IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

FELISA GARBER,
Plaintiff/Counterdefendant/Appellant,

v.

SUSAN LYNN GARBER-NEVINS,
Defendant/Counterclaimant/Appellee.

No. 2 CA-CV 2022-0156
Filed July 17, 2023

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20194365
The Honorable Michael Butler, Judge

AFFIRMED

COUNSEL

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By Joseph H. Watson
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Mesch Clark Rothschild, Tucson
By J. Emery Barker and Bernardo M. Velasco
Counsel for Defendant/Counterclaimant/Appellee

MEMORANDUM DECISION

Judge Gard authored the decision of the Court, in which Presiding Judge Eppich and Chief Judge Vásquez concurred.

G A R D, Judge:

¶1 In this case involving trust equalization and the transfers of two parcels of real property, Felisa Garber appeals from the superior court's ruling granting partial summary judgment in favor of Susan Lynn Garber-Nevins. Felisa[1] contends the court erred by excluding parol evidence and by entering final judgment under Rule 54(b), Ariz. R. Civ. P. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts and draw all reasonable inferences in the light most favorable to Felisa, the non-moving party. *See McCaw v. Ariz. Snowbowl Resort*, 254 Ariz. 221, ¶ 9 (App. 2022). The parties are sisters and the daughters of Richard L. Garber and Harriet I. Garber. In May 2003, Richard and Harriet created the Garber Living Trust, which included the family home on North Flagstaff Place ("Flagstaff house") as an asset. The trust provided that, upon the death of the last-surviving parent, the assets of the trust were to be distributed to Felisa and Susan in equal shares.

¶3 Harriet died in July 2008. In 2009, Richard purchased a home on East Streams Edge Place ("Streams house") and transferred it into a trust he had formed called the Richard Leon Garber Revocable Streams Edge Trust ("Streams Edge Trust"). Like the Garber Living Trust, the Streams Edge Trust provided that its assets would be distributed to Felisa and Susan in equal shares upon their father's death.[2] Sometime thereafter, Richard moved into the Streams house, and Susan moved into the Flagstaff house.

[1]Multiple individuals involved in this matter share the same surname. To avoid confusion, we refer to those individuals by their first names.

[2]The record does not include documentation related to the Streams Edge Trust, but the parties agree that it contained a similar requirement for equal distribution.

¶4 Richard died in January 2018. Felisa and Susan subsequently retained counsel to settle Richard's trusts and estate. In May 2018, Felisa and Susan, as successor co-trustees of the Garber Living Trust and with documents prepared by counsel, distributed the Flagstaff house from the trust to themselves as individuals. In a separate quitclaim deed, Felisa, in her individual capacity, quitclaimed all her "right, title and interest" in the Flagstaff house to Susan. The Streams house was likewise distributed from the Streams Edge Trust to the sisters as individuals, and Susan thereafter quitclaimed her interest to Felisa. Neither of the two sets of quitclaim deeds contained any reservations, restrictions, or conditional language.

¶5 In September 2019, Felisa filed a complaint against Susan, raising multiple claims, including that Susan had breached an agreement to reimburse her for payment of a third-party settlement, a claim for "estate equalization," and a conversion claim. As relevant here, Felisa alleged the Streams house was worth less than the Flagstaff house, resulting in an inequitable division of assets from the two trusts.[3]

¶6 Susan thereafter moved for partial summary judgment on Felisa's equalization claim relating to the distribution of the houses. Susan argued that Felisa had "waived all her rights to the Flagstaff house and [was] estopped to assert such by virtue of her quit claim deed to Susan." In response, Felisa contended that the series of quitclaim deeds did not represent a fully integrated agreement, that there had been a mistake in the valuation of the houses, and that she had not intended to waive the trusts' mandates for equal distribution.

¶7 The superior court held a hearing on the motion, at the end of which it granted partial summary judgment. The court reasoned that there was "no question that if [Felisa and Susan] each got half of the houses they each got half of the value of both houses," therefore each of the trusts "did what the trust was supposed to do, which was distribute half of each house to each . . . sister." Thus, the court determined, the subsequent quitclaim deeds, in which each sister had deeded her interest in one house to the other sister, "were a disposition of property they already had from the estate." On that basis, the court concluded those transfers were not governed by the trusts and granted Susan's motion for partial summary judgment.

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[3]Felisa's complaint also included equalization claims for personal property—Richard's vehicle and Harriet's jewelry. The superior court's order granting partial summary judgment did not involve this property.

¶8 Susan subsequently lodged a form of judgment, and Felisa filed an objection. Felisa argued that the form of judgment and the proposed Rule 54(b) language were inappropriate because the facts surrounding the transfer of houses were "clearly relevant and may be dispositive to other issues in the case, such as the division of personal property." Felisa further contended that the proposed judgment "request[ed] more than this Court upholding the transfer of title, it, in fact, exclude[d] the values of the properties from equalization under the trusts."

¶9 Felisa also moved for reconsideration regarding the superior court's grant of partial summary judgment. As relevant here, Felisa argued that the sisters, as trustees, owed each other fiduciary duties and could not distribute trust assets unequally. She further cited A.R.S. § 14-2712 and argued that the statutory presumptions concerning the validity and effects of deeds are impacted by a different burden where a fiduciary relationship exists. The superior court denied Felisa's motion for reconsideration, reaffirming its earlier determination "that the properties were quitclaimed from the trusts to the parties *equally*, with each sister receiving a one-half interest in each piece of property." "As such," the court continued, "the parties as co-trustees performed in accordance with the trust[s] and in accordance with their fiduciary obligations. Any further conveyances of the houses between the parties were transactions between the parties individually, not in their capacities as co-trustees. No equalization is therefore necessary or appropriate." The court thereafter entered final judgment in Susan's favor "on the issue of an imbalance in the value" of the two houses, and included Rule 54(b) language.

¶10 Felisa moved for a new trial and to amend the judgment. She argued that the judgment involved an error of law and was contrary to the evidence and law under Rule 59, Ariz. R. Civ. P. She pointed to Susan's deposition in which Susan had acknowledged there was an agreement between the sisters as to the distribution of the property before their father's death and had admitted the distribution that occurred was unequal. With regard to the Rule 54(b) language, Felisa contended that "restricting any claim for equalization of the trust distribution" was an error and would result in piecemeal litigation. Lastly, Felisa argued that "the Court's prohibition against the Plaintiff showing an unequal distribution of the real property is an intrusion on the trial to be conducted for an equal distribution of the trusts." The court denied Felisa's motion, finding that she had made the same or substantially the same arguments in her motion to reconsider.

¶11 This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 12-2101(A)(1).

Discussion

¶12 On appeal, Felisa argues that the superior court erred by excluding parol evidence in its summary-judgment ruling, as set forth in *Taylor v. State Farm Mutual Automobile Insurance Co.*, 175 Ariz. 148 (1993), and that the court should not have entered final judgment under Rule 54(b) because the quitclaim deeds are part of a larger equalization claim. We address each issue separately and, for the reasons stated below, we affirm.

I. Exclusion of Parol Evidence in Granting Summary Judgment

¶13 We review the superior court's grant of partial summary judgment de novo. *See Weitz Co. v. Heth*, 235 Ariz. 405, ¶ 11 (2014); *Russell Piccoli P.L.C. v. O'Donnell*, 237 Ariz. 43, ¶ 10 (App. 2015). Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). A motion for summary judgment should be granted if "the facts produced in support of the claim or defense have so little probative value . . . that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309 (1990).

¶14 The pertinent facts here are undisputed. We must therefore determine whether Susan was entitled to judgment as a matter of law, precluding Felisa from seeking damages based on the disparity in value of the houses. *See Cramer v. Starr*, 240 Ariz. 4, ¶ 8 (2016). Felisa argues that, in granting summary judgment, the superior court failed to "require a complete review of the evidence outside the quit-claim deeds," and erroneously relied "on the parol evidence rule in excluding the real property at issue from redistribution and/or equalization of the trust." We disagree.

¶15 Nothing in the record suggests that the superior court excluded any proffered extrinsic evidence, under the parol evidence rule or otherwise. Although the court did not mention the statements by Susan on which Felisa relies, it did not exclude them from consideration.[4] The court

[4] In opposing summary judgment, Felisa's counsel argued that no extrinsic agreements had occurred. The court considered this argument, responding, "There had to be some other understanding or deal outside of

simply concluded that the undisputed facts showing the houses had been conveyed from the trusts by deed in equal shares to each sister, established an equal distribution of that property in accordance with the trust documents and rendered equalization unnecessary.

¶16 But even if we were to agree the superior court excluded the statements under the parol evidence rule, we would still affirm its ruling. "The parol evidence rule prohibits the admission of extrinsic evidence to vary or contradict the terms of a written contract, and a deed may be treated as a contractual agreement." *Valento v. Valento*, 225 Ariz. 477, ¶ 22 (App. 2010) (citation omitted); *see also In re McDonnell's Estate*, 65 Ariz. 248, 252 (1947) ("A deed . . . is an executed contract . . . ."). A fundamental rule of contract interpretation is "that the court must ascertain and give effect to the intention of the parties at the time the contract was made if at all possible." *Polk v. Koerner*, 111 Ariz. 493, 495 (1975); *see also Taylor*, 175 Ariz. at 152 (extrinsic evidence is available to interpret agreement but not to vary or contradict it). Even under Arizona's more permissive approach to the parol evidence rule, "a proponent of parol evidence cannot completely escape the confines of the actual writing." *Long v. City of Glendale*, 208 Ariz. 319, ¶ 32 (App. 2004).

¶17 In applying the parol evidence rule, the judge must first consider the evidence to determine whether the contract language is "reasonably susceptible" of the interpretation offered by its proponent. *Taylor*, 175 Ariz. at 154. The court should then "finaliz[e]" its understanding of the contract and exclude "extrinsic evidence that would vary or contradict the meaning of the written words." *Id.* The decision as to whether to admit or exclude extrinsic evidence is left to the judge's discretion. *Id.*

¶18 Here, Felisa appears to offer, as parol evidence, Susan's acknowledgement that the sisters had reached an agreement as to the division of assets before their father's death. Felisa also points to Susan's contradictory statements about the equality of the division—first, her statement in her answer that the division of assets was equal, and, second, her deposition agreement that the division had been unequal. Based on this evidence, Felisa contends the quitclaim deeds were not intended "to be a

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the trust that the two sisters went into to make the quitclaim deeds off to each other. Because the trust doesn't require either of these houses to go to one particular sister."

final agreement" between the sisters regarding the division of the trust assets involved.

¶19 Felisa, however, does not challenge the quitclaim deeds' validity or authenticity or that they transferred all of her right, title, and interest in the Flagstaff house to Susan. And the language of the quitclaim deeds is not reasonably susceptible to Felisa's interpretation that the deeds were not meant to be "a final agreement." *See Taylor,* 175 Ariz. at 154. The deeds that distributed the houses from the trusts to the two sisters conveyed to the women "all right, title and interest" in each house. They therefore created "estates in common," A.R.S. § 33-431(A), and presumptively gave each sister an equal share of each house, *see* 20 Am. Jur. 2d Cotenancy and Joint Ownership § 116 ("Where two or more persons take as tenants in common under an instrument silent as to their respective shares, there is a presumption that their shares are equal."). The deeds included no conditional language reflecting a larger agreement or a reservation of rights, nor did they include language indicating that either sister had received a benefit or detriment to the exclusion or advantage of the other. The deeds' plain language thus establishes that the houses were conveyed to each of the sisters in equal shares, satisfying the requirements of the trusts. Therefore, Susan's testimony about the sisters' agreement regarding the division of property does not create a genuine issue of material fact precluding summary judgment. Regardless of whether an agreement did or did not exist between Felisa and Susan, the plain language of the deeds shows that the trust distributed the two homes to the sisters equally.

¶20 The subsequent pair of quitclaim deeds, in which each sister deeded her interest in one house to the other sister, constitute agreements made between Felisa and Susan in their individual capacities, not as co-trustees or representatives of the trusts, as the houses had already been distributed from the trusts. This is illustrated by the use of the words, "single woman" in referring to each sister as opposed to "successor trustee" or "successor co-trustees" as utilized in the first pair of deeds. These deeds are separate from the functions of the Garber Living Trust and the Streams Edge Trust.

¶21 Accordingly, the deeds establish that the sisters distributed the two houses from the trusts to themselves, with each sister receiving a one-half interest in each house. At that point, the relevant trust assets had been distributed equally. The subsequent conveyances between the sisters were made in their individual capacities, not as co-trustees or representatives of the trusts. We agree with the superior court that the trust

assets were distributed equally, that the subsequent conveyances were accomplished outside the trusts, and that, as a matter of law, no equalization is necessary. The court did not err in granting summary judgment in Susan's favor.[5]

II. Entry of Final Judgment under Rule 54(b), Ariz. R. Civ. P.

¶22 Rule 54(b) provides that the superior court "may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines there is no just reason for delay and recites that the judgment is entered under Rule 54(b)." Rule 54(b) is considered a "compromise between the rule against deciding appeals in a piecemeal fashion and the desirability of having a final judgment in some situations with multiple claims or parties." *Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304 (App. 1991).

¶23 The superior court is afforded discretion to "decide whether a judgment should be certified as final pursuant to Rule 54(b)," and we will not disturb that decision absent an abuse of that discretion. *Sw. Gas Corp. v. Irwin*, 229 Ariz. 198, ¶ 7 (App. 2012). "'[W]hether the judgment in fact is' final is [a] question of law that we review de novo." *Id.* (quoting *Kim v. Mansoori*, 214 Ariz. 457, ¶ 6 (App. 2007)). Thus, before a court designates a ruling as final under Rule 54(b), it must determine that it is "an ultimate disposition of an individual claim." *Davis*, 168 Ariz. at 304 (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956)).

¶24 Multiple claims exist if "the factual basis for recovery states different claims that could be separately enforced." *Id*. In other words, "[a] single claimant presents multiple claims for relief . . . when his possible recoveries are more than one in number and not mutually exclusive, or stated another way, when the facts give rise to more than one legal right or cause of action." *Musa v. Adrian*, 130 Ariz. 311, 313 (1981) (quoting 10 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2657 (1973)). A separate claim for purposes of Rule 54(b) need not be "entirely distinct from all the other claims in the action" nor "arise from a different occurrence or transaction." *Cont'l Cas. v. Superior Court*, 130 Ariz. 189, 191 (1981). Rather, a claim is separable when it is "such that no appellate court

[5]Because the houses were distributed equally under the trust and Susan is entitled to judgment as a matter of law on the equalization claim, we need not address Felisa's arguments on appeal regarding A.R.S. § 14-2712.

would have to decide the same issues more than once even if there are subsequent appeals." *Id.* (quoting *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 6 (1980)).

¶25 Felisa argues that the superior court erred by entering final judgment under Rule 54(b) because the real estate transactions were "factually intertwined with the overall 'equal' distribution to the parties" under the two trusts. Felisa further contends that the quitclaim deeds and the houses are "part of a larger trust plan, which the court or the trier of fact must interpret in light of all facts to be presented by the parties" and that these facts should not be determined in "piecemeal" litigation.

¶26 In support of her argument, Felisa appears to rely on *Musa*, but the facts here are distinguishable. In contrast to *Musa*, in which the appellants only had a single claim for relief but offered numerous legal theories to support it, Felisa's complaint alleged other independent claims, as described above. The claim at issue here—estate equalization, restitution, and accounting—itself consisted of subclaims, including equalization both for the disparity in value of the two houses and for personal property retained by Susan, including Richard's vehicle and Harriet's jewelry. Unlike in *Musa*, Felisa's complaint thus presents multiple claims, not multiple legal theories as to one claim, offered in the alternative.

¶27 The superior court's entry of judgment on the equalization claim with regard to the two houses does not preclude Felisa's ability to pursue or prevail on the personal-property claims. An appeal on the equalization claims relating to the personal property would not require this court to revisit the same issues presented in this appeal. Contrary to Felisa's argument, entry of final judgment under Rule 54(b) in this case would not violate the public policy against piecemeal litigation. We conclude that the summary judgment ruling on the equalization claim relating to the two houses disposed of one claim, and therefore, the court did not abuse its discretion by entering final judgment under Rule 54(b).[6]

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[6]Felisa also asserts, without argument or citation to authority, that the summary judgment ruling is "not an appealable, interlocutory order under [the former] A.R.S. § 12-2101(D)." But given our disposition above, even were we to excuse her waiver based on the claim's relationship to our jurisdiction, we need not address it. As discussed above, the superior court's Rule 54(b) ruling was final and appealable pursuant to A.R.S. § 12-2101(A)(1).

Attorney Fees and Costs

¶28 Susan requests reasonable attorney fees and costs incurred on appeal pursuant to A.R.S. § 12-341.01(A) and Rule 21(a), Ariz. R. Civ. App. P. Felisa opposes this request, arguing that "the trust at issue is not a contract" within the purview of the statute.

¶29 Section 12-341.01 permits a court to award reasonable attorney fees to a successful party for actions "arising out of a contract, express or implied." Our supreme court has held that § 12-341.01 applies to "awarding attorney's fees to the party ultimately successful on appeal." *Wenk v. Horizon Moving & Storage Co.*, 131 Ariz. 131, 133 (1982). Generally, "suits that arise out of a trust relationship are not suits arising out of a contract" for purposes of § 12-341.01. *In re Naarden Trust*, 195 Ariz. 526, ¶ 18 (App. 1999). However, the distinction between a trust and a contract is important here. A contract to convey property is not a trust "because the relationship between the buyer and seller is not a fiduciary one." *Id.* ¶ 10. And as we stated before, a deed "is an executed contract." *McDonnell's Estate*, 65 Ariz. at 252.

¶30 This appeal arises out of a trust equalization claim. However, as discussed above, the inequity Felisa alleges does not arise from the trusts' distribution of property but from two separate conveyances between the sisters in their individual capacities, outside of the trusts. We conclude that the second set of quitclaim deeds the sisters executed, in their individual capacities and not as trustees, fall within § 12-341.01.

¶31 In determining whether attorney fees should be awarded under § 12-341.01, we consider the following factors: (1) the merits of the unsuccessful party's claim or defense; (2) whether the litigation could have been avoided or settled; (3) whether a fee award would create extreme hardship; (4) whether the successful party prevailed completely; (5) the novelty of the legal question presented; and (6) whether the award would discourage parties with legitimate claims. *Assoc. Indem. Corp. v. Warner*, 143 Ariz. 567, 570 (1985).

¶32 Here, the factors weigh in favor of awarding Susan reasonable attorney fees. On appeal, Felisa disregards the chronological facts in this case and their legal effect—that by deed, Felisa transferred all right, title, and interest in the Flagstaff house to Susan and that the conveyances between the sisters were accomplished outside the trusts, rendering equalization unnecessary. Therefore, Felisa's arguments on appeal lacked merit pursuant to the first factor, and did not pose a complex legal question

under the fifth factor. These facts also support the second factor—that litigation could have been avoided. As to the third factor, Felisa has not provided any information regarding whether a fee award would create extreme hardship. As to the fourth factor, because we affirm both the superior court's ruling granting partial summary judgment and its entry of final judgment under Rule 54(b), Susan has prevailed completely on appeal. Lastly, a fee award here would not discourage parties from pursuing legitimate claims.

¶33 Because Susan is the prevailing party on appeal, and after considering the relevant *Warner* factors, we award Susan her reasonable attorney fees and costs upon compliance with Rule 21(b).

Disposition

¶34 For the foregoing reasons, we affirm the superior court's ruling granting partial summary judgment in favor of Susan Lynn Garber-Nevins and its entry of final judgment under Rule 54(b).