IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

IN THE MATTER OF ROBERT S. BULLINGTON AND
FRANCES BULLINGTON LAND TRUST.

STEPHEN BULLINGTON, et al., *Petitioners/Appellees*,

v.

ROBERT H. BULLINGTON, SR., et al., *Respondents/Appellants*.

No. 1 CA-CV 21-0774
FILED 11-10-2022

Appeal from the Superior Court in Maricopa County
No. PB2009-000579
The Honorable Thomas Marquoit, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Jennings, Strouss & Salmon, P.L.C., Phoenix
By William A. Clarke, J. Scott Rhodes, Daniel J. F. Peabody,
Ashley M. Mahoney
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By Cameron C. Artigue
Counsel for Respondents/Appellants

MEMORANDUM DECISION

Judge D. Steven Williams delivered the decision of the court, in which Presiding Judge David D. Weinzweig and Judge Randall M. Howe joined.

W I L L I A M S, Judge:

¶1 Appellants Robert H. Bullington ("Robert Sr."), Robert H. Bullington Jr. ("Robert Jr.") and Michael Bullington (collectively "Trustees") challenge the superior court's ruling removing them as trustees of the Robert S. Bullington and Francis Bullington Land Trust (the "Trust"). For reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Robert Sr.'s parents established the Trust in 1990. They named Robert Sr. and his brother, J. Daniel Bullington ("Daniel"), as trustees. Daniel resigned as co-trustee in 2010, and Robert Sr. appointed his son, Robert Jr., to serve in Daniel's place. Another of Robert Sr.'s sons, Michael, became a co-trustee in 2017. Robert Sr.'s niece (Daniel's daughter), Elizabeth Bullington Lorenz, is one of the Trust beneficiaries.

¶3 The Trust owns a land parcel in Scottsdale. The terms of the Trust require "the vote of all but one" of a list of family members, including Robert Sr., Robert Jr., Daniel, and Elizabeth, to sell, lease, or trade that parcel.

¶4 By April 2018, the Trustees were negotiating a potential ground lease to develop a hotel on the property. On May 31, 2018, Robert Jr. informed Elizabeth and the other Trust beneficiaries that there were "three good ground lease offers to consider." One month later, Robert Jr. told the beneficiaries that the Trustees had agreed to pursue one of those offers and circulated a draft lease agreement.

¶5 Elizabeth requested additional information on the proposed deal and asked about "the plan for holding the vote that's required under . . . the Trust." Robert Jr. responded that the Trustees "fully intend to follow the guidelines of the Trust, including gaining approval from the beneficiaries to proceed with any lease option." Robert Jr. also suggested having a meeting to discuss the lease.

¶6 On July 31, 2018, Elizabeth requested additional information she felt she needed to evaluate the proposed ground lease. She renewed that request on August 20, 2018. Elizabeth then met with Robert Jr. five days later. She told Robert Jr. during that meeting that she would not oppose the Trustees pursuing the proposed transaction.

¶7 The Trustees signed the ground lease on September 5, 2018. Their communications with the beneficiaries suggested, however, that the lease had not yet been signed. Michael told Elizabeth approximately two weeks after signing the ground lease that his goal was "to get a deal done." And when Elizabeth met with Michael and Robert Jr. in November 2018, neither of them informed her that they had already signed the lease.

¶8 In February 2019, the Trust received $100,000 in non-refundable earnest money, and an additional $20,000 six months later. But the Trustees did not disclose those funds to the beneficiaries until September 2019. Once Elizabeth was informed, she requested copies of any agreements "relating to the proposed deal . . . so we can review, provide any comments, and be ready to vote." She also requested any documentation authorizing the Trustees to enter into any such agreement. Robert Jr. responded that "[f]or the immediate future, there are no plans to enter into any agreements to bind or obligate the Trust." And when directly asked if the Trust had entered into a lease or purchase contract, Robert Jr. offered to meet with Elizabeth and Daniel "to explain the exact status of the lease . . . and the ongoing discussions regarding development of the Trust property."

¶9 On October 25, 2019, Elizabeth petitioned (1) to remove the Trustees, (2) to compel Trust accountings and production of certain documents, and (3) to confirm that any sale or lease of the Trust property required beneficiary approval. Shortly thereafter, the Trustees gave Elizabeth a copy of the signed lease. On Elizabeth's motion for partial summary judgment, the court ruled the Trustees materially breached the Trust by entering into the lease without first holding a beneficiary vote. The court also determined that the Trustees failed to provide accountings as required by A.R.S. § 14-10813(C). It did not, however, remove the Trustees at that time; it instead set a status conference "to discuss the next steps in the case."

¶10 Both sides filed proposed findings of fact and conclusions of law. Elizabeth also petitioned to recover attorney fees under A.R.S. § 12-349(A). Shortly thereafter, the Trustees filed a petition indicating their willingness to resign if allowed "to exercise the power of appointment

granted them under the Trust . . . ." They also asked the court to "determine how and when a vote is to occur with respect to any potential lease." Following a hearing, the court formally granted Elizabeth's original petition and removed Robert Jr. as a trustee. The court noted that Michael and Robert Sr. "are no longer co-trustees" but "reserve[d] ruling on how that came about," directing the parties to brief the issue. The court also denied the Trustees' petition, invited both sides to file new proposed findings of fact and conclusions of law, and allowed Elizabeth to file an amended fee petition.

¶11 After receiving the amended filings, the court largely adopted Elizabeth's proposed findings and set an evidentiary hearing on her fee claim. It then entered an Arizona Rule of Civil Procedure ("Rule") 54(b) judgment granting Elizabeth's original petition and removing all three Trustees.

¶12 The Trustees moved for a new trial. They also moved to amend the findings of fact and conclusions of law. The court denied both motions. Elizabeth filed another amended fee application, which the court granted in part. The Trustees filed a notice of appeal challenging their removal and the denial of the motion for new trial.[1]

¶13 We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and A.R.S. § 12-2101(A)(9).

DISCUSSION

I. The Superior Court Did Not Err by Entering Findings of Fact.

¶14 The Trustees first contend the superior court erred by entering findings of fact in connection with its summary judgment ruling. As noted above, the Trustees submitted their own proposed findings of fact and conclusions of law. They also moved under Rule 52(b) to amend the proposed findings of fact and conclusions of law without raising this issue. In fact, they did not raise this argument until their motion for new trial. They therefore have waived it on appeal. *Conant v. Whitney*, 190 Ariz. 290, 293 (App. 1997).

¶15 The Trustees also contend the superior court improperly allowed Elizabeth to write its findings of fact, citing *Elliott v. Elliott*, 165 Ariz. 128, 134 (App. 1990), for the proposition that the court "may not rely upon the parties to prepare findings that support its judgment." This court

[1] The Trustees also challenge the fee award in a separate appeal.

also said in *Elliott*—in the very next sentence—that the court "may adopt proposed findings that the parties submit, but only if those findings are consistent with the ones that it reaches independently after properly considering the facts." *Id.*

¶16 That is what happened here. The superior court noted that the first part of Elizabeth's proposed findings of fact "basically recite[d]" its earlier summary judgment ruling. The court then directed the parties to make specific changes to exclude "a couple other things that don't appear to be requested in front of me." The court also struck some of Elizabeth's proposed findings as they addressed issues that had not yet been determined. We therefore reject the Trustees' contention.

II. Trustees Did Not Show Questions of Material Fact Remained That Would Have Precluded Summary Judgment.

¶17 We review *de novo* whether summary judgment is warranted, including whether genuine issues of material fact exist and whether the trial court properly applied the law. *Am. Furniture Warehouse Co. v. Town of Gilbert*, 245 Ariz. 156, 159, ¶ 9 (App. 2018). We view the evidence in the light most favorable to the Trustees as the non-prevailing party. *Normandin v. Encanto Adventures, LLC*, 246 Ariz. 458, 460, ¶ 9 (2019). Summary judgment should be granted only "if the facts produced in support of [a] claim . . . 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 . . . ." *Orme School v. Reeves*, 166 Ariz. 301, 309 (1990).

A. Did the Trustees Intend to be Bound When They Executed the Lease?

¶18 The Trustees first contend material fact questions remain as to whether they "intended to be bound" when they signed the ground lease. They further contend the record contains undisputed evidence that the lease was "conditional." Not so. While the Trustees repeatedly characterized the lease as "conditional" in their response to Elizabeth's motion, they conceded that it contains no language to that effect.

B. Did the Trustees Reasonably Believe Elizabeth Supported the Deal?

¶19 The Trustees also contend fact questions remain whether they reasonably believed Elizabeth supported the deal. They cite A.R.S. § 14-11006, which provides that "[a] trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to

a beneficiary for a breach of trust to the extent the breach resulted from the reliance."

¶20 The Trust requires "the vote of all but one" of seven family members, including Elizabeth and Daniel, to lease the Trust property. The Trustees presented no evidence that any such vote occurred; they instead argued that Elizabeth "implied that she could provide her assent orally —with no need for a paper plebiscite—when she told Robert Jr. that she supported the . . . deal" in August 2018. Implying that one could agree to a lease is not the same as voting to approve a lease.

¶21 The Trustees also contend their expert witness, James Ryan, concluded that Elizabeth had approved the lease. Ryan only relayed his "understanding from the record and from speaking with legal counsel associated with this lease transaction[ ] that the Trustees believed they had the necessary verbal approval." The issue is not whether the Trustees believed Elizabeth had approved going forward with a lease; it is whether Elizabeth and the other beneficiaries voted on the lease the Trustees eventually signed. The record shows that the Trustees were aware of the vote requirement, as Robert Jr. wrote the following two months before the Trustees signed the lease:

> [W]e need input from every beneficiary in order to move forward with the ground lease process.
>
> . . .
>
> In order to reduce the meeting burden on everyone, we would like to accomplish as much of this as possible by email, but we should also plan to have a meeting to discuss the lease, answer any questions *and perhaps vote at that time on moving forward with the signing of the lease*.

(Emphasis added). He then emailed the beneficiaries two weeks later to set a meeting at which "all the beneficiaries will have further discussion and probably take a vote on which direction we need to go for the benefit of the Trust." Indeed, Ryan also acknowledged that the Trust "does require Beneficiaries to vote on specific agreements."

¶22 The Trustees also argue that the Trust does not require any specific voting procedures and that the emergence of an informal consensus can constitute a vote, citing *Hokanson v. High School District No. 8 of Pima County*, 121 Ariz. 264, 268 (App. 1978). *Hokanson* involved a challenge to a school board executive session that commenced without a majority vote as

required by statute. *Id* at 266-267. This court held under the facts of that case that the violation was "a technical irregularity" that did not nullify any other actions taken at the meeting. *Id* at 268. *Hokanson* thus does not stand for the proposition that an informal consensus can be treated as a vote; but instead that the school board's failure to vote was inconsequential. *Id. Hokanson* does not support the Trustees' position.

¶23 The Trustees also cite *Hernandez v. Banco De Las Americas*, 116 Ariz. 552, 555 (1977), for the proposition that corporate boards can develop "a tradition that allows the directors to act informally." Setting aside that the Trustees are not a corporate board, this court held in *Hernandez* that a corporate board either informally amended or waived one of the corporation's bylaws by entering into an employment contract that extended beyond the board's term. *Id* at 556. There was no contention that the board either voted or failed to vote on the contract in question. Moreover, the Trustees point to no evidence suggesting any "tradition" had developed over the years that would have allowed them to forego the express Trust requirement of a beneficiary vote before selling or leasing the Trust property.

C. Did Questions of Material Fact Remain About the Standard of Care or Trustees' Breaches of the Trust?

¶24 The Trustees next contend fact questions remain whether they met the applicable standard of care and whether they breached a fiduciary duty. They cite Ryan's opinion that their "decision to conditionally sign the lease was a 'reasonable and defensible judgment call.'" But that opinion hinges on Ryan's "understanding" that the Trustees had "the necessary verbal approval" from the beneficiaries. As discussed above, Elizabeth's oral statement implying future consent was neither.

D. Did the Trustees Take Reasonable Steps to Keep Elizabeth Informed?

¶25 The Trustees next contend fact questions remain whether they fulfilled their duty to keep Elizabeth reasonably informed of Trust affairs. *See* A.R.S. § 14-10813(A).

¶26 It is undisputed that Elizabeth and another beneficiary made multiple requests for accountings. Indeed, Robert Jr. wrote in response to one of Elizabeth's requests that he thought it was "very appropriate to ask all the Trustees to submit an accounting of all the Trust expenses they have incurred and to require the Trustees to submit an annual report to the beneficiaries . . . ." Despite this, the Trustees did not provide any

accounting—formal or otherwise—until one year after they signed the ground lease.

¶27 The Trustees also contend withholding the signed lease from Elizabeth based on confidentiality concerns was reasonable, which included their counsel's advice to "restrict the sharing of information regarding the . . . lease's payment provisions." Concerns about sharing the lease's payment provisions do not justify (1) withholding the entire signed lease until after Elizabeth filed her petition or (2) not telling her the lease had been signed for more than a year.

¶28 The Trustees' contention that they kept Elizabeth reasonably informed by providing a draft lease fails for the same reasons. Providing a draft lease before the final lease was signed does not justify withholding the final lease after it was signed. Moreover, if the confidentiality concerns the Trustees cited were legitimate, the draft lease, which Robert Jr. described as an "essentially final version of the lease document," likely would have triggered the same concerns. Indeed, the record indicates the draft lease included at least some payment terms, as Elizabeth commented on its "up front" money and rent terms in a July 17, 2018 email.

E. Was Removal an Appropriate Remedy?

¶29 The Trustees also contend the superior court erred by removing them at the summary judgment stage, noting that A.R.S. § 14-11001 lists several potential remedies for a trustee's breach of trust. Removal is one of the listed remedies. A.R.S. § 14-11001(B)(7). The Trustees argue, however, that shaping a remedy "is a totality-of-circumstances decision that can be made only after the pertinent facts have been established," citing two out-of-state cases in which the removal of a trustee at the summary judgment stage was reversed on appeal. Neither case on which the Trustees rely held that courts can never grant summary judgment on a petition to remove a trustee; they only held that summary judgment was not appropriate on those particular fact records. *See Becker v. Dulberg*, 176 So. 2d 583, 585 (Fla. Dist. Ct. App. 1965) ("There were genuine issues as to certain material facts raised by the pleadings which should not have been summarily resolved."); *In re Mercer*, 990 N.Y.S.2d 58, 60 (N.Y. App. Div. 2014) ("[T]he allegations in this case are sharply disputed and give rise to conflicting inferences regarding the [f]iduciaries' alleged misconduct.").

¶30 A trustee may be removed for, among other things, a material breach of trust. A.R.S. § 14-10706(B)(1). The superior court found the Trustees breached the Trust by (1) entering into the lease without a vote of

the beneficiaries, (2) not giving Elizabeth a copy of the signed lease until after she filed her petition, and (3) not providing an accounting despite multiple beneficiary requests. As discussed above, the court did not err in finding these material breaches occurred. It therefore did not err by removing the Trustees without hearing additional evidence.

III. Attorney Fees on Appeal.

¶31 The Trustees request attorney fees under A.R.S. § 14-11004. That statute authorizes a trustee to receive reimbursement from the trust for

> . . . reasonable fees, expenses and disbursement, including attorney fees and costs, that arise out of and that relate to the good faith defense or prosecution of a judicial or alternative dispute resolution proceeding involving the administration of the trust, regardless of whether the defense or prosecution is successful.

A.R.S. § 14-11004(A). Whether the Trustees pursued this appeal in good faith is an objective determination based upon all the circumstances. *In re Guardianship of Sleeth*, 226 Ariz. 171, 178, ¶ 30 (App. 2010). The Trustees offer no argument or evidence to suggest they pursued this unsuccessful appeal in good faith. We therefore deny their request. We also deny their request to assess fees against Elizabeth under A.R.S. § 14-11004(B).

¶32 Elizabeth requests attorney fees and costs under A.R.S. § 12-349(A) and Arizona Rule of Civil Appellate Procedure ("ARCAP") 25. The superior court's A.R.S. § 12-349 fee award is the subject of a separate appeal. We therefore do not address it in this decision. For the same reason, we do not address fees under ARCAP 25 here.

CONCLUSION

¶33 We affirm. Elizabeth may recover her taxable costs incurred in this appeal upon compliance with ARCAP 21.