DIVISION ONE
FILED: 11/29/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WELLS FARGO BANK, N.A., as Successor Trustee for the Sonia A Thompson Grantor Trust dated October 19, 2006, Plaintiff/Appellee, v. BERT JOHNSON and JANE DOE JOHNSON, husband and wife, and KENNETH JOHNSON and JANE ROE JOHNSON, husband and wife, Defendants/Appellants.	1 CA-CV 10-0069 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-033304

The Honorable Bethany G. Hicks, Judge

AFFIRMED

Fennemore Craig, P.C. — Phoenix
By Roger Hargrove
Attorneys for Appellee

Beus Gilbert, P.L.L.C. — Phoenix
By Franklyn D. Jeans
Britton M. Worthen
Cassandra H. Ayres
Brian J. McNamara
Attorneys for Appellants

K E S S L E R, Presiding Judge

¶1 Defendants-Appellants Bert Johnson and Kenneth Johnson (the "Johnsons") appeal the trial court's grant of partial summary judgment to Plaintiff-Appellee Wells Fargo Bank N.A. For the reasons that follow, we affirm the court's ruling.

FACTUAL AND PROCEDURAL HISTORY

¶2 In 2005, Sonia Thompson ("Sonia") purchased three properties in Cochise County (the "Properties") for $2,239,150.50. Sonia purchased the Properties to help the Johnsons, who wanted to farm the Properties but did not want to purchase the land themselves. Sonia also received tax benefits by buying the Properties. In 2006, Sonia and the Johnsons entered into an agreement ("Agreement") for the Johnsons to lease the Properties and to give Sonia the option to sell the Properties to the Johnsons at a later date.

¶3 The Agreement called for the Johnsons to pay five percent of the purchase price of the Properties as annual rent retroactive to June 2005. It also contained an option to sell:

> It is further agreed and made a part of this agreement that at the end of the three years, Sonia Thompson has the option to get out of said land purchase and on or after June 2, 2008, after payment of all rental payments mentioned above, that Bert Johnson and Kenneth Johnson hereby agrees [sic] to purchase the property and has [sic] the ability to purchase the property at the original purchase price, as long as no other expenses have been incurred by Sonia Thompson and all rental property has been paid. This would be the minimum that Sonia Thompson will receive. *If the*

> *property has increased in value, Sonia Thompson would be entitled to 1/3rd of the increase over and above her initial costs at that time when she is exercising her right to sell said property.*

(Emphasis added.) Sonia subsequently transferred the deeds of the Properties into a trust, of which she was the trustee. Meanwhile, the Johnsons installed between $1,900,000 and $3,000,000 in improvements on the Properties.

¶4 In April 2008, Sonia informed the Johnsons by letter that she was exercising her option to sell. The letter referenced an August 2007 appraisal of the Properties prepared at the Johnsons' request and an April 2008 update to the appraisal indicating that the Properties were worth $7,500,000 at both times. Based on that valuation, Sonia demanded payment of $3,992,767.[1] The Johnsons neither responded to the letter in writing nor tendered any payment.[2]

---

[1] According to the demand, the $7,500,000 value reflected an increased value of $5,260,850 over the original purchase price of $2,239,150. One-third of that increased value was $1,753,617. Adding $1,753,617 to the initial purchase price of $2,239,150 yielded a sale price of $3,992,767.

[2] The Johnsons argued on summary judgment that in conversations with Sonia's husband, they had indicated their willingness to purchase the Properties, but that they disputed Sonia's method of calculating the purchase price pursuant to the Agreement. However, they did not support this contention by any citation to an affidavit or any other admissible evidence. *See* Ariz. R. Civ. P. 56(c)(2) (mandating that party opposing summary judgment specify in a controverting statement of facts "the specific portion of the record where the fact may be found").

¶5 Sonia died fourteen days after she sent the letter to the Johnsons, and Wells Fargo became the successor trustee of the trust holding the deeds to the Properties. In November 2008, Wells Fargo sent a letter to the Johnsons demanding that they either complete the transaction for the purchase price of $3,992,767 within twenty days or execute a quit-claim deed surrendering title to the Properties. Wells Fargo sent another letter in early December 2008 threatening litigation if the Johnsons did not take action regarding the Properties.

¶6 The Johnsons responded that the appraisal upon which Sonia and Wells Fargo based their price was erroneous and that the Agreement did not contemplate the Johnsons paying one-third of the increase in value due to the Johnsons' improvements. The Johnsons agreed that Wells Fargo was entitled to at least the minimum purchase price stated in the Agreement and informed Wells Fargo that they were having an independent appraisal performed.[3]

¶7 In late December 2008, Wells Fargo filed a three-count complaint against the Johnsons based on the Johnsons' failure to complete the purchase of the Properties. In the first two

[3] The Johnsons did not provide the trial court any information related to the result of this appraisal until their motion for reconsideration. We do not consider evidence first presented in a motion for reconsideration. *Brookover v. Roberts Enters.*, 215 Ariz. 52, 57 n.2, ¶ 17, 156 P.3d 1157, 1162 n.2 (App. 2007).

counts, Wells Fargo sought a declaration that the Johnsons had materially breached the Agreement and had no legal or equitable interest in the Properties and asked the trial court to quiet title in Wells Fargo. In the third count, Wells Fargo sought damages based on the Johnsons' failure to pay rent or other required costs pursuant to the Agreement.

¶8 Wells Fargo filed a motion for partial summary judgment on the first two counts, arguing the Johnsons' failure to tender payment was a material breach of the Agreement and that breach terminated any legal or equitable right the Johnsons may have had in the Properties. The Johnsons argued that summary judgment was inappropriate because: (1) the Agreement was ambiguous in light of its failure to define the term "value"; and (2) Sonia and Wells Fargo demanded an excessive amount of money to complete the sale.

¶9 The trial court held that the Agreement was not ambiguous in failing to set a means of determining value, the Johnsons were not entitled to an offset for the amount spent on improvements, and Sonia's assessment of value based on the appraisal was not improper. Accordingly, the court entered

partial summary judgment in favor of Wells Fargo pursuant to Arizona Rule of Civil Procedure 54(b).[4]

¶10 The Johnsons timely appealed. This Court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (Supp. 2011).

STANDARD OF REVIEW

¶11 This Court reviews *de novo* a grant of summary judgment. *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 199, ¶ 15, 165 P.3d 173, 177 (App. 2007). Summary judgment is appropriate only when the party resisting summary judgment fails to proffer any evidence indicating that a genuine issue of material fact exists. *See id.* A mere scintilla of evidence, or evidence which only creates slight doubt, is insufficient to defeat summary judgment. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). We view the facts and any reasonable inferences therefrom in the light most favorable to the non-moving party. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). Additionally, we review *de novo* any issues relating to the interpretation of leases and other contracts. *Id.*

[4] After the trial court issued its final judgment, the Johnsons filed a counterclaim for unjust enrichment, breach of the covenant of good faith and fair dealing, and asserted a constructive trust upon the improvements.

DISCUSSION

¶12 The Johnsons contend that the trial court erred in granting summary judgment because: (1) the Agreement was ambiguous in not defining the "value" of the Properties and in failing to state whether such value could include the value of the Johnsons' improvements; and (2) the value had to be based on reasonable extrinsic evidence and the appraisal in this case was unreasonable. Accordingly, they argue the trial court erred in defeasing their interest in the Properties as a remedy. We disagree.

¶13 Our goal in interpreting a contract is to discern and enforce the parties' intent, which we do by considering "the plain meaning of the words in the context of the contract as a whole." *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 593, ¶ 9, 218 P.3d 1045, 1050 (App. 2009). The "ordinary meaning of language [is] given to words where circumstances do not show a different meaning is applicable." *Chandler Med. Bldg. Partners v. Chandler Dental Grp.*, 175 Ariz. 273, 277, 855 P.2d 787, 791 (App. 1993). If the language of the contract is clear and unambiguous there is no need for interpretation. *Grosvenor Holdings*, 222 Ariz. at 593, ¶ 9, 218 P.3d at 1050. "Whether a contract is ambiguous is a question of law; the mere fact that parties disagree as to its meaning does not establish

an ambiguity." *Chandler Med. Bldg. Partners*, 175 Ariz. at 277, 855 P.2d at 791.

¶14 The ordinary meaning of "value" is "[t]hat amount of some commodity, medium of exchange, etc., which is considered to be an equivalent for something else; a fair or adequate equivalent or return," or the "material or monetary worth of a thing." *The Compact Edition of the Oxford English Dictionary* 3587 (1971).

¶15 Here, the Agreement provided: "If the property has increased in value, Sonia Thompson would be entitled to 1/3rd of the increase over and above her initial costs at that time when she is exercising her right to sell said property." The meaning of "value" includes the improvements. If Sonia and the Johnsons meant "value" to mean the worth of the Properties excluding the Johnsons' improvements, they would have crafted the Agreement to reflect that desire.

¶16 The only support for the Johnsons' argument that "value" in the Agreement was intended to exclude the value of their improvements is an affidavit by Duane Schurman, the attorney who drafted the Agreement. Schurman averred that in June 2005, Allan Thompson ("Allan"), Sonia's husband, paid him to draft the Agreement. Schurman's affidavit stated that "Bert Johnson provided [him] with certain terms and conditions for same," and "the Agreement contemplates that if the option to

purchase is exercised, Sonia Thompson would be entitled to only one-third (1/3) of the increase in the value of the land, *but not any improvements constructed after she purchased the property*." (Emphasis added.)

¶17 Relying on *Taylor v. State Farm Mutual Automobile Insurance Company*, 175 Ariz. 148, 154, 854 P.2d 1134, 1140 (1993), the Johnsons contend that the affidavit is parol evidence that created an issue of fact precluding summary judgment. Under *Taylor*, parol evidence is admissible to aid in the interpretation of a contract if the language of the contract is "reasonably susceptible" to the interpretation supported by the parol evidence, but it cannot be used to vary or contradict the contract. *Id.* To be considered on a motion for summary judgment, however, evidence must be admissible under the Arizona Rules of Evidence. Rule 56(e) of the Arizona Rules of Civil Procedure requires that an affidavit supporting or opposing a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Villas at Hidden Lakes Condominiums Ass'n v. Geupel Constr. Co.*, 174 Ariz. 72, 81, 847 P.2d 117, 126 (App. 1992).

¶18 If the Schurman affidavit were admissible, we might agree with the Johnsons that it created a genuine issue of

material fact as to whether the "value" of the Properties included the value of the Johnsons' improvements, thereby precluding summary judgment. However, Schurman's affidavit did not say he was personally acquainted with Sonia or worked with her in drafting the Agreement; rather, he worked with Allan, who is not a party to the Agreement nor has any interest in this litigation.

¶19 Moreover, Schurman's affidavit did not say that the Johnsons or Sonia directed him to draft the Agreement so that the Properties' "value" would be limited to the value of the land alone. Rather, the affidavit merely states "[i]t was my understanding that Sonia Thompson . . . would not receive one-third (1/3) of the value of any improvements constructed on the property by the Johnsons" and that "the Agreement contemplates . . . [that the sale prices would be] one-third (1/3) of the increase in the value of the land, but not any improvements constructed after she purchased the property." This statement lacks foundation because nothing shows that Schurman has personal knowledge of Sonia's intentions that might render him competent to testify about such matters. *See* cases cited *supra* ¶ 17. Other than the Schurman affidavit and the Johnsons' unsupported allegations regarding Allan's role, there is no indication in the record that Allan was informed about Sonia's intent with respect to the Agreement.

¶20 Thus, Schurman was not competent to testify about the intent of the parties and the affidavit was inadmissible as parol evidence supporting the Johnsons' opposition to the motion for summary judgment. In the absence of any other evidence supporting the Johnsons' contentions regarding the meaning of "value," the trial court correctly concluded the plain meaning of "value" includes the improvements the Johnsons made to the Properties.

¶21 Alternatively, the Johnsons argue that even if the purchase price was to be based on the value of the Properties including improvements, the determination of value had to be based on reasonable extrinsic evidence. The Johnsons contend the update to the original appraisal on which Sonia calculated the purchase price was unreasonable because it did not meet the requirements of the Uniform Standards of Professional Appraisal Practice. The Johnsons did not raise this issue in opposing summary judgment and we will not consider it on appeal. *McDowell Mtn. Ranch Land Coal. v. Vizcaino*, 190 Ariz. 1, 5, 945 P.2d 312, 316 (1997).

¶22 Rather, the Johnsons argued that the August 2007 appraisal could not be used to set the purchase price because the appraisal was for a bank loan, and an appraisal made for such a purpose is inflated over the fair-market value of a property. They also argued the April 2008 update was unreliable

because it stated the value of the Properties had not changed since August 2007 even though the "real estate market in Arizona [had since] collapsed." Other than referring to their attorney's letters to Wells Fargo and their own unverified disclosure statements, the Johnsons offered no admissible evidence to support their arguments.

¶23 Wells Fargo requests an award of attorneys' fees because this dispute arises out of contract. A.R.S. § 12-341.01 (2003). We exercise our discretion to deny attorneys' fees, but we award taxable costs incurred on appeal upon Wells Fargo's compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶24 For the above reasons, we affirm the trial court's summary judgment for Wells Fargo.

/s/
DONN KESSLER, Presiding Judge

CONCURRING:

/s/
ANN A. SCOTT TIMMER, Judge

/s/
DIANE M. JOHNSEN, Judge