

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MINDI PERDUE, a single woman, *Defendant/Cross-Defendant/Counter-Claimant/Appellant*,

v.

JOSEPH E. LA RUE and PAMELA J. LA RUE, husband and wife,
Defendants/Cross-Plaintiffs/Counter-Defendants/Appellees.

No. 1 CA-CV 19-0657
FILED 9-3-2020

Appeal from the Superior Court in Maricopa County
No. CV2017-055020
The Honorable Theodore Campagnolo, Judge

AFFIRMED

COUNSEL

Molever Conelly PLLC, Scottsdale
By Loren Molever
Co-counsel for Defendants/Cross-Claimants/Counter-Defendants/Appellees

Joseph Eugene La Rue, Scottsdale
Defendant/Cross-Claimant/Counter-Defendant/Appellee

Pelcic Law Firm PLLC, Phoenix
By Collette Nicole Pelcic
Counsel for Defendant/Counter-Defendant/Counter-Claimant/Appellant

OPINION

Judge Randall M. Howe delivered the Opinion of the Court, in which Presiding Judge Samuel A. Thumma and Chief Judge Peter B. Swann joined.

H O W E, Judge:

¶1 Mindi¹ Perdue appeals the trial court’s granting Pamela and Joseph La Rue (collectively, the “La Rues”) summary judgment on various claims involving the sale of property in which she claimed an equitable interest. She argues that in resolving the summary judgment motion, the trial court improperly applied the sham affidavit doctrine to disregard her declaration that she had an interest in the property because it contradicted her deposition testimony she had given in her earlier divorce proceedings. She contends that the sham affidavit doctrine is inapplicable to deposition testimony in other litigation.

¶2 We hold that the sham affidavit doctrine applies to testimony in litigation. And because Mindi’s declaration squarely contradicted her earlier divorce deposition testimony, the trial court properly disregarded her declaration. Therefore, we affirm the trial court’s granting of the La Rue’s motion for summary judgment.

FACTS AND PROCEDURAL HISTORY

¶3 In 2012, Pamela La Rue, Mindi Perdue, and another investor agreed to purchase a house on East Cascade Drive in Fountain Hills, Arizona (“the Property”). Pamela supplied the money for the down payment. The other investor obtained a loan to finance the rest of the purchase price and purchased the Property through, and in the name of, his business. In 2013, the other investor conveyed the Property, along with his interest, to Mindi and Pamela, neither of whom had been previously on the title. Mindi and Pamela obtained a new loan to pay off the other investor’s original loan. Joseph La Rue, Pamela’s husband, was not involved because

¹ Because two of the parties share a last name, this Court, with respect, will refer to all parties individually by their first names.

PERDUE v. LA RUE
Opinion of the Court

the Property was Pamela's project. He therefore signed a disclaimer deed in 2013.

¶4 When the initial hope to improve and sell the Property failed, Mindi and Pamela rented out the Property in August 2013. Mindi was listed as an owner of the Property in the lease agreement. Mindi, who owned other investment properties, emailed Pamela in September 2013 that she was having financial difficulties keeping up payments on all her properties. Mindi told Pamela that she could not contribute more money to the Property until her other properties sold and that she was "not interested in holding Cascade long term." Joseph responded that he and Pamela were "pretty much out of money" and could not spend anymore unless they had "an exit strategy."

¶5 In September 2013, Pamela and Mindi discussed obtaining a conventional loan. Mindi could not qualify because of her other investment properties, so she and Pamela discussed whether she would deed her interest in the Property to Pamela and Joseph so they could obtain a conventional loan. Pamela emailed Mindi that if Joseph's "name goes on it, the deal is still the same. The La Rues are not on the hook for all the payments, taxes[?]" Later in October 2013, Pamela emailed Mindi that she needed to deed the Property to Pamela. Pamela was told that she would be able to add Mindi back on the title after the transaction. Mindi responded that she was also told that. Mindi later conveyed her interest in the Property to the La Rues with a signed a warranty deed. She reserved no interest in the Property.

¶6 In July 2014, Mindi and the La Rues entered into a listing contract, giving Mindi, in her capacity as a real estate agent, the exclusive right to sell the Property. When Mindi had an interest in the Property, she listed herself as an owner or having a financial interest in the Property in various real estate documents. But this listing contract did not list Mindi as an owner or as having any financial interest in the Property. While serving as the listing agent, Mindi did not list an ownership or financial interest in the Property. Instead, she listed the La Rues as the sole owners on the July and September 2014 Residential Input forms, a subsequent lease agreement with new tenants, and a subsequent purchase contract for the Property for a sale that never occurred. Mindi likewise did not indicate any ownership or financial interest in the Property when filling out the March and August 2016 MLS Listing Sheets.

¶7 In October 2014, Mindi was deposed in her divorce proceeding. When asked about the Property, she testified that it "is not my

PERDUE v. LA RUE
Opinion of the Court

sole and separate property, and I have no legal ownership in that property at all.” She further testified that the Property was “\$60,000 under water” and that she had been paying \$2,400 per month for it, \$1,800 for her current home, and \$1,200 for her other property in Albuquerque. As a result, Mindi said her only option “was to let the La Rues retain ownership and walk away.” Because the Property was “\$60,000 under water,” Mindi also testified that she transferred her interest to the La Rues for nothing because she would have owed the La Rues \$30,000 if it sold; the La Rues “took over the property, the payments, everything.” Mindi also attached an exhibit to her deposition stating that the Property was disposed of before her divorce and that she “has no claim to it.”

¶8 In February 2017, the La Rues sold the Property, receiving \$194,120 in proceeds. Before closing, Mindi filed a notice of *lis pendens* asserting that she held 50% title to the Property as a tenant in common with the La Rues. Mindi claimed she had a right to a portion of the proceeds from the sale. The parties agreed to deposit the proceeds in a trust with Mindi’s attorneys so the sale of the Property could close. After holding the proceeds for some time, the attorneys filed an interpleader complaint, serving the La Rues and Mindi.

¶9 In the interpleader action, the La Rues requested a declaratory judgment that they were entitled to all the proceeds from the Property sale and that Mindi had filed a groundless *lis pendens*. Mindi asserted claims against the La Rues for multiple breaches of contract, promissory estoppel, constructive trust, fraudulent inducement, unjust enrichment, and declaratory relief.

¶10 The La Rues moved for summary judgment on their declaratory judgment claim that they were entitled to all the proceeds from the sale of the Property. They argued that Mindi deeded the Property to them in the 2013 warranty deed, that the statute of frauds barred any alleged oral agreement from modifying the warranty deed, and that Mindi’s testimony in her divorce deposition disavowed any ownership interest in the Property. The La Rues also moved for summary judgment on their *lis pendens* claim, arguing that Mindi filed a groundless notice of *lis pendens* because she had no interest in the Property, did not file a civil complaint before the notice of *lis pendens*, and used the *lis pendens* improperly to force the La Rues to “acquiesce to her demands.” The La Rues also moved for summary judgment on all of Mindi’s claims against them because they were based on her alleged right to one-half the proceeds from the sale of the Property. The La Rues attached to their motion for summary judgment declarations that they had orally given Mindi a one-year option

PERDUE v. LA RUE
Opinion of the Court

to buy back into the Property after executing the warranty deed, but that she had declined to exercise it.

¶11 Mindi responded that she was not seeking to quiet title, that the warranty deed was void based on fraud, that the statute of frauds was not applicable because the oral agreement did not modify the warranty deed, and that the full performance exception took the oral agreement outside the statute of frauds. Mindi also claimed that she would be entitled to recovery of the proceeds in quantum meruit. She argued that her deposition testimony was inadmissible, that her testimony was consistent with her declaration, and that her deposition testimony needed to be explained by affidavit or live testimony. She also alleged that she did file a civil complaint before filing her notice of *lis pendens*, that she had an interest in the Property, and that using a *lis pendens* to create pressure on the La Rues did not violate A.R.S § 33-420.

¶12 Mindi also attached a declaration that she and the La Rues had orally agreed in September 2013, that if she “conveyed title of the Property to them, they would obtain a conventional loan [in] their names, but [she] would retain [her] equitable interest in the Property and that, when the Property was eventually sold, [she] would share equally in the proceeds of the sale.” She asserted that she “never testified in a deposition or court proceeding to facts intending to convey that [she had] relinquished all rights and interests to the Property and the Proceeds by conveying title in the Property” to the La Rues. She also explained that she did not disclose her equitable ownership interest or financial interest in the Property in real estate transactions after October 2013 because she “did not believe it was required if [she] was not the title holder” and that she never intended her nondisclosure to indicate that she “did not have an equitable interest in the Property or the Proceeds.”

¶13 Mindi, who was representing herself at the time, failed to appear at the summary judgment hearing and the trial court granted the La Rues summary judgment from the bench. The trial court found that Mindi conveyed her entire interest in the Property in the 2013 warranty deed and that her 2014 deposition testimony that she had no claim to the Property contradicted her declaration. Therefore, it disregarded her declaration as a sham affidavit. The court thus found “no genuine issue of material fact as to the ownership of the property.”

¶14 The court also found that any oral agreement between the parties violated the statute of frauds and that she had stopped putting “owner-controlled language” in real estate documents after October 2013.

PERDUE v. LA RUE
Opinion of the Court

The court further found that based on Mindi's deposition testimony, she knew she had no claim to the Property or proceeds and thus had filed a groundless *lis pendens*. The court therefore awarded the La Rues \$5,000 in statutory damages under A.R.S. § 33-420(A). Because the court found that Mindi had no interest in the Property, it also granted the La Rues summary judgment on Mindi's counterclaims.

¶15 Mindi moved for reconsideration, asserting she had discovered additional evidence, the trial court did not consider the exhibits she had attached to her opposition to summary judgment, and she had excusable neglect for not appearing for oral argument on the summary judgment motion because her attorney's calendar had moved or deleted the oral argument date. The court granted the motion and, after a second summary judgment hearing, reinstated its findings from the first summary judgment hearing. The trial court entered partial final judgment under Arizona Rule of Civil Procedure 54(b) and Mindi timely appealed.

DISCUSSION

¶16 Mindi argues that the trial court erred by granting the La Rue's summary judgment motion because it disregarded Mindi's declaration as a sham. She contends that the sham affidavit doctrine is applicable only when the affidavit contradicts deposition testimony in the same litigation. We review a trial court's grant of summary judgment de novo and consider the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Lennar Corp. v. Transamerica Ins. Co.*, 227 Ariz. 238, 242 ¶ 7 (App. 2011).

¶17 A party cannot defeat summary judgment by submitting an affidavit that contradicts the party's prior sworn testimony. *Allstate Indem. Co. v. Ridgely*, 214 Ariz. 440, 442 ¶ 9 (App. 2007). When a party attempts to do so, the affidavit is considered a sham and may be disregarded when considering the motion. *Id.* The sham affidavit doctrine does not apply if the affiant was confused at the deposition and the affidavit helps explain the confusion, or if the affiant "lacked access to material facts and the affidavit sets forth the newly discovered evidence." *Id.* at 442-43 ¶ 10.

¶18 Although Mindi gave her deposition in her separate divorce proceeding, this does not prevent the doctrine from applying here. The sham affidavit doctrine does not limit its application to deposition testimony taken in the same litigation; the doctrine applies when an affidavit contradicts a party's prior sworn testimony. *Id.* at 442 ¶ 9. While the sham affidavit doctrine's most common application has been in cases

PERDUE v. LA RUE
Opinion of the Court

where a party's prior deposition was given in the same litigation, nothing precludes it from applying to deposition testimony given in different litigation. *See, e.g., Bank of Illinois v. Allied Signal Safety Restraint Sys.*, 75 F.3d 1162, 1171-72 (7th Cir. 1996) (applying the sham affidavit doctrine to testimony given in a previous child custody hearing and to answers contained in interrogatories). The sham affidavit doctrine thus applies here.

¶19 Mindi's declaration contradicts her divorce deposition testimony. The statements in her declaration that she retained an equitable interest in the Property and was entitled to one-half the proceeds from the sale of the Property squarely contradict her deposition testimony that she had "walked away" from the Property, that she had "no claim" to the Property, and that the La Rues had "t[aken] over the property, the payments, everything." Her statement that she had conveyed the Property to the La Rues so they could obtain a conventional loan also contradicted her deposition testimony that she had transferred her interest in the Property to the La Rues because the Property was "underwater" and she could not afford to keep paying for multiple properties. She argues that her deposition does not contradict her declaration because she testified that she did not have "legal ownership" of the Property. But her deposition testimony that she had no claim to the Property appears unequivocal.

¶20 Mindi now argues that her deposition testimony needed to be explained by affidavit or live testimony and that the Property was not "underwater." The time to explain her deposition testimony, however, was in her declaration. Mindi argued to the trial court only that she had "never testified in a deposition or court proceeding to facts intending to convey that [she had] relinquished all rights and interests to the Property and the Proceeds by conveying title in the Property" to the La Rues. Because Mindi did not assert that she had been confused in her deposition or that she had lacked access to material facts and set forth the newly discovered evidence, neither of the exceptions to sham affidavit doctrine apply. *See Allstate Indem. Co.*, 214 Ariz. at 442 ¶ 10.

¶21 She also argues that the sham affidavit doctrine does not apply because the Property was irrelevant to the divorce proceedings. She contends that the Property was irrelevant to her divorce because her husband had signed a disclaimer deed and the Property was her sole and separate property. This argument, however, squarely contradicts her testimony that the Property was not her property at all. Even if the Property were irrelevant to her divorce, Mindi clearly testified that she had no claim to the Property and her testimony cannot be read consistently with her current position that she had retained an equitable interest in the Property

PERDUE v. LA RUE
Opinion of the Court

and the proceeds. Because Mindi's declaration contradicted her deposition testimony, the sham affidavit doctrine applied and the trial court properly disregarded it. As a result, Mindi's argument that she had an interest in the Property, and the resulting proceeds from its sale, fails.

¶22 Mindi argues next that the court erred by finding that the statute of frauds defeated any alleged oral agreement she had with the La Rues and did not meet one of its exceptions. She also argues that because the La Rues fraudulently induced her to convey title of the Property, the statute of frauds was inapplicable. We need not consider whether any alleged oral agreement would have satisfied the statute of frauds, however, because the trial court properly disregarded Mindi's declaration, the only evidence of the alleged oral agreement. Even if the alleged oral agreement were considered, Mindi's divorce deposition, taken more than a year after the alleged oral agreement, established that she had no claim to the Property.

¶23 Mindi's deposition testimony established that no genuine issue of material fact supported her claim that she had retained an equitable ownership interest in the Property or the future proceeds. Mindi testified in her divorce deposition that the Property was not her sole and separate property, that the Property was "underwater," that she "walk[ed] away" from the Property, that she had "no claim" to the Property, and that the La Rues "took over the property, the payments, everything."

¶24 Likewise, the warranty deed and the affidavit of property value reserved no interest in the Property. The affidavit of property value was required to list "[t]he total consideration paid for the property" and "the conditions of the transaction." A.R.S. § 11-1133(A)(6) & (9). The affidavit of property value did not list the conditions of the alleged oral agreement cited by Mindi. And, after deeding the La Rues her interest in the Property, she stopped listing herself as an owner of, or having a financial interest in, the Property in various real estate documents. Based on this evidence, the trial court properly granted summary judgment in favor of the La Rues on the declaratory relief claim.

¶25 Mindi argues that the trial court improperly considered the various real estate documents because her reasons for disclosing or not disclosing an interest in the real estate documents are questions of fact, not law. She also asserts that the court improperly considered the credibility of evidence when it stated that "no credible evidence was submitted" to oppose the fact that Mindi did not include her ownership or financial interest in real estate documents after October 2013. Mindi's arguments fail.

PERDUE v. LA RUE
Opinion of the Court

First, the court concluded that if Mindi had an ownership or financial interest in the Property, she would have been required to make those disclosures as a matter of law and did not do so. Second, no evidence showed that she had made those disclosures. Therefore, the trial court did not err by considering the real estate documents Mindi filled out. Mindi has also waived her argument that the court improperly weighed evidence because she fails to develop it by identifying the evidence that the trial court improperly weighed. *See Polanco v. Indus. Comm'n of Ariz.*, 214 Ariz. 489, 491 ¶ 6 n.2 (App. 2007) (failing to develop an argument results in waiver of the argument). Nor has she otherwise shown error by the court weighing evidence.

¶26 Nevertheless, Mindi asserts that she had indicated a financial interest on the January 2017 MLS Listing Sheet and on the January 2017 purchase contract. She also contends that the La Rues “signed an acceptance of the Purchase Contract without disputing or modifying the language.” The citation Mindi provided does not lead to the January 2017 MLS listing sheet and this Court cannot find the document in the record. Mindi did not cite to the 2017 purchase contract or the La Rues’ alleged acceptance of the purchase contract and this Court cannot find these documents in the record. As a result, we do not consider them.

¶27 Mindi also argues that the trial court erred by finding her *lis pendens* groundless. She contends that the court incorrectly found that she did not file a civil complaint before or contemporaneously with her notice of *lis pendens* and that she used the *lis pendens* to pressure the La Rues to acquiesce to her demands. Mindi’s arguments fail, however, because the record does not show that the trial court made any such findings.

¶28 Mindi argues next that her *lis pendens* was not groundless because she legitimately believed she had an equitable interest in the Property. Mindi’s deposition testimony, however, shows that she knew that she had no claim to the Property and no claim to the proceeds. As a result, the trial court did not err by granting the La Rues motion for summary judgment on count two after finding Mindi filed a groundless *lis pendens*.

¶29 Mindi argues next that the trial court erred by dismissing all her counterclaims because a genuine issue of material fact existed whether she had an interest in the Property and the sale proceeds. Because Mindi’s breach of contract and promissory estoppel claims were based on the oral agreement contained in her declaration, which the trial court properly disregarded, the trial court properly granted summary judgment on Mindi’s breach of contract and promissory estoppel claims.

PERDUE v. LA RUE
Opinion of the Court

¶30 Mindi’s constructive trust and fraudulent inducement claims likewise fail because no evidence supports her assertion that the La Rues fraudulently induced her to convey her interest in the Property. A constructive trust may be imposed when title to property was obtained through fraud or misrepresentation. *Turley v. Ethington*, 213 Ariz. 640, 643 ¶ 9 (App. 2006). Mindi’s deposition testimony shows that she had conveyed the Property to the La Rues because she could not afford it anymore and not because she was fraudulently induced. Therefore, the trial court properly granted summary judgment on Mindi’s constructive trust and fraudulent inducement claims.

¶31 She contends that her unjust enrichment and quantum meruit claims are available even if the oral agreement is absent or unenforceable. An unjust enrichment claim requires proof of “(1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and impoverishment, (4) the absence of justification for the enrichment and impoverishment, and (5) the absence of a remedy provided by law.” *Wang Elec., Inc. v. Smoke Tree Resort, LLC*, 230 Ariz. 314, 318 ¶ 10 (App. 2012). Quantum meruit is “a measure of damages imposed when a party prevails on the equitable claim of unjust enrichment.” *Western Corrections Grp., Inc. v. Tierney*, 208 Ariz. 583, 590 ¶ 27 (App. 2004).

¶32 The trial court properly granted summary judgment of Mindi’s unjust enrichment claim. In Mindi’s 2014 deposition, she testified that the Property was “underwater” and that she “walked away” from the Property and transferred it to the La Rues, letting them take over “the property, the payments, everything.” Because Mindi was released from any financial obligations concerning the Property in exchange for deeding the Property to the La Rues, the La Rues were not unjustly enriched. Mindi’s quantum meruit claim fails for the same reason. *See Western Corrections Grp., Inc.*, 208 Ariz. at 590 ¶ 27 (requiring the party to prove unjust enrichment to obtain a remedy such as quantum meruit). Therefore, the trial court properly granted summary judgment on Mindi’s unjust enrichment and quantum meruit claims.

¶33 Mindi argues last that the trial court never considered whether she was entitled to quantum meruit damages for the services she had performed as the real estate agent for the Property. In her summary judgment motion, she claimed that she was entitled to one-half the proceeds based on quantum meruit. She never claimed, however, that she was entitled to quantum meruit damages for her services as a real estate agent. Mindi has waived any argument that she was entitled to quantum meruit damages for her services as a real estate agent. *See Henderson v. Henderson*,

PERDUE v. LA RUE
Opinion of the Court

241 Ariz. 580, 586 ¶ 13 (App. 2017). Therefore, the trial court properly granted summary judgment on all of Mindi's counterclaims.

CONCLUSION

¶34 For the foregoing reasons, we affirm. The La Rues request an award of their reasonable attorneys' fees under A.R.S. § 33-420(A). In our discretion, we award the La Rues their reasonable attorneys' fees and costs incurred on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21.



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