

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

SHIRLEY WASHBURN, a widow; DOUG FRANZ, a married man dealing
with his sole and separate property, *Plaintiffs/Appellees*,

v.

WAYNE M. DAVIS, a married man dealing with his sole and separate
property; AMANDA L. DAVIS, his wife, *Defendants/Appellants*.

No. 1 CA-CV 15-0481
FILED 10-4-2016

Appeal from the Superior Court in Maricopa County
No. CV2013-011133
The Honorable James T. Blomo, Judge

AFFIRMED

COUNSEL

Amanda L. Davis, Wayne M. Davis, Mesa
Defendants/Appellants

Quindry Koniuszy Follett & Styskal, LLP, Mesa
By Stephen W. Follett, Thomas E. Koniuszy
Counsel for Plaintiffs/Appellees

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MEMORANDUM DECISION

Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Lawrence F. Winthrop joined.

T H U M M A, Judge:

¶1 Defendants Wayne and Amanda Davis appeal the superior court's entry of partial summary judgment against them and subsequent partial final judgment quieting title to Mesa real estate in favor of plaintiff Shirley Washburn. Because defendants have shown no disputed issue of material fact or legal error, the partial final judgment is affirmed.

FACTS¹ AND PROCEDURAL HISTORY

¶2 As of early January 2013, Shirley and her late husband Robert Washburn owned the property as joint tenants. On January 14, 2013, the Washburns transferred, in a warranty deed, fee simple title in the property to Doug Franz. Also on January 14, 2013, Franz transferred fee simple title in the property to Shirley as the sole owner in a warranty deed. Although the Washburns to Franz deed was recorded on January 16, 2013, it is undisputed that the Franz to Shirley deed was never recorded.

¶3 In April 2013, Shirley's grandson Wayne Davis asked Shirley to transfer title to the property to him. According to Shirley, "at the insistence [of] and under pressure from" Davis, she removed the front page of the Franz to Shirley deed, replaced it with a different first page naming Davis as grantee, and attached this new cover to the signature page bearing Franz' January 14, 2013 signature. Davis then recorded this Franz to Davis document on April 19, 2013.

¶4 In August 2013, Shirley and Franz filed this quiet title action in superior court, alleging there was never a legally binding conveyance of

¹ This court "view[s] the evidence and reasonable inferences in the light most favorable to the party opposing the motion," *Andrews v. Blake*, 205 Ariz. 236, 240 ¶ 12 (2003), to determine "whether any genuine issues of material fact exist," *Brookover v. Roberts Enter., Inc.*, 215 Ariz. 52, 55 ¶ 8 (App. 2007).

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the property to Davis and that defendants had no cognizable claim to the property. In October 2014, Shirley and Franz moved for partial summary judgment regarding Shirley's ownership of the property. After full briefing, the court granted the motion, finding the evidence presented did not show the property was validly conveyed to Davis. In May 2015, the court entered a partial final judgment naming Washburn the sole owner of the property. See Ariz. R. Civ. P. 54(b) (2016).² Davis timely appeals, and this court has jurisdiction under Arizona Revised Statutes (A.R.S.) sections 12-2101(A)(1) and 12-120.21(A)(1).

DISCUSSION

¶5 Summary judgment should be granted "if the moving party shows that 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). The party opposing a properly-supported motion for summary judgment has the burden to "set forth specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment, if appropriate, shall be entered against that party." Ariz. R. Civ. P. 56(e)(4). When uncontroverted, "facts alleged by affidavits attached to motions for summary judgment may be considered as true." *Portonova v. Wilkinson*, 128 Ariz. 501, 502 (1981). This court reviews de novo whether a genuine issue of material fact is in dispute and whether the superior court properly applied the law. See *Chaurasia v. General Motors Corp.*, 212 Ariz. 18, 21 ¶ 5 (App. 2006).

¶6 Defendants argue the facts and conclusions alleged in their response to plaintiffs' motion for summary judgment were sufficient to show a genuine dispute of material fact as to the ownership of the property. But allegations in filings are not evidence; they are merely "statements of facts which the pleader must prove unless admitted by the opposing party." *Bank of Yuma v. Arrow Const. Co.*, 106 Ariz. 582, 585 (1971). Evidence, by contrast, consists of "sworn affidavits, stipulated facts, depositions, and oral testimony." *State v. Grounds*, 128 Ariz. 14, 15 (1981) (also noting "[a]rgument of counsel is not evidence").

¶7 Plaintiffs' motion for summary judgment was supported by sworn affidavits asserting that neither Franz nor Washburn signed a deed conveying the property to Davis. See A.R.S. § 33-401(A) (outlining formal

² Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

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requirements for conveyance of a deed). Plaintiffs also presented evidence that Franz had conveyed a valid deed to Shirley. *See id.*

¶8 Defendants' response to plaintiffs' properly-supported motion for summary judgment did not include affidavits from defendants and was not an admissible unsworn declaration, subscribed as true under penalty of perjury. *See* Ariz. R. Civ. P. 80(i). Although defendants' response included written statements from various individuals, those statements did not relate to whether the recorded Franz to Davis deed was valid and also were not admissible unsworn declarations, subscribed as true under penalty of perjury. *Id.* Nor did plaintiffs admit the facts alleged in defendants' response and, accordingly, did not relieve defendants of their burden to prove those alleged facts. *Bank of Yuma*, 106 Ariz. at 585. As a result, defendants failed to produce evidence to create a genuine issue of disputed material fact. *See* Ariz. R. Civ. P. 56(e) (noting party seeking to dispute facts asserted in support of motion for summary judgment must do so in a form "that would be admissible in evidence"). Moreover, defendants have not argued or shown on appeal that the superior court erred in its application of the law. As a result, based on the uncontroverted facts tendered by plaintiffs, the superior court did not err in granting plaintiffs partial summary judgment and by entering a partial final judgment in favor of plaintiffs.

¶9 In the court's discretion, plaintiff's application for attorneys' fees incurred on appeal pursuant to A.R.S. § 12-349 is denied. Plaintiffs are, however, awarded their taxable costs contingent upon their compliance with Ariz. R. Civ. App. P. 21.

CONCLUSION

¶10 The partial final judgment is affirmed.



AMY M. WOOD • Clerk of the Court
FILED: AA