthly to live on the property, and Olsen paid the mortgage, utilities, and other expenses, all of which were in Olsen's name.

¶3 In mid-2019, Olsen entered into a contract to sell the property to a third party, but Orr refused to leave. Orr then sued Olsen seeking to quiet title to the property, claiming adverse possession. Olsen moved for summary judgment, asserting that Orr's use of the property was permissive, not adverse or hostile to Olsen's ownership. After briefing and oral argument, the superior court granted summary judgment in favor of Olsen. The court later awarded Olsen almost $20,000 in attorney's fees.

¶4 Orr timely appealed the resulting judgment. We have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

¶5 Orr first challenges the superior court's summary judgment ruling. Summary judgment is proper if there are no genuine issues of material fact and, based on those undisputed facts, the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a); *Orme Sch. v. Reeves*, 166 Ariz. 301, 305 (1990). A defendant moving for summary judgment may prove entitlement to judgment as a matter of law by "point[ing] out by specific reference to the relevant discovery that no evidence exist[s] to support an essential element of the claim." *Orme Sch.*,

166 Ariz. at 310. The opposing plaintiff "may not rely merely on allegations . . . of its own pleading" and instead "must, by affidavits or as otherwise provided in this rule, set forth specific facts showing a genuine issue for trial." Ariz. R. Civ. P. 56(e); *see also Orme Sch.*, 166 Ariz. at 310. We review the grant of summary judgment de novo, viewing the facts in the light most favorable to the party against whom judgment was entered. *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 213, ¶ 14 (App. 2012).

¶6 A person claiming title to property by adverse possession must show actual, visible, and continuous possession of the property for at least ten years, and that the possession was "under a claim of right inconsistent with and hostile to the claim of another." A.R.S. §§ 12-521(A)(1), -526(A); *Spaulding v. Pouliot*, 218 Ariz. 196, 203, ¶ 25 (App. 2008). If the property owner initially gave the claimant permission to use the property, the claimant must show a "positive disclaimer and disavowal of the title" providing notice to the owner that the claimant's use changed from permissive to hostile. *See Tenney v. Luplow*, 103 Ariz. 363, 367 (1968).

¶7 Here, based on the summary judgment filings, judgment for Olsen was proper. Although Orr argued that she should have been record owner from the beginning, she acknowledged that title was in Olsen's name alone. When faced with Olsen's avowal that Orr was using the property with permission, Orr simply stated that she did not need Olsen's permission. In doing so, she presented no evidence that she communicated her hostile claim to Olsen. And Orr did not controvert Olsen's statement that "Orr never made a claim that she was legal and proper owner of the Property" until filing the quiet title suit, arguing instead that such a fact was irrelevant. Rather than showing a claim of right hostile to Olsen's, Orr relied on the fact that she alone had lived on the property for almost 25 years. But possession alone without a claim of title hostile to that of the true owner is not enough. *See Tenney*, 103 Ariz. at 367.

¶8 Orr argues, however, that Olsen should be bound by deemed admissions of fact based on Olsen's incomplete answer to Orr's first amended complaint, and that Olsen's amended answer (which denied relevant allegations) was untimely and improper. Orr filed a motion to amend her complaint just a few days after Olsen answered the initial complaint. Before the court ruled on Orr's motion to amend, Olsen filed an incomplete answer to the amended complaint, omitting responses to more than half of Orr's allegations. After the superior court granted Orr's motion to amend, however, Olsen filed an amended answer to Orr's first amended complaint, this time responding to (and in relevant part denying) all of Orr's allegations.

¶9 Although Orr's motion to amend was filed within the time in which she would have been entitled to amend as a matter of course, *see* Ariz. R. Civ. P. 15(a)(1)(B), her motion instead sought leave of court to do so. *Cf.* Ariz. R. Civ. P. 15(a)(2). In that context, Olsen's initial answer to the amended complaint—filed before the superior court granted Orr leave to amend—was premature. *See* Ariz. R. Civ. P. 15(a)(5). After the court granted Orr's motion to amend, Orr had 10 business days to file and serve the amended complaint (although she did not do so), and Olsen had 10 business days thereafter to answer. *See* Ariz. R. Civ. P. 15(a)(5); *see also* Ariz. R. Civ. P. 6(a)(2). Olsen's amended answer to Orr's first amended complaint was timely filed within that timeframe. Moreover, Orr never objected to or otherwise challenged Olsen's amended answer in superior court, and Orr does not offer any reason the court would have denied leave to amend if she had objected. *See* Ariz. R. Civ. P. 15(a)(2) ("Leave to amend must be freely given when justice requires."). Accordingly, Orr's challenge to summary judgment based on Olsen's purported admissions fails.

¶10 Orr next challenges the award of attorney's fees in favor of Olsen. We generally review the court's attorney's fee award for an abuse of discretion, *see Cook v. Grebe*, 245 Ariz. 367, 369–70, ¶¶ 6, 11 (App. 2018), but we review de novo whether an award is authorized by statute. *See id.* at 369, ¶¶ 5–6; *Tucson Estates Prop. Owners Ass'n v. McGovern*, 239 Ariz. 52, 54, ¶ 7 (App. 2016).

¶11 Olsen requested an award of fees under A.R.S. § 12-1103(B) and § 12-349(A). The court's award simply granted Olsen's application for fees without stating the basis on which it relied.

¶12 Section 12-1103(B) authorizes a discretionary award of fees to the prevailing party in a quiet title action if, 20 days before bringing the action, the prevailing party tendered five dollars with a request that the other party execute a quit claim deed, and the other party did not comply. But to qualify for an award on this basis, the party must be the one "bringing the action," whether by complaint or counterclaim; simply answering and successfully defending against another's quiet title claim does not suffice. *Long v. Clark*, 226 Ariz. 95, 96, ¶¶ 4–5 (2010). Although Olsen first tendered a quit claim deed and then successfully defended against Orr's quiet title claim, she did not assert a quiet title counterclaim and thus did not qualify for an award of attorney's fees on this basis.

¶13 Section 12-349(A)(1) requires the court to award fees if it finds a party brought a claim "without substantial justification." But when making an award on this basis, the court must "set forth the specific reasons

for the award," including relevant factors listed in § 12-350. *See also Bennett v. Baxter Grp., Inc.*, 223 Ariz. 414, 421, ¶ 28 (App. 2010). The court made no such findings here. Accordingly, we vacate the fee award and remand for reconsideration and, if the court determines an award is proper under § 12-349, for appropriate findings.

CONCLUSION

¶14 We affirm summary judgment in favor of Olsen but vacate the award of attorney's fees and remand for further proceedings.

¶15 Olsen requests an award of attorney's fees on appeal under A.R.S. § 12-1103(B) or § 12-349. We deny her § 12-1103(B) request for the reasons described above, and, in an exercise of our discretion, we also deny her request under § 12-349. As the prevailing party, Orr is entitled to her taxable costs on appeal upon compliance with ARCAP 21. *See* A.R.S. § 12-342(A).

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