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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



DIVISION ONE
FILED: 06/30/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

TINA BLASER dba EXECUTIVE MARBLE) 1 CA-CV 10-0183
& STONE CO.,)
) DEPARTMENT D
Plaintiff/Appellant,)
) **MEMORANDUM DECISION**
v.) (Not for Publication -
) Rule 28, Arizona Rules
MICHAEL P. SALVINI and BARBARA) of Civil Appellate
J. SALVINI, husband and wife;) Procedure)
THE SALVINI GROUP, INC.,)
)
Defendants/Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-003751

The Honorable Larry Grant, Judge

AFFIRMED IN PART; REVERSED AND REMANDED

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O R O Z C O, Judge

¶1 Tina Blaser (Blaser), doing business as Executive
Marble and Stone Company, appeals from the grant of a motion for

summary judgment which dismissed Barbara Salvini (Barbara) from the underlying lawsuit. For the reasons stated below, we affirm in part, reverse in part, and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶2 Barbara and Michael (Michael) Salvini (collectively the Salvinis) were married in 1993 and have resided in California during their marriage. Michael is the sole shareholder and employee of the Salvini Group, Incorporated (SGI), a broker of marble and stone, based in California.

¶3 In December 2002, the Salvinis entered into a post-nuptial agreement (the Post-Nuptial Agreement), which took effect in January 2003.¹ The relevant aspects of the Post Nuptial Agreement stated:

1. The character of the real property located at 1349 Cerritos Drive, Laguna Beach [(Family Residence)], California is changed from community property to the separate property of Barbara.
2. The character of the business ventures owned by Michael, including but not necessarily limited to, the business known as Corsi & Nicolai, Incorporated and any business operations arising out of Michael's general contractor's license are changed from community property to the separate property of Michael.

¹ The purpose of the Post-Nuptial Agreement was to transmute from community property into separate property any community property shared by the Salvinis and was prompted by the Salvini's estate planning.

3. Each party shall have no right, interest, or obligation relating to the separate property of the other. Each party's earnings and accumulations from the effective date of this agreement forward are to remain said party's separate property. For purposes of this agreement, the phrase "separate property" is designed to include salaries, income, personal property, retirement fund(s), business earnings, any appreciation in real estate, stocks, dividends, gains, income or property acquired by one party during the marriage by gift, devise, descent or inheritance, and earnings gains or winnings earned or received or acquired or bestowed upon one particular party.
4. Each party shall be responsible for his or her own debts, liabilities or liens, both present and future.
5. Each party waives and releases all marital property rights in the other's estate that he or she might otherwise have or obtain. On the death of husband or wife, the decedent's property will pass by will or intestate succession to decedent's heirs as if the marriage between husband and wife had never occurred.

¶4 After entering into a contract with SGI, Blaser filed a lawsuit in Arizona against SGI and the Salvinis alleging breach of contract, fraud, and negligent misrepresentation. SGI and the Salvinis filed a motion to dismiss, claiming a lack of personal jurisdiction. Before Blaser responded to the motion to dismiss, Blaser, Michael, and SGI entered into a settlement agreement (the Settlement Agreement).

¶5 Under the Settlement Agreement, SGI and Michael agreed to pay Blaser \$17,500, under a timeline for specific payments.

Barbara did not sign or agree to the Settlement Agreement or its provisions. In December 2008, SGI and Michael made the first payment to Blaser pursuant to the terms of the Settlement Agreement. No further payments were made and Blaser filed suit against SGI and the Salvinis alleging breach of contract and breach of implied covenant of good faith and fair dealing.²

¶16 Barbara filed a motion to dismiss because she was not a party to the Settlement Agreement and claimed she did not share any community property with Michael. Blaser filed a joint response to the motion to dismiss and a motion for summary judgment. Blaser alleged the following assets were purchased or in existence prior to the Salvinis entering into of the Post-Nuptial Agreement: (1) Wells Fargo Checking Account, and (2) the Charles Schwab Brokerage Account and (3) the Family Residence located in Laguna Beach, California. Blaser argued that: the Post-Nuptial Agreement transmuted only the expressly identified property; monies contributed to the Wells Fargo and Schwab accounts were community property; and Salvini and SGI committed a material breach of the Settlement Agreement. In December 2009, the trial court granted Blaser's motion for summary judgment against Michael only. The court went on to state:

² In the Settlement Agreement the parties agreed that if a breach occurred, jurisdiction and venue would be in Phoenix, Arizona.

The Court further finds as a matter of law that as a result of this transformation of this community property to separate property that there is no community property in the marriage between Michael P. Salvini and Barbara J. Salvini.

IT IS ORDERED that [Barbara's] Motion to Dismiss is granted. This case is dismissed in its entirety.

IT IS FURTHER ORDERED that [Blaser's] Motion for Summary Judgment is denied.

¶17 Blaser filed a request for clarification of the trial court's orders and argued neither SGI nor Michael opposed SGI's inclusion in the court's grant of summary judgment. Blaser also requested "the Court identify the particular provision or provisions of the agreement that the Court found to effect a transmutation of those community assets so that the record is clear."

¶18 Before the trial court could rule on the request for clarification, Blaser timely appealed. We remanded this matter to the trial court to rule on the request for clarification. The trial court *nunc pro tunc* granted summary judgment against Michael and SGI. Furthermore, the trial court clarified its prior ruling by pointing to paragraph three of the Post-Nuptial Agreement (Paragraph Three).

¶19 We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101.B (2003).

DISCUSSION

¶10 On appeal Blaser argues the trial court's determination of the effect the Post-Nuptial Agreement had on assets including Michael's companies, the Wells Fargo and Charles Schwab accounts, was erroneous. Blaser also contends the court erred in its order denying the grant of summary judgment in favor of Blaser and against SGI. Because the trial court has addressed this issue in Blaser's favor and neither the Salvini's nor SGI object, we do not address it herein.

¶11 We review a trial court's grant of summary judgment *de novo*, while viewing the evidence in the light most favorable to Blaser. *Espinoza v. Schulenburg*, 212 Ariz. 215, 216, ¶ 6, 129 P.3d 937, 938 (2006).³

¶12 All property real or personal, acquired during a marriage is presumed to be community property. Cal. Fam. Code (C.F.C.) § 760 (2006). Property acquired during the marriage by gift, bequest, devise, or decent, including rents and profits derived from, is that spouse's separate property. C.F.C. § 770(a). When funds are commingled the presumption is that they are community property, unless they can be traced. *See v. See*,

³ The Salvinis currently reside in California, therefore in addressing the assets and Post-Nuptial Agreement we look to California laws for guidance. *Lorenz-Auxier Fin. Grp., Inc. v. Bidewell*, 160 Ariz. 218, 221, 772 P.2d 41, 44 (App. 1989) (this Court must look to the state of Oregon to determine the status of the community property because that is the couple's state of domicile).

64 Cal. 2d 778, 784, 51 Cal. Rptr. 888, 892 (1966) (once funds are commingled the party claiming they are separate property bears the "burden of keeping records adequate to establish the balance of community income and expenditures at the time an asset is acquired with commingled property").

¶13 California's statutory scheme allows married persons to alter their property rights when certain requirements are met. Under C.F.C. § 852(a) (2004), married persons may transmute community property to the separate property of one or the other, if the transmutation is "made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected." The California Supreme Court held that a writing is an express declaration only if it states on its face that a change in character or ownership of the subject property is being made. *Estate of MacDonald*, 51 Cal. 3d 262, 264, 794 P.2d 911, 913 (1990). In 2005, the California Supreme Court confirmed its holding in *MacDonald*. *In re Marriage of Benson*, 36 Cal. 4th 1096, 1106-07, 116 P.3d 1152, 1158 (2005). Under *Benson*, "the writing must reflect a transmutation on its face, and must eliminate the need to consider other evidence in divining this intent." *Id.*

The Agreement's Effect on the Salvini's Assets

I. SGI - Ownership and Incomes

¶14 Blaser argues the language of paragraph two of the Post Nuptial Agreement (Paragraph Two) is limiting and intends to only include businesses such as Corsi & Nicolai, Inc. and others in which Michael uses his general contractor's license are transmuted as Michael's separate property. We disagree. In pertinent part, Paragraph Two states:

The character of the business ventures owned by Michael, including but not necessarily limited to, the business known as Corsi & Nicolai, Incorporated and any business operations arising out of Michael's general contractor's license are changed from community property to the separate property of Michael.

(emphasis added).

¶15 The parties do not dispute that Paragraph Two demonstrated that Corsi & Nicolai, Inc. and other businesses created by Michael, using his general contractor's license, are his separate property. In interpreting the meaning of this paragraph, we look only to the Post-Nuptial Agreement to determine if a transmutation was made. See *id.* (extrinsic evidence is excluded to prove the writing made a transmutation).

¶16 The introductory sentence of Paragraph Two sets out the subject of the paragraph in the Post-Nuptial Agreement. The intent of this sentence is to ensure that "business ventures owned by Michael" are his separate property. Paragraph Two

continues to clarify that Michael also owns the businesses that were present when the Post-Nuptial Agreement was made. However, Blaser contends the statement "including but not necessarily limited to," limits the businesses which are transmuted to Michael's separate property. We disagree and instead find that the plain meaning of the Post-Nuptial Agreement is inclusive and seeks to include all businesses owned by Michael. The statement "including but not necessarily limited to," makes it clear that the businesses which are to be considered Michael's separate property are not "limited to" those where he uses his contractor's license.

¶17 We find no error in the trial court's interpretation of Paragraph Two that the businesses are Michael's separate property.⁴

II. Wells Fargo and Charles Schwab Accounts

¶18 Blaser contends the Wells Fargo and Charles Schwab accounts remained community property after the effective date of the Post-Nuptial Agreement because they were not specifically transmuted. Under *Estate of MacDonald*, there must be a writing which on its face transmutes community property to separate property. 51 Cal. 3d at 264, 794 P.2d at 913. Accounts or

⁴ We also find that the SGI stock Michael owned is covered by Paragraph Two because it defines the character of his business ventures. Therefore we do not address Blaser's arguments regarding Paragraph Three in regards to Michael's businesses.

property acquired during the marriage are presumed to be community property, yet this principle is inapplicable to those acquired before the marriage. *In re Marriage of Leversee*, 156 Cal. App. 3d 891, 895-96, 203 Cal. Rptr. 481, 483 (Cal. Ct. App. 1984).

¶19 Paragraph Three states, "Each party shall have no right, interest, or obligation relating to the separate property of the other . . . 'separate property' is designed to include salaries, income, personal property, retirement fund(s), [and] business earnings." This paragraph, like the entire Post-Nuptial Agreement, attempts to take all of the Salvinis' community property and transmute it to separate property.

¶20 The Wells Fargo and Charles Schwab accounts were opened prior to the effective date of the Post-Nuptial Agreement.⁵ While Paragraph Three of the Post-Nuptial Agreement defines Michael and Barbara's individual salaries as separate property, there is nothing in the Post-Nuptial Agreement indicating that the Wells Fargo or Charles Schwab accounts or any other account was transmuted from community property to Barbara's separate property. Furthermore, there is no indication in the Post-

⁵ The Salvinis agree that both Michael and Barbara's name were on the Wells Fargo account, however Barbara claims Michael was only a beneficiary of the account. On appeal, this Court is not directed to evidence that indicates Michael was merely a beneficiary of the account nor to a detailed record of each party's separate property placed into the account.

Nuptial Agreement that Michael agreed to the transmutation of the Wells Fargo or Charles Schwab accounts, or any other bank account from community property to separate property.

¶21 Therefore, we find that the trial court erred in finding that the Wells Fargo and Charles Schwab accounts were Barbara's separate property, when there was no mention of either account in the Post-Nuptial Agreement or any indication that Michael agreed to the transmutation of either account.⁶

¶22 Although the Post-Nuptial Agreement failed to transmute the accounts into Barbara's separate property, the Salvinis did not show what funds they had deposited into the accounts, the nature of those funds, community or separate, and whether the funds in the account may have become community assets because of post-agreement commingling.

CONCLUSION

¶23 We affirm the judgment of the trial court with the exception of those portions pertaining to the Wells Fargo and Charles Schwab accounts. We reverse the trial court's rulings regarding the Wells Fargo and Charles Schwab accounts, vacate the

⁶ Blaser asserts the post-lawsuit transfers from the Wells Fargo and Charles Schwab accounts were not valid because they were fraudulently transmuted. As the evidence before us is insufficient to determine the status of the Wells Fargo and Charles Schwab accounts, we remand this issue for the trial court to determine whether transfers from the accounts after the filing of the lawsuit were fraudulently made in accordance with Cal. Civ. Code. § 3439.04.

grant of Barbara's motion to dismiss to the extent of the Wells Fargo and Charles Schwab accounts, and remand for further proceedings consistent with this decision.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

PATRICIA K. NORRIS, Presiding Judge

/S/

JOHN C. GEMMILL, Judge