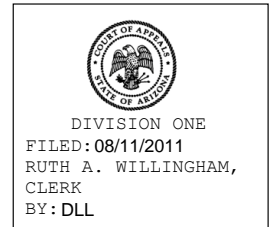


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



KENNETH KING,) 1 CA-CV 09-0770
)
Respondent/Third Party) DEPARTMENT C
Plaintiff/Appellant,)
)
v.) **AMENDED**
) **MEMORANDUM DECISION**
)
JOSEPH FERMIN ESPINOZA, a single)
man,) (Not for Publication -
) Rule 28, Arizona Rules of
Third Party Defendant/) Civil Appellate Procedure)
Appellee.)
)
_____)
LOWELL J. SHINN and DEBRA D.)
SHINN, as Trustees of the DEBRA)
D. SHINN LIVING TRUST DATED JUNE)
9, 1999,)
)
Third Party Defendants/)
Intervenors/Appellees.)
_____)

Appeal from the Superior Court in Mohave County

Cause No. DO 2007-7318

The Honorable Jill W. Davis, Judge Pro Tempore

AFFIRMED

Kenneth L. Sondgeroth, P.C.
By Kenneth L. Sondgeroth
Attorney for Plaintiff/Appellant

Bullhead City

Joseph F. Espinoza, Appellee
In Propria Persona

Lake Havasu City

Bruno, Brooks & Goldberg, P.C.

Kingman

By Robert H. Brooks

and

Gust Rosenfeld P.L.C.

Phoenix

By Scott A. Malm

Attorneys for Defendants/Appellees

Lowell J. Shinn and Debra D. Shinn

P O R T L E Y, Judge

¶1 Kenneth King ("King") appeals from the summary judgment granted to Joseph Espinoza and Lowell and Debra Shinn, as Trustees of the Debra D. Shinn Living Trust ("the Shinns") (collectively, "Appellees"). King argues that the superior court misapplied the law when it entered summary judgment upholding the transfers of real property made by King's former wife, Betty Jean King, to Espinoza, and from Espinoza to the Shinns. For the reasons that follow, we affirm the summary judgment.

FACTS AND PROCEDURAL BACKGROUND¹

¶2 King married Betty in July 1995. They purchased real property in Mohave County in 2003. Betty wanted to apply for a loan. Because she had better credit, King signed a warranty deed in May 2004 conveying the property to Betty as her sole and

¹ We view the facts in the light most favorable to King as the party against whom summary judgment was entered. *Angus Med. Co. v. Digital Equip. Corp.*, 173 Ariz. 159, 162, 840 P.2d 1024, 1027 (App. 1992).

separate property. They also agreed that she would ultimately place King's name back on the title to the property.

¶13 In spite of their agreement, Betty conveyed the property to Espinoza on September 4, 2007, by quitclaim deed. King recorded a lis pendens against the property two weeks later. Betty filed a petition for divorce in November 2007 and acknowledged that the property was community property.² In addition to responding to the petition, King filed a third-party complaint against Espinoza. He alleged that the transfer to Espinoza was a fraudulent conveyance. Espinoza subsequently conveyed the property to the Shinns.

¶14 The Shinns intervened and filed a counterclaim to quiet title. They subsequently filed a motion for summary judgment and argued that King had no interest in the property that they owned. Espinoza joined their motion. In his response, King argued that the issues of the fraudulent transfer to Espinoza and the transfer to the Shinns after the lis pendens had been filed were genuine issues of material fact that precluded summary judgment. The trial court granted summary

² The Kings had acquired the property as joint tenants with right of survivorship but agreed the property was community property. See *State v. Superior Court*, 188 Ariz. 372, 373, 936 P.2d 558, 559 (App. 1997) (Married joint tenants each hold "his or her ownership interest as separate property."); *Toth v. Toth*, 190 Ariz. 218, 220, 946 P.2d 900, 902 (1997) ("Joint tenancy property is separate, not community, property.").

judgment because it found no evidence of a fraudulent conveyance or that any deeds were invalid.

¶15 The Kings subsequently entered into a stipulated divorce decree, wherein Betty acknowledged that her failure to put King's name back on the title to the property was a result of "fraud or mistake and/or a breach of her fiduciary duty." She also admitted that she improperly transferred the property to Espinoza so that he could sell the property for her sole benefit. The Kings agreed the property was worth \$250,000 and King's interest equaled \$120,000. As a result, King was given a judgment against Betty for \$120,000 as an equalizing payment.

¶16 King appealed the summary judgment, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

¶17 Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c). We determine de novo whether any issue of material fact exists and whether the court properly applied the law. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996).

¶18 Although it appears that Betty fraudulently conveyed the property to Espinoza³ and the Shinns then received the property despite a recorded lis pendens, those facts are not material to resolving this matter. The material fact is, however, the contract that Betty and King entered into that led to the decree that included the judgment to King for \$120,000.

¶19 Generally, a bona fide purchaser refers to a person who purchases property for value without notice of another person's interest in the property. *First Am. Title Ins. Co. v. Action Acquisitions, LLC*, 218 Ariz. 394, 398, ¶ 12, 187 P.3d 1107, 1111 (2008). A lis pendens, however, provides notice that a particular piece of property is the subject of litigation. *Warren v. Whitehall Income Fund 86*, 170 Ariz. 241, 244, 823 P.2d 689, 692 (App. 1991). The purpose of a lis pendens is to prevent innocent third persons from acquiring an interest in such property which, in turn, might prevent the court from granting suitable relief. *Id.*

¶10 Here, the lis pendens was recorded in September 2007. King filed his third-party complaint against Espinoza in December 2007 and alleged that Espinoza participated in a fraudulent conveyance by obtaining the property from Betty

³ The superior court granted summary judgment based on the validity of the warranty deed conveying the property to Betty as her sole and separate property. Although King did not contest the validity of that deed, he argued that he retained a community interest in the property, which Betty did not dispute.

without adequate consideration in order to deprive him of his interest in the property.⁴ Espinoza, however, subsequently sold the property to the Shinns,⁵ and they took title even though there was a recorded lis pendens affecting the property. As a result, they took title subject to King's claims. *Id.* at 243, 823 P.2d at 691 (a person who purchases property with actual and/or constructive knowledge of a prior claim to the property is not a bona fide purchaser); see also *Santa Fe Ridge Homeowners' Ass'n v. Bartschi*, 219 Ariz. 391, 395, ¶ 11, 199 P.3d 646, 650 (App. 2008) (a lis pendens provides constructive notice that a pending lawsuit may affect title to real property).

¶11 Despite those facts, Betty and King settled their differences. Betty acknowledged that she fraudulently conveyed community property. The couple, however, entered into another contract, a substituted contract, to settle the issue and finalize the divorce. "A substituted contract is a contract that is itself accepted by the obligee in satisfaction for the

⁴ According to the stipulated decree, Betty received a \$20,000 loan from Espinoza when she transferred the property to him. Espinoza received \$112,508.38 in sale proceeds from the Shinns. Espinoza gave Betty the \$112,508.38, and Betty returned \$20,000 to Espinoza as repayment for the loan.

⁵ According to the Shinns, they purchased the property for \$306,418.92, which was allocated as follows: \$112,508.38 to Espinoza; \$166,000 to B.T. Investments, Inc., for the benefit of Kenneth and Betty; \$5,100 to a 401(K) plan for the benefit of Kenneth and Betty; \$15,300 for a commission to Espinoza; and the remainder for taxes, recording, title insurance, and escrow.

obligator's existing duty." Restatement (Second) of Contracts § 279 (1981). "The substituted contract discharges the original duty and breach of the substituted contract by the obligor does not give the obligee a right to enforce the original duty." *Id.* Additionally, "[a] substituted contract is one that contains a term that is inconsistent with a term of an earlier term between the parties." *K-Line Builders, Inc. v. First Federal Sav. & Loan Ass'n*, 139 Ariz. 209, 213, 677 P.2d 1317, 1321 (App. 1983).

¶12 Here, despite Betty's breach of her original agreement to return King's name to the property and selling it to Espinoza, she and King entered into a substituted contract that gave King a \$120,000 judgment as an equalizing payment for his community interest in the property. King, therefore, lost his right to enforce the original agreement because of the settlement. Consequently, the original contractual duty to return King's name back on the property was discharged and substituted by the terms of the decree.

¶13 Moreover, because the substituted contract was reduced to a judgment, he has to look to Betty to secure payment of the \$120,000, and not Espinoza or the Shinns. Consequently, there is no genuine issue to preclude summary judgment and we affirm the judgment granted.

¶14 King requests attorneys' fees on appeal pursuant to A.R.S. § 12-341.01(A), (C) (2003). Because he is not the prevailing party, we deny his request.

CONCLUSION

¶15 Based on the foregoing, we affirm the summary judgment.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Judge

/s/

PATRICIA A. OROZCO, Judge