IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

JULIE A. MCCLEARY AND DAVID A. ROBINSON,
Plaintiffs/Appellees,

v.

JOSEPHINE TRIPODI,
Defendant/Appellant.

No. 2 CA-CV 2016-0145
Filed August 29, 2017

Appeal from the Superior Court in Pima County
No. C20152870
The Honorable Jeffrey T. Bergin, Judge

AFFIRMED

COUNSEL

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Counsel for Plaintiffs/Appellees

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OPINION

Chief Judge Eckerstrom authored the opinion of the Court, in which Presiding Judge Vásquez and Judge Howard[1] concurred.

E C K E R S T R O M, Chief Judge:

¶1 Josephine Tripodi appeals from the trial court's grant of summary judgment, quieting title to Lot 18 of Lazy Creek I ("the Property"), real property in Pima County, in favor of Julie McCleary and David Robinson ("the Devisees"). We affirm for the following reasons.

Factual and Procedural Background

¶2 Viewing the facts in the light most favorable to the non-moving party, *Ochser v. Funk*, 228 Ariz. 365, ¶ 11, 266 P.3d 1061, 1065 (2011), in May 1996, Dominic Tripodi of Philadelphia, Pennsylvania, named himself trustee of the Dominic Tripodi Living Trust ("the Trust"), which he settled with $92,000 of his own, separate assets for the purpose of acquiring and holding title to real property in Arizona. The Trust directed that upon his death, Jennifer Robinson would receive the balance of the trust estate, if she survived him. A few days later, a deed was recorded with the Pima County Recorder conveying the Property to "Dominic Tripodi, Trustee of the Dominic Tripodi Living Trust."

¶3 In October 1997, Dominic died, and his wife, Josephine Tripodi, became the administrator of his estate. In September 2002, Josephine, acting as the administrator, recorded a deed purporting to convey the Property from Dominic's estate to herself. In June 2005, Jennifer, as successor trustee and pursuant to the Trust, recorded a deed conveying the Property from the Trust to herself. In September

[1]The Hon. Joseph W. Howard, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

and December of 2009, Josephine twice more recorded deeds purporting to convey the Property from Dominic's estate to herself.

¶4 In February 2015, Jennifer died. In March, the Devisees, acting as personal representatives of her estate and pursuant to her will, executed a deed of distribution conveying the Property to themselves. In April, acting through counsel and pursuant to A.R.S. § 12-1103, the Devisees sought a quitclaim deed to the Property from Josephine for consideration of five dollars.

¶5 In June 2015, not having obtained such deed, the Devisees commenced this action to quiet title. On June 28, 2016, the trial court issued an unsigned, under-advisement ruling granting summary judgment and quieting title to the Property in favor of the Devisees. In July, Josephine filed two motions asking the court to reconsider its June 28 order. Later that month, before the court ruled on those motions and before it entered final judgment, Josephine filed two notices of appeal. In August, the court summarily denied the motions for reconsideration.

¶6 In September, the Devisees filed a motion to dismiss the appeal, arguing the notices were premature because final judgment had not been entered. The same day, this court independently determined the trial court's order lacked requisite finality language, stayed the appeal, and revested jurisdiction in the trial court. On October 3, the trial court entered final judgment and, a few days later, this court revested jurisdiction in itself and denied the Devisees' motion to dismiss. We have jurisdiction for the following reasons. A.R.S. §§ 12-120.21(A)(1), 12-2101(A)(1); Ariz. R. Civ. App. P. 9(c).

Premature Notices of Appeal

¶7 As a court of limited jurisdiction, A.R.S. §§ 12-120.21(A)(1), 12-2101(A)(1), we have an independent duty to determine whether we have the authority to consider an appeal. *Camasura v. Camasura*, 238 Ariz. 179, ¶ 5, 358 P.3d 600, 602 (App. 2015). Generally, only final judgments are appealable. *Id.* ¶ 6. With limited exceptions not applicable here, a judgment is not final unless the court has signed it, Ariz. R. Civ. P. 58(b)(1), and it "recites that no further matters remain pending and that the judgment is entered under

Rule 54(c)." Ariz. R. Civ. P. 54(c). Here, the June 28 order was not final because it was not signed and did not contain Rule 54(c) language of finality. Thus, Tripodi's notices of appeal, filed in July, were premature because they predated the final judgment, entered on October 3.

¶8 Ordinarily, a premature notice of appeal is a nullity. *Craig v. Craig*, 227 Ariz. 105, ¶ 13, 253 P.3d 624, 626 (2011). The question before us, however, is whether an exception for certain premature appeals applies. *See* Ariz. R. Civ. App. P. 9(c). The Devisees suggest Rule 9(c) merely codifies the narrow, ministerial exception announced in *Barassi v. Matison*, 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981). Tripodi argues our supreme court, by adopting Rule 9(c) and mirroring it after Rule 4(a)(2), Fed. R. App. P., intended to expand the exception beyond *Barassi* to include a broader class of premature notices of appeal.

***Barassi*'s Ministerial Exception**

¶9 In *Barassi*, our supreme court recognized an exception for premature notices of appeal when "no appellee was prejudiced" and "a subsequent final judgment was entered." 130 Ariz. at 422, 636 P.2d at 1204. This "limited exception" applies only "if no decision of the court could change and the only remaining task is merely ministerial." *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, ¶ 37, 132 P.3d 1187, 1195 (2006).

¶10 *Barassi*'s ministerial-defects exception does not cover Tripodi's premature notices of appeal because she had previously filed two pending motions asking the trial court to reconsider its June 28 order over which the court still needed to exercise its discretion. Because the *Barassi* exception does not apply, we must consider whether Rule 9(c) encompasses a broader range of premature notices of appeal than the exception adopted in *Barassi*.

Rule 9(c)

¶11 Rule 9(c), Ariz. R. Civ. App. P., states, "A notice of appeal . . . filed after the superior court announces an order . . . but before entry of the resulting judgment that will be appealable—is treated as

filed on the date of, and after the entry of, the judgment." By its plain language, Rule 9(c) applies to notices of appeal taken from orders upon which the trial court later enters an appealable, final judgment. *Id.* The dual references to "the resulting judgment" and "the judgment" limit the rule to orders and decisions that actually culminate in a judgment. *Id.*

¶12 In *Camasura*, this court observed that Rule 9(c) contains "functionally equivalent" language to Rule 4(a)(2), Fed. R. App. P., and noted that the year before the rule change, the State Bar had petitioned the court to adopt the federal rule. 238 Ariz. 179, ¶ 12, 358 P.3d at 603-04. Applying our supreme court's practice of according "'great weight' to the federal interpretations" of rules upon which state procedural rules are based, the court presumed our supreme court was "aware of and embraced the United States Supreme Court's definitive interpretation" of Rule 4(a)(2) in *FirsTier Mortgage Insurance Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269 (1991). *Camasura*, 238 Ariz. 179, ¶ 13, 358 P.3d at 604, *quoting Edwards v. Young*, 107 Ariz. 283, 284, 486 P.2d 181, 182 (1971).

¶13 In *FirsTier*, the Court determined a notice of appeal from an order granting summary judgment was not "fatally premature" under Rule 4(a)(2), even though it was filed not only before final judgment was entered, but also before the prevailing party complied with the district court's order to submit proposed findings of fact and conclusions of law. 498 U.S. at 271-72, 277. There, the Court reasoned that the otherwise premature appeal provided "effective notice from [the] subsequently entered final judgment." *Id.* at 274.

¶14 The Court, however, specified that Rule 4(a)(2) would not apply to all premature appeals; it limited the rule's reach to appeals taken from those orders that "would be appealable if immediately followed by the entry of judgment." *Id.* at 276 (emphasis omitted). As matters of policy, the Court reasoned: (1) the rule was intended to accommodate a "litigant's confusion" about when to file; (2) "permitting the notice of appeal to become effective when judgment is entered does not catch the appellee by surprise"; and (3) "[l]ittle would be accomplished by prohibiting the court of appeals from reaching the merits." *Id.*

¶15 Applying *FirsTier*, the court in *Camasura* determined Rule 9(c) did not save the appellant's premature notice of appeal. Specifically, it concluded that the order from which it was taken could not have resulted in a final judgment inasmuch as it left attorney fees, legal decision-making, and parenting time unresolved. *Camasura*, 238 Ariz. 179, ¶¶ 7, 15, 358 P.3d at 602-03, 604.

¶16 Here, the order from which Tripodi filed her premature notices of appeal disposed of all issues as to all parties and the trial court ultimately entered final judgment upon it. Accordingly, the order comports with the plain language of Rule 9(c).

Intervening Motions for Reconsideration

¶17 The Devisees claim that, even if we interpret Rule 9(c) as mirroring the federal rule, Tripodi's intervening, substantive motions for reconsideration render the June 28 order unappealable because those motions "sought to and could have" changed the trial court's decision.

¶18 The Supreme Court has not determined whether Rule 4(a)(2) applies when a party has filed an intervening motion for reconsideration. [2] However, following the Court's approach in *FirsTier*, Tripodi's motions for reconsideration need not prevent application of Rule 9(c). First, the motions had no effect on whether the June 28 order resolved all issues as to all parties. *See FirsTier*, 498 U.S. at 276. Although Tripodi raised new arguments in her motions for reconsideration, she did not raise new *issues* requiring determination before the trial court could have entered final judgment. Second, because the trial court summarily denied her motions for reconsideration and the final judgment mirrored the June 28 order, we can confidently say the trial court actually entered judgment on that order. *See id.*

[2] In *Metropolitan Life Insurance Co. v. Estate of Cammon*, the Seventh Circuit applied Rule 4(a)(2) even though a motion for reconsideration was pending when the notice was filed. 929 F.2d 1220, 1222 (7th Cir. 1991).

¶19 Relying on language in *FirsTier*, the Devisees contend the exception does not apply because the trial court needed to first rule on Tripodi's intervening motions and, therefore, judgment could not have immediately been entered. But the Devisees misread *FirsTier* to focus on the presence or absence of intervening events rather than on the order itself. *See id.* (exception applies if "decision . . . would be appealable if immediately followed by the entry of judgment") (emphasis omitted). Such an interpretation is inconsistent with the facts of *FirsTier*, in which the trial court had ordered the prevailing party to submit proposed findings of fact and conclusions of law, *id.* at 270, a subject over which the parties could be expected to litigate. Rather, the Court considered whether the order could form the basis of a final judgment and whether it actually resulted in final judgment. *Id.* at 276. Here, the June 28 order meets these conditions and so the intervening motions should not deprive Tripodi's notices of appeal from the benefit of Rule 9(c). For the foregoing reasons we determine Tripodi's premature notices of appeal should be treated as filed on the date of, and after the entry of, the October 3, 2016 judgment. Accordingly, we have jurisdiction. A.R.S. §§ 12-120.21(A)(1), 12-2101(A)(1); Ariz. R. Civ. App. P. 9(c).[3]

Summary Judgment

¶20 Advancing multiple arguments, Tripodi contends the trial court erroneously granted summary judgment quieting title in favor of the Devisees. We review a grant of summary judgment de novo, viewing the evidence and all reasonable inferences in the light

[3]We need not reach the question of whether we may consider arguments Tripodi raised for the first time in her motions for reconsideration because she does not reassert them on appeal.

Also, we need not consider arguments made and evidence presented in Tripodi's motion to set aside the judgment filed January 20, 2017, the same day she filed her opening brief, because she did not appeal the trial court's denial of that motion. Thus, our review is limited to the order granting summary judgment and the evidence then produced.

most favorable to the non-moving party. *Ochser*, 228 Ariz. 365, ¶ 11, 266 P.3d at 1065.

¶21 "Summary judgment is appropriate only if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law." *Id.*; *see* Ariz. R. Civ. P. 56(a). Once a moving plaintiff makes such a prima facie showing, the burden of production shifts to the non-moving party to produce evidence sufficient to raise a triable issue of fact. *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, ¶ 12, 180 P.3d 977, 979-80 (App. 2008). Although an adverse party may support its opposition by affidavit, depositions, answers to interrogatories, or admissions, Ariz. R. Civ. P. 56(c)(5), (6), unsworn and unproven assertions of facts are insufficient. *See Moretto v. Samaritan Health Sys.*, 190 Ariz. 343, 346, 947 P.2d 917, 920 (App. 1997). Importantly, the opposing party cannot rely on the pleadings, but must "respond with specific facts showing a genuine issue for trial." *Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, ¶ 15, 17 P.3d 790, 793 (App. 2000).

¶22 Tripodi first argues there is a triable issue of material fact over whether she was the legal owner of the Property because Dominic acquired the Property with their joint assets. Alternatively, Tripodi claims the Devisees could not quiet title against her because she has acquired the property by adverse possession.

Marital Property

¶23 Tripodi contends she has an interest in the Property because it was purchased with funds she and Dominic jointly owned. However, Tripodi produced no admissible evidence that she had any interest in the monies enumerated in the Trust schedule. *See Nat'l Bank of Ariz.*, 218 Ariz. 112, ¶ 12, 180 P.3d at 979-80. Although Tripodi asserted at the hearing on the motion for summary judgment that the funds in question came from joint accounts she shared with Dominic, she did not make these statements under oath. As such, they do not create a question of fact rendering summary judgment improper. *See Moretto*, 190 Ariz. at 346, 947 P.2d at 920.

¶24 Relying on a 2009 decree from the Philadelphia Court of Common Pleas, Tripodi also asserts that court "recognized the

existence of the joint ownership of these monies." But a seven-year-old, interlocutory order to show cause, without more, does not amount to a reasonable inference that a triable issue of fact exists. By contrast, the trust instrument explicitly states that "all" of the property described in the attached schedule was Dominic's "separate property" and that the Trust, made for the purpose of "holding title to Arizona real estate," would be governed by Arizona law "except for any community property law of such state." Indeed, it was Dominic's "intent that [his] property retain the separate character it would have under the laws of the Commonwealth of Pennsylvania, which [was his] domicile."[4] Thus, the trial court correctly found no genuine dispute of material fact existed with respect to whether Tripodi ever held an interest in the Property by virtue of her claim to joint ownership of the purchase money. As a matter of law, the trial court also correctly found that Tripodi's attempts to convey title to herself as the personal representative of Dominic's estate were of no effect, because the estate did not own the Property. *Cf. Register v. Coleman*, 130 Ariz. 9, 12, 633 P.2d 418, 421 (1981) (person cannot transfer interest greater than what she holds); *Capital Inv. Corp. of Wash. v. King County*, 47 P.3d 161, 162 n.3 (Wash. Ct. App. 2002) (attempted transfer ineffective because grantor did not own property at issue); *Gilstrap v. June Eisele Warren Trust*, 106 P.3d 858, ¶ 17 (Wyo. 2005) ("where a party attempts to grant more property than he or she owns, that excess grant is a nullity").

Adverse Possession

¶25 Alternatively, Tripodi argues she has acquired title by adverse possession pursuant to A.R.S. § 12-525(A). The statute provides that one may obtain title by adverse possession after five

[4]On appeal, Tripodi relies on Pennsylvania statutes regarding that state's presumption of marital property in certain contexts. However, Tripodi did not raise this argument before the trial court and has therefore waived it on appeal. *Price v. City of Mesa*, 236 Ariz. 267, n.3, 339 P.3d 650, 652 n.3 (App. 2014). Likewise, Tripodi's argument that A.R.S. § 25-214(c) renders the purchase voidable at her option is waived because she did not raise it below. *See Price*, 236 Ariz. 267, n.3, 339 P.3d at 652 n.3.

years when such person has "pa[id] taxes thereon" and has "duly recorded" a deed. A.R.S. § 12-525(A). As noted earlier, evidence in the record established that Tripodi recorded a deed in September 2002 and again in September and December 2009. At the hearing on the motion for summary judgment, Tripodi, without being sworn, argued that she "always paid th[e] property taxes," and before this court, she argues that she began paying taxes as early as 1996. However, she produced no evidence below to support these assertions. *Moretto*, 190 Ariz. at 346, 947 P.2d at 920 (unsworn and unproven assertions of facts are insufficient).[5] As such, the trial court correctly determined that Tripodi failed to raise a genuine dispute of material fact concerning her adverse possession claim.[6] *See* A.R.S. § 12-521.

Attorney Fees

¶26 A party successfully quieting title may recover attorney fees if, twenty days before bringing the action, he or she requests a quitclaim deed from the adverse party, tenders five dollars, and the adverse party refuses or neglects to comply. A.R.S. § 12-1103(B). "It

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[5]On appeal, Tripodi urges that the trial court should have taken judicial notice of certain public records, purportedly showing she paid property taxes. But Tripodi never requested that the trial court do so. Moreover, Tripodi develops no legal argument concerning judicial notice and therefore has waived the argument on appeal. *See* Ariz. R. Civ. App. P. 13(a)(6), (7); *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62, 211 P.3d 1272, 1289 (App. 2009).

[6]Relying on an acknowledgment date of April 22, 1996, in the deed from the grantor to "Dominic Tripodi, Trustee of the [Trust]," Tripodi claims the trial court erred inasmuch as the Trust did not exist when the property was acquired. But in her answer below, Tripodi acknowledged that Dominic acquired the property as trustee after the Trust's creation. And, because she has provided no supporting legal argument, we do not address her claim that the Property could not have been "after acquired property" because the deed by which Dominic took title was signed by the grantor before creation of the Trust. *See* Ariz. R. Civ. App. P. 13(a)(6), (7); *Ritchie*, 221 Ariz. 288, ¶ 62, 211 P.3d at 1289.

is within the trial court's discretion to determine whether to award attorney fees to a party who has prevailed in a quiet title action and otherwise complied with the provisions of section 12–1103(B)." *Scottsdale Mem'l Health Sys., Inc. v. Clark*, 164 Ariz. 211, 215, 791 P.2d 1094, 1098 (App. 1990); *see Lewis v. Pleasant Country, Ltd.*, 173 Ariz. 186, 195, 840 P.2d 1051, 1060 (App. 1992) (attorney fees pursuant to § 12-1103 available on appeal). Factors courts have considered include: (1) the merits of the unsuccessful party's claim or defense, (2) whether litigation could have been avoided or settled, (3) whether an award would cause extreme hardship to the unsuccessful party, (4) whether the successful party prevailed with respect to all relief sought, (5) novelty of the legal questions presented, (6) whether such claim or defense had been previously adjudicated in the jurisdiction, and (7) whether an award would deter others with viable claims or defenses from vindicating their rights. *Scottsdale Mem'l*, 164 Ariz. at 215-16, 791 P.2d at 1098-99.

¶27 Here, the Devisees sought a quitclaim deed from Tripodi in April 2015, tendering a five-dollar check. Not having obtained such deed, the Devisees brought this action in June 2015. Because Tripodi's substantive claims lacked substantial merit or novelty, the litigation could have been avoided or settled, and the Devisees prevailed with respect to all the relief sought, we grant the Devisees' request for attorney fees, pending compliance with Rule 21, Ariz. R. Civ. App. P.

Disposition

¶28 The trial court correctly determined that Tripodi did not raise a triable issue of fact concerning the Devisees' claim to the Property and that they are "the legal and rightful owners" as a matter of law. Accordingly, we affirm the trial court's grant of summary judgment quieting title in favor of Devisees. Further, we award reasonable attorney fees incurred on appeal, pending compliance with Rule 21, Ariz. R. Civ. App. P.