

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

RICK RANDALL, et al., *Plaintiffs/Appellants*,

v.

EQUINOX 7, LLC, et al., *Defendants/Appellees*.

No. 1 CA-CV 20-0513
FILED 4-27-2021

Appeal from the Superior Court in Maricopa County
No. CV2019-008141
The Honorable Daniel J. Kiley, Judge

AFFIRMED

COUNSEL

Horne Slaton, PLLC, Scottsdale
By Thomas C. Horne
Counsel for Plaintiffs/Appellants

Wright Welker & Pauole PLC, Phoenix
By Donald B. Petrie, Diane L. Bornscheuer, Scott G. Andersen
Counsel for Defendant/Appellee Equinox 7, LLC

MEMORANDUM DECISION

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

T H U M M A, Judge:

¶1 Plaintiffs Rick and Andrea Randall appeal from the grant of summary judgment for defendant Equinox 7, LLC d/b/a Aspect Fine Homes (AFH). Because the Randalls have shown no error, the judgment is affirmed.

FACTS AND PROCEDURAL HISTORY

¶2 In 2018, the Randalls hired AFH to remodel their Scottsdale home. AFH was to perform work and supervise subcontractors and vendors. In June 2019, the Randalls filed this case against AFH, alleging breach of contract, breach of the covenant of good faith and fair dealing, and unjust enrichment, claiming damage to the property resulting from AFH's failure to timely and correctly complete the work. In filing their complaint, the Randalls failed to submit a statement certifying whether expert opinion testimony was necessary. *See* Ariz. Rev. Stat. (A.R.S.) § 12-2602(A) (2021).¹ In September 2019, the Randalls then filed a certification declaring that expert opinion testimony was necessary. Later that month, the Randalls served their preliminary expert opinion affidavit signed by Michael Keith. *See* A.R.S. § 12-2602(B).

¶3 The court ordered the parties to “disclose the identity and opinions of experts by November 15, 2019.” The Randalls, however, did not supplement their preliminary expert disclosure by that deadline. AFH then moved for summary judgment in December 2019, arguing the Randalls “lack[ed] expert evidence necessary to make a prima facie case on their claims.” The Randalls filed an opposition on January 16, 2020, alleging they disclosed an expert opinion report to AFH the previous day. However, no such report was attached to their response, nor did they submit a supplemental affidavit.

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

¶4 The superior court found that, because the Randalls certified that expert testimony was necessary to prove their claims, they were required to come forward with competent expert testimony to support their claims. Finding the preliminary Keith affidavit was inadequate to create a genuine issue of material fact, the court granted summary judgment for AFH. The court denied the Randalls' motion for reconsideration and awarded AFH attorneys' fees and costs.

¶5 After entry of final judgment against the Randalls dismissing their claims with prejudice, they timely appealed. This court has jurisdiction over that appeal pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

¶6 The Randalls argue the superior court erred in granting summary judgment or, in the alternative, erred in failing to dismiss the claim without prejudice under A.R.S. § 12-2602(F). The court addresses these arguments in turn.

I. The Court Properly Granted Summary Judgment for AFH.

¶7 This court reviews the entry of summary judgment de novo, "viewing the evidence and reasonable inferences in the light most favorable to the party opposing the motion." *Andrews v. Blake*, 205 Ariz. 236, 240 ¶ 12 (2003). "The court shall grant summary judgment if the moving party shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). Summary judgment is appropriate when a plaintiff fails to establish a prima facie case. *Gorney v. Meaney*, 214 Ariz. 226, 232 ¶ 17 (App. 2007). When uncontroverted, "facts alleged by affidavits attached to a motion for summary judgment may be considered true." *Portonova v. Wilkinson*, 128 Ariz. 501, 502 (1981). The grant of summary judgment will be affirmed if it is correct for any reason. *Hawkins v. State*, 183 Ariz. 100, 103 (App. 1995).

¶8 Here, the Randalls certified that expert testimony was "necessary to prove the licensed professional's standard of care or liability for the claim(s) as alleged in Plaintiffs['] Verified Complaint." Therefore, by their own admission, they needed to provide an admissible and proper expert opinion affidavit to establish a prima facie case in the summary judgment briefing. See *Gorney*, 214 Ariz. at 232 ¶ 20.

RANDALL, et al. v. EQUINOX 7, et al.
Decision of the Court

¶9 AFH argued, and the superior court agreed, that the preliminary Keith affidavit did not establish that AFH’s conduct fell below the standard of care or that such failure damaged the property and was therefore inadequate. *See* A.R.S. § 12-2602(B). The Randalls have not argued or shown that the court’s analysis of the Keith affidavit was defective. Summary judgment was therefore appropriate because the Randalls failed to provide sufficient expert evidence (required for them to establish a prima facie case for their claims) in response to a proper motion for summary judgment. *See Gorney*, 214 Ariz. at 232 ¶ 20 (citing *Hydroculture, Inc. v. Coopers & Lybrand*, 174 Ariz. 277, 283 (App. 1992)).

¶10 On appeal, the Randalls argue that because some defects to the property “would be obvious to a jury as a matter of common sense,” the superior court improperly dismissed all of their claims for lack of expert testimony. The court, however, found that because the Randalls did not raise this argument until oral argument on the motion for summary judgment, the argument was waived. The Randalls do not challenge this aspect of the court’s ruling, so this court need not address it further. *See Trance Indus., Inc. v. Nature Med, Inc.*, 2 CA-CV 2019-0115, 2020 WL 5793361 at *2 ¶ 9 (App. Sept. 29, 2020).

II. A.R.S § 12-2602(F) Is Not Applicable.

¶11 In a claim against a licensed professional, “if the claimant fails to file and serve a preliminary expert opinion affidavit after the claimant . . . has certified that an affidavit is necessary,” the superior court must dismiss the claim without prejudice if the claimant fails to file and serve such an affidavit. A.R.S. § 12-2602(F).

¶12 On appeal, the Randalls argue the superior court erred by failing to dismiss their claims without prejudice under Section 12-2602(F) but offer no support for this assertion. Under the plain language of the statute, because the Randalls submitted the preliminary Keith affidavit, Section 12-2602(F) no longer applied. Moreover, the superior court did not dismiss the Randalls’ claims for failure to submit a proper, timely expert affidavit. Instead, the court granted summary judgment for AFH because the Randalls failed to present evidence sufficient to support their claims and defeat summary judgment. On this record, the Randalls have shown no error.

RANDALL, et al. v. EQUINOX 7, et al.
Decision of the Court

III. Attorneys' Fees.

¶13 The superior court awarded AFH \$99,784.69 in attorneys' fees. Although the Randalls challenged this award in their opening brief on appeal, in their reply they concede that if the judgment is affirmed, the fee award is proper. Because entry of summary judgment was proper, the award of attorneys' fees is proper.

CONCLUSION

¶14 The Randalls seek attorneys' fees under A.R.S. § 12-341.01. AFH seeks attorneys' fees and costs on appeal under A.R.S §§ 12-341, -341.01 and -349. Because they are not the successful parties on appeal, the Randalls' request is denied. Because AFH is the successful party on appeal, AFH is awarded its reasonable attorneys' fees incurred on appeal pursuant to A.R.S. § 12-341.01, and its taxable costs incurred on appeal pursuant to A.R.S. § 12-341, contingent on its compliance with ARCAP 21.



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