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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RICHARD BELLINFANTE, Plaintiff/Appellant, v. MARTHA FALCONER, Defendant/Appellee.	2 CA-CV 2009-0187 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CV200800576

Honorable James L. Conlogue, Judge

AFFIRMED IN PART;
VACATED AND REMANDED IN PART

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E C K E R S T R O M, Presiding Judge.

¶1 Appellant Richard Bellinfante appeals from the trial court's entry of judgment in favor of appellee Martha Falconer and from its denial of his motion to amend the complaint and motion for a new trial. Bellinfante argues the court erred when it granted summary judgment, finding he had raised no genuine issue of material fact that Falconer had entered into an enforceable agreement to share her property with him. He also argues summary judgment was granted improperly on Falconer's counterclaim for wrongful lien because there were questions of material fact about his intent. Finally, Bellinfante argues the court erred in awarding attorney fees to Falconer under the wrongful lien statute based on an affidavit in support of fees that covered the entire litigation and because Falconer failed to file the counterclaim in the appropriate form.[1]

Factual and Procedural History

¶2 When reviewing the grant of summary judgment, we view the evidence and the reasonable inferences therefrom in the light most favorable to the nonmoving party. *Andrews v. Blake*, 205 Ariz. 236, ¶ 12, 69 P.3d 7, 11 (2003). Bellinfante and Falconer began living together in 1992. At that time, Bellinfante alleges, they verbally agreed that any property they acquired after that point would be held jointly and "treated as community property, the same as if they were married." In 2002, the couple moved into a home that Falconer had purchased in her own name. Bellinfante contends they had "agreed to purchase and improve the . . . property for their joint benefit and to share equally in all profits and accumulations." Bellinfante's contributions to the home

[1]To the extent Bellinfante raised a claim for unjust enrichment in his complaint, he has not argued on appeal that claim was wrongly dismissed.

thereafter included "rent, building on the property, improvements to the house, landscaping, mortgage payments and paying for other household bills." When the parties terminated their relationship in early 2008, Bellinfante asked Falconer for half the fair market value of the home. After Falconer refused to compensate him in this manner, Bellinfante filed a complaint against her, asking the court for his equitable share in the property.

¶3 After the denial of her motion to dismiss the complaint,[2] Falconer filed an answer that included counterclaims for wrongful lien, fraud, and conversion. She alleged Bellinfante had filed a false mechanic's lien on the real property and had taken items of her personal property when he had moved out of the home. Falconer then filed a motion for summary judgment. She contended there was no genuine issue of material fact as to whether the alleged oral agreement violated the statute of frauds and, in any event, Bellinfante had no legal interest in the home but merely "contribute[d] toward the household bills . . . because he lived there and ran his business from there." She also contended no issue of material fact existed on the wrongful lien claim "because [Bellinfante] was not a licensed contractor at the time he performed the work, he did not comply with the statutes governing recording a mechanic's lien and he did not have a judgment or order authorizing him to file said lien." Bellinfante opposed summary judgment, relying on *Cook v. Cook*, 142 Ariz. 573, 691 P.2d 664 (1984), to support his

[2]Falconer had argued, *inter alia*, that the statute of frauds prevented enforcement of an oral agreement concerning real property. We have not been provided a transcript of the hearing, and the trial court's minute entry order denying the motion is unclear as to the reasons for its ruling.

argument that Falconer had entered into an enforceable agreement. He also emphasized the money and time he had spent on improvements to the property and attached an itemized list of expenditures to his sworn affidavit. He did not, however, dispute Falconer's argument that she was entitled to summary judgment on her wrongful lien claim.

¶4 In Falconer's reply to Bellinfante's opposition to the motion, she alleged for the first time that Bellinfante was married to another woman at the time Bellinfante claims they had entered into the agreement and that he had purchased a truck from Falconer in 2005. Falconer argued this supported her contention that they had not entered into a valid agreement to share real and personal property. After a hearing, the trial court granted Falconer's motion on the wrongful lien claim and, as to the alleged agreement, it found, primarily based on Bellinfante's marriage, "a failure of consideration and also . . . that the agreement would be so contrary to public policy that it is unenforceable, in any event."

¶5 After substituting his former counsel with a new attorney, Bellinfante filed a motion for new trial, arguing there existed genuine issues of material fact that precluded summary judgment. The trial court denied Bellinfante's motion and, after dismissing Falconer's claims for fraud and conversion with prejudice, entered final judgment in favor of Falconer. As part of the final judgment, Falconer was awarded costs of $141 and attorney fees of $12,645. This timely appeal followed.

Summary Judgment

¶6 Bellinfante argues the trial court erred when it granted Falconer's motion for summary judgment on her counterclaim for wrongful lien and on his implied contract claim.[3] Under Rule 56(c)(1), Ariz. R. Civ. P., a party is entitled to summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." We review de novo whether the party opposing summary judgment has raised issues of genuine material fact and whether the trial court properly applied the law. *Wilshire Ins. Co. v. S.A.*, 224 Ariz. 97, ¶ 4, 227 P.3d 504, 505 (App. 2010). We will affirm a trial court's grant of summary judgment if it is correct for any reason. *City of Tempe v. Outdoor Sys., Inc.*, 201 Ariz. 106, ¶ 14, 32 P.3d 31, 36 (App. 2001).

Implied Contract

¶7 Bellinfante argues he raised a genuine issue of material fact that he and Falconer had entered into an implied contract to pool their resources and share in the proceeds of their accumulations based on *Cook*. He also argues the trial court erred when it granted summary judgment on the ground that recognition of the alleged agreement would violate public policy. Falconer counters that Bellinfante's action to enforce an

[3]Although on appeal Bellinfante contends his claim involves an "oral partnership agreement," he did not allege the arrangement constituted an "oral agreement[] to form a partnership" until after summary judgment had been granted. Otherwise, throughout the proceedings below and on appeal, Bellinfante has alleged the parties had an agreement pursuant to *Cook*. *Cook* does not involve a partnership agreement, but rather an implied contract based on the parties' continuing course of conduct throughout their relationship. 142 Ariz. at 581, 691 P.2d at 672; *see also In re Marriage of Pownall*, 197 Ariz. 577, ¶ 18, 5 P.3d 911, 916 (App. 2000).

implied oral agreement for an interest in real estate is barred by the statute of frauds. *See* A.R.S. § 44-101(6). Because we agree that Bellinfante presented insufficient material facts to show part performance of an implied agreement and thereby overcome Falconer's assertion that his action on it was barred by the statute of frauds, we affirm the court's grant of summary judgment on this basis.[4]

¶8 In Arizona, "[t]he statute of frauds is by its terms absolute, providing that '[n]o action' can be brought on oral contracts for the conveyance of land." *Owens v. M.E. Schepp Ltd. P'ship*, 218 Ariz. 222, ¶ 14, 182 P.3d 664, 667 (2008), *quoting* § 44-101(6) (second alteration in *Owens*). On its face, Bellinfante's complaint brings an action seeking an interest in Falconer's real property based on an alleged oral agreement between him and Falconer.[5] Bellinfante does not maintain the agreement was ever reduced to writing.

¶9 Although acts of "part performance" that demonstrate reliance on an oral agreement can remove an agreement from the reach of the statute of frauds, *id.* ¶ 16, Bellinfante did not present sufficient material facts to demonstrate part performance here. As the court explained in *Owens*,

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[4]For this reason we need not address whether the trial court erred in granting summary judgment on the grounds that "any agreement is clearly contrary to public policy" and unenforceable due to "a failure of consideration." *See Cook*, 142 Ariz. at 577-78, 691 P.2d at 668-69 (rejecting argument implied contract to pool resources between unmarried cohabitants in contravention of public policy).

[5]Although Bellinfante also asserted the agreement gave him joint ownership of all personal property Falconer had acquired when they lived together, the only relief he sought was an equitable one-half interest in the value of Falconer's residence.

> acts of part performance serve an important evidentiary function—they excuse the writing required by the statute because they provide convincing proof that the contract exists. So that the exception does not swallow the rule, the acts of part performance take an alleged contract outside the statute only if they cannot be explained in the absence of the contract.

Id. (citations omitted). Here, Bellinfante avows he made payments toward, and improvements to, the property over several years in reliance on the oral agreement. But given the nature of Bellinfante and Falconer's relationship during those years as a cohabiting couple, such evidence can be "explained in the absence" of the alleged oral agreement. *Id.* Indeed, our supreme court specifically observed that "[t]he modern case law . . . requires that any alleged act of part performance be consistent only with the existence of a contract and inconsistent with other explanations such as . . . an existing relationship between the parties." *Id.* ¶ 18. Because Bellinfante's payments to Falconer and improvements to the property can be explained as either contributions toward his living expenses or gifts to Falconer in light of their relationship, Bellinfante did not present sufficient material facts to demonstrate part performance of an oral agreement. Bellinfante's action therefore is barred by the statute of frauds, and the trial court did not err in granting summary judgment on Bellinfante's implied oral contract.

¶10 Bellinfante next argues his action should have survived summary judgment because his purported arrangement with Falconer could be characterized as an oral partnership agreement, and oral partnership agreements for the conveyance of an interest

in real property are not similarly subject to the statute of frauds.[6] Assuming *arguendo* that the species of oral partnership agreement alleged here would fall outside the statute,[7] we cannot agree that Bellinfante presented sufficient material facts to demonstrate that he and Falconer entered into an oral partnership agreement.

¶11 In Arizona, a partnership is "an association of two or more persons to carry on as co-owners a business for profit." A.R.S. § 29-1012(A). In *Myrland v. Myrland*, 19 Ariz. App. 498, 502-03, 508 P.2d 757, 761-62 (1973), a former spouse similarly was claiming the existence of an oral partnership agreement arising from a pattern of conduct. There, we held that the "fundamental requisites" of a partnership were "intention, co-ownership of the business, community of interest, and community of power in administration."

¶12 In neither his original complaint nor his response to Falconer's motion for summary judgment did Bellinfante allege that he and Falconer had entered into an agreement to act as co-owners of any "business for profit." § 29-1012(A). To the contrary, Bellinfante's complaint and affidavit suggest the purpose of the agreement was to jointly own property acquired during their relationship rather than to organize a business for profit. Accordingly, we conclude Bellinfante did not present sufficient material facts to demonstrate that he and Falconer had entered into an oral agreement to

[6]Because Bellinfante raised the oral partnership theory in his motion for new trial and because he asserts in the alternative that his oral partnership theory entitled him to amend his complaint to raise that claim, we address it here.

[7]In *Turley v. Ethington*, 213 Ariz. 640, ¶ 27, 146 P.3d 1282, 1289 (App. 2006), this court held that, under most circumstances, the statute of frauds does not apply to an oral partnership agreement to acquire or convey real property.

form a partnership. *See* § 29-1012(C)(1) (mere shared interest in property and sharing of profits from property "does not by itself establish a partnership").[8]

Wrongful Lien

¶13 Bellinfante argues a genuine issue of material fact precluded summary judgment on Falconer's claim for wrongful lien—whether he had the requisite intent when he filed the lien—thereby precluding Falconer's entitlement to damages. Under A.R.S. § 33-420(A),

> [a] person purporting to claim an interest in, or a lien or encumbrance against, real property, who causes a document asserting such claim to be recorded in the office of the county recorder, knowing or having reason to know that the document is forged, groundless, contains a material misstatement or false claim or is otherwise invalid is liable to the owner or beneficial title holder of the real property for the sum of not less than five thousand dollars, or for treble the actual damages caused by the recording, whichever is greater, and reasonable attorney fees and costs of the action.

¶14 But in his opposition to the motion for summary judgment, Bellinfante conceded he had filed an improper lien and otherwise did not dispute Falconer's wrongful lien claim. Then, in his motion for new trial, he contended for the first time there was no evidence to satisfy the statute's scienter requirement and support an award

[8]Bellinfante also argues the trial court should not have considered facts Falconer raised for the first time in her reply to his opposition to summary judgment, namely, that Bellinfante was married at the time he allegedly entered into the agreement with Falconer and that he had purchased a vehicle from her later in their relationship. *But see* Ariz. R. Civ. P. 7.1(a) (trial court may consider reply memorandum to extent directed to matters raised in response). But these facts were irrelevant to the enforceability of the implied contract under the statute of frauds—the basis on which we have affirmed the grant of summary judgment. We therefore do not address whether the trial court erred in considering them.

of attorney fees. *Id.* Generally in a civil case, an issue raised for the first time in a motion for new trial is waived. *See Conant v. Whitney*, 190 Ariz. 290, 293-94, 947 P.2d 864, 867-68 (App. 1997). In any event, our review of a grant of summary judgment is limited to the record before the trial court at the time the motion was heard. *Nelson v. Nelson*, 164 Ariz. 135, 138, 791 P.2d 661, 664 (App. 1990). Bellinfante neither stated in his affidavit nor produced any other evidence tending to show he believed filing the mechanic's lien was proper. *See Coventry Homes, Inc. v. Scottscom P'ship*, 155 Ariz. 215, 219, 745 P.2d 962, 966 (App. 1987) (finding question of fact about whether plaintiff knew or should have known notice of lis pendens was groundless based on affidavit of company president stating his subjective belief notice had merit and evidence supporting belief). The court did not err when it granted summary judgment on Falconer's claim for wrongful lien pursuant to § 33-420.

Motion for New Trial

¶15 Bellinfante argues the trial court erred when it denied his motion for new trial pursuant to Rule 59, Ariz. R. Civ. P. Bellinfante's sole argument is that the court misapplied the principles set forth in *Cook*, essentially the same argument he made in support of his appeal from the grant of summary judgment. But, as discussed, even assuming Bellinfante presented sufficient material facts to demonstrate an implied contract under *Cook*, the statute of frauds precludes any action on that alleged oral agreement. Therefore, the court did not abuse its discretion in denying Bellinfante's motion for new trial on that basis. *See In re Estate of Craig*, 174 Ariz. 228, 233, 848

P.2d 313, 318 (App. 1992) (reviewing ruling on motion for new trial for abuse of discretion).

Motion to Amend

¶16 Bellinfante argues the trial court erred when it denied the motion to amend his complaint he had filed shortly after he moved for a new trial.[9] We review the denial of a motion to amend pursuant to Rule 15(a), Ariz. R. Civ. P., for an abuse of discretion. *Dewey v. Arnold*, 159 Ariz. 65, 68, 764 P.2d 1124, 1127 (App. 1988). "Leave to amend shall be freely given when justice requires." Ariz. R. Civ. P. 15(a)(1). The purpose of the rule allowing amendments to pleadings is to give parties an opportunity to adjudicate the merits of their claims. *Pargman v. Vickers*, 208 Ariz. 573, ¶ 23, 96 P.3d 571, 576 (App. 2004).

¶17 Bellinfante emphasizes that a motion to amend should not be rejected merely because it has been filed after a motion for summary judgment has been granted and that our supreme court has favored motions to amend when they are "directed to the same party and predicated on the same transactions which appellee had notice of from the start of the litigation." *Spitz v. Bache & Co.*, 122 Ariz. 530, 531, 596 P.2d 365, 366 (1979). But trial courts are not required to grant motions to amend when doing so would create undue prejudice to the opposing party or when the amendment would be futile. *Id.*; *see, e.g.*, *Hall v. Romero*, 141 Ariz. 120, 123-24, 685 P.2d 757, 760-61 (App. 1984) (when plaintiffs' complaint failed to state cause of action for fraud, not abuse of

[9]Although the trial court did not expressly deny the motion to amend, both parties agree it effectively was denied by the court's inaction. *See McElwain v. Schuckert*, 13 Ariz. App. 468, 470, 477 P.2d 754, 756 (1970).

discretion to deny motion to amend complaint when filed after summary judgment and "plaintiffs' proffered 'new' evidence" did not support fraud allegation); *In re Estate of Torstenson*, 125 Ariz. 373, 377, 609 P.2d 1073, 1077 (App. 1980) (when record showed no "compelling reason" for delay and proposed amendment on its face insufficient to cure defect, no abuse of discretion in denying leave to amend).

¶18 On appeal, Bellinfante maintains his proposed amendment "would have clarified his causes of action," and he lists the additional causes of action asserted in his proffered amended complaint. However, he does not articulate on appeal why such clarification would not be futile, nor does he specify how the underlying facts here would support those claims so as to survive summary judgment.

¶19 During oral argument, Bellinfante placed special emphasis on the potential merits of amending the complaint to add claims of unjust enrichment and breach of an oral partnership agreement. But in his reply brief, Bellinfante claimed his oral partnership agreement claim had been implicitly presented by his original complaint—and, as we have discussed, he has failed to present sufficient material facts to demonstrate that he and Falconer entered into any such partnership agreement. Likewise, Falconer clearly understood Bellinfante to have pled unjust enrichment within his original complaint, and she specifically contended during the summary judgment proceedings that Bellinfante had presented no material facts supporting several of the necessary elements of that claim.[10] Thus, although the trial court did not articulate why it rejected

[10]In support of Falconer's summary judgment motion, counsel argued: "They are asking for equitable relief for unjust enrichment. You have to show enrichment and

Bellinfante's motion to amend, it reasonably could have concluded on the record before it that Bellinfante's efforts to re-characterize the claims would be futile or that he merely was seeking to re-litigate claims already implicitly rejected.[11]

¶20 Finally, we acknowledge our supreme court has cautioned trial courts against denying a motion to amend merely because it has been filed after summary judgment has been granted. *Spitz*, 122 Ariz. at 531, 596 P.2d at 366. But the trial court also could have concluded that the persistence of further litigation after judgment would unduly prejudice Falconer, a person defending the ownership of her residence after separation with her longtime cohabiting boyfriend. Such circumstances would suggest that Falconer would have a substantial interest in the finality of the litigation.

¶21 Because Bellinfante has not articulated sufficiently why further litigation would not be futile and because the trial court could have concluded that the persistence of litigation would have prejudiced Falconer, the court did not abuse its discretion in denying his motion for leave to amend the complaint.

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impoverishment and absence of justification, and they can't show that here. . . . [Bellinfante] did not meet his burden to show th[ere] is a triable issue regarding enrichment and impoverishment . . . ."

[11]Bellinfante also lists "breach of fiduciary duty" and "partition" as additional causes of action in the amended complaint but does not describe on appeal why such causes of action would be successful or whether the specific facts already asserted would have been sufficient to support those claims. Because it is Bellinfante's burden to persuade us the trial court erred in denying the motion to amend, *see Regal Homes, Inc. v. CNA Ins.*, 217 Ariz. 159, ¶ 45, 171 P.3d 610, 621 (App. 2007), and because we presume the court knows the law and applied it correctly, *see Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 32, 97 P.3d 876, 883 (App. 2004), we do not address the merits of these causes of action further.

Attorney Fees

¶22 Bellinfante contends Falconer is not entitled to attorney fees under A.R.S. § 33-420 because her "attorneys did not comply with the required procedure in litigating the wrongful lien." He argues that pursuant to § 33-420(B) she was obligated to bring her claim in a special action rather than assert it as a counterclaim to his civil complaint. We note that this court has entertained such counterclaims, albeit without discussion of whether the proper procedure had been followed. *E.g.*, *Santa Fe Ridge Homeowners' Ass'n v. Bartschi*, 219 Ariz. 391, ¶ 1, 199 P.3d 646, 648 (App. 2008). And, the permissive language of § 33-420(B)—"[t]he owner . . . of the real property may bring an action"—suggests bringing the claim as a special action is not mandatory. *See Walter v. Wilkinson*, 198 Ariz. 431, ¶ 7, 10 P.3d 1218, 1219 (App. 2000) (observing use of term "may" in statute "generally indicates permissive intent"). In the absence of any authority supporting Bellinfante's contention that Falconer was required to file her wrongful lien claim as a special action under § 33-420(B), we reject his contention.

¶23 Bellinfante also argues the trial court erred when it awarded Falconer attorney fees pursuant to § 33-420 because she filed a "blanket fee request[]" that did not distinguish between the fees spent litigating the wrongful lien claim and the fees expended defending the contract claim. He contends her request is improper because the court awarded her only the fees she had incurred litigating her wrongful lien claim.

¶24 Our record is inconsistent on the issue of whether the trial court awarded Falconer the fees incurred in both the contract action and the wrongful lien action or only those incurred in litigating the wrongful lien. Falconer sought fees pursuant to A.R.S.

§§ 12-341.01(A) and 33-420(A) in her motion for attorney fees. Bellinfante responded that the fee affidavit needed to segregate the fees expended on each part of the action. In its minute entry ruling on the issue of attorney fees, the court simply stated, "there is no need to segregate attorney's fees," thereby suggesting it was awarding Falconer all of the fees she had incurred. But the final judgment states the award is based solely on § 33-420, even though the amount awarded includes all Falconer's fees. Because the record is unclear, we vacate that portion of the judgment and remand the case to the trial court, with directions to clarify the award of fees and to specify the statutory basis or bases for the award.[12] *See State Farm Mut. Auto. Ins. Co. v. O'Brien*, 24 Ariz. App. 18, 22, 535 P.2d 46, 50 (1975) (noting attorney fees only recoverable when statutory or contractual basis exists); *cf. Santa Fe Ridge Homeowners' Ass'n*, 219 Ariz. 391, ¶¶ 26-27, 199 P.3d at 654 (finding claim for enforcement of covenants, conditions, and restrictions distinct from counterclaim under § 33-420 and remanding for award of "only those fees attributable to [the] counterclaim"); *Janis v. Spelts*, 153 Ariz. 593, 597-98, 739 P.2d 814, 818-19 (App. 1987) (affirming trial court's refusal to award fees on one claim under § 12-341.01 but reversing court's failure to award fees for successful counterclaim under § 33-420(C)).

[12]Generally when there is a conflict between the minute entry and the final judgment, the terms of the final judgment control. *Hiatt v. Hiatt*, 52 Ariz. 284, 291, 80 P.2d 692, 695 (1938). The rationale for that principle is that a trial court has the discretion to change its ruling before the final judgment. *See Reid v. Reid*, 20 Ariz. App. 220, 220-21, 511 P.2d 664, 664-65 (1973) (court has discretion to change ruling between minute entry and final judgment). However, nothing in the record here suggests the court changed its mind. And, in fact, the judgment itself is conflicting. Thus, we remand for clarification.

Attorney Fees on Appeal

¶25 Falconer asks us to "determine that [Bellinfante]'s appeal is frivolous, and award her sanctions, in the form of attorney's fees and costs," and to award her attorney fees incurred on appeal pursuant to § 33-420(A). Because she has cited no statutory basis for her sanctions request, we award her attorney fees incurred on appeal for the wrongful lien claim only, subject to her compliance with Rule 21, Ariz. R. Civ. App. P. *See Roubos v. Miller*, 214 Ariz. 416, ¶ 21, 153 P.3d 1045, 1049 (2007) (party must state statutory or contractual basis for fee award); *Grand Canyon Pipelines, Inc. v. City of Tempe*, 168 Ariz. 590, 594, 816 P.2d 247, 251 (App. 1991) (exercising discretion to decline fee request unsupported by argument or citation to authority).

Disposition

¶26 Affirmed in part; vacated and remanded in part.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge