NOT FOR OFFICIAL PUBLICATION
See Okla.Sup.Ct.R. 1.200 before citing.

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

BARBARA HISS,

Plaintiff/Appellee,

vs.

BILL MACLEAN aka WILLIAM MACLEAN,

Defendant/Appellant,

and

LOBO TEJAS MINISTRIES, a 508 religious organization and THE ORIGIN OF LOVE, TRUTH AND HEALTH, a corporation sole, a non-profit corporation,

Defendants.

Case No. 121,570

APPEAL FROM THE DISTRICT COURT OF
ATOKA COUNTY, OKLAHOMA

HONORABLE PRESTON HARBUCK, ASSOCIATE DISTRICT JUDGE

AFFIRMED

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Matt Irby
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Coalgate, Oklahoma

For Plaintiff/Appellee

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For Defendant/Appellant

OPINION BY GREGORY C. BLACKWELL, JUDGE:

Defendant, Bill Maclean, appeals the court's order granting summary judgment in favor of plaintiff, Barbara Hiss. Upon review, we hold that the trial court was correct in granting summary judgment and thereby affirm.

I.

December 9, 1999, Hiss, Maclean, and non-party to this suit, Paul Tatum purchased property as tenants in common via a contract for deed from a company named Richad LLC.[1] The property consisted of nearly eighty acres located in Atoka County, Oklahoma. On November 25, 2003, Maclean quitclaimed all of his right, title, and interest in the property to an organization called Lobo Tejas Ministries (Lobo). On October 7, 2004, Lobo quitclaimed all of its right, title, and interest in the property to another organization called The Origin of Love, Truth, and Health (Origin). On March 30, 2023, Origin quitclaimed the property back to Maclean.

Upon review, it appears all parties made varying payments on the contract for deed throughout the years. On August 4, 2015, Hiss issued a cashier's check to Richad LLC to satisfy the remaining balance on the contract. On June 8, 2016, Richad LLC filed a deed with the Atoka County Clerk conveying the property to Hiss, Maclean, and Tatum. A correction deed was later filed to correct the legal description from a previously filed warranty deed to the parties.

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[1] This entity is variously referenced as Richad LLC, Richaad LLC, and Richard LLC throughout the record However, the grantor of the contract for deed is Richad LLC, so we will use that name throughout the opinion.

Hiss issued a promissory note to Tatum on August 26, 2015, in the amount of $7,000 for Tatum's interest in the property. Tatum filed a correction quitclaim deed transferring his interest in the property to Hiss on June 18, 2016. Hiss made two payments on the promissory note: the first payment was made on May 15, 2016, in the amount of $2,000 and the second on January 22, 2017, in the amount of $5,000. Tatum signed the note as "paid in full" on the same date as the second payment.

In July 2016, Hiss filed a petition against Maclean for partition of the property, later dismissing her claim without prejudice in May 2018. On April 5, 2021, Hiss filed an amended petition to partition the property against Maclean, Lobo, and Origin, alleging that she owned an undivided two-thirds fee simple interest. She also alleged that Maclean or the other entities owned an undivided one-third fee simple interest in the property as a tenant in common. Maclean answered, admitting that he was an owner of the real property, but denying Hiss's characterization of her ownership of the property.

Hiss filed five separate motions for summary judgment against the three defendants. The court, in a journal entry filed on August 4, 2023, granted summary judgment in favor of Hiss on all five issues.[2] Maclean now appeals.

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[2] Hiss filed a motion for summary judgment against Maclean alleging that he had no interest in the property because Origin was the record title holder. She also filed motions for summary judgment on his counterclaims for fraud and equitable division of the property. Curiously, Maclean did not raise a fraud claim or a claim for equitable division in his answer to Hiss's re-filed petition. The fraud and equitable division claims were raised in Maclean's answer to Hiss's first petition; however, they were not alleged or otherwise re-incorporated when Hiss dismissed her claim without prejudice and re-filed her petition in 2021. Regardless, by raising the issues on summary judgment, Hiss put them at issue, and we will address them accordingly.

II.

Although a trial court considers factual matters in making a decision on whether summary judgment is appropriate, the ultimate decision turns on purely legal determinations, whether one party is entitled to judgment as a matter of law because there are no material disputed factual questions. *Carmichael v. Beller*, 1996 OK 48, ¶ 2, 914 P.2d 1051, 1053. Therefore, as the decision involves purely legal determinations, the appellate standard of review of a trial court's grant of summary judgment is *de novo*. *Id.*

III.

On appeal, Maclean first alleges that the court erred in determining that there were no disputed questions of fact regarding Hiss's two-thirds interest in the property. Upon review, we hold that the trial court correctly determined that Hiss owns a two-thirds interest in the property.[3]

At the outset, we note that "[w]here the movant presents evidence in a summary judgment motion showing no controversy as to material facts, the burden of proof shifts to the opposing party to present evidence justifying trial on the issue." *Gurley-Rodgers v. Brookhaven West Condo. Owners' Ass'n, Inc.*, 2011 OK CIV APP 64, ¶ 8, 258 P.3d 1190. Specifically, 12 O.S. § 2056 states in

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[3] Hiss argues in her response to the petition in error that Maclean's counterclaims for equitable division of property, partial performance, and fraud are not ripe for appeal because the property is owned by Origin, and hence Maclean had no standing in the district court. As we note in section III-C, *infra*, if Origin ever existed as a separate entity, its interest was transferred back to Maclean during the pendency of the case below. Additionally, the court specifically addressed equitable division, fraud, and partial performance when granting summary judgment in favor of Hiss on each of the issues. We find no evidence that the court's order is not a final judgment as to all of Maclean's claims.

relevant part: "[w]hen a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must, by affidavits or as otherwise provided by this rule, set out specific facts showing a genuine issue for trial." Therefore, when Hiss presented properly supported evidence showing no controversy as to the material facts in her motion for summary judgment, the burden shifted to Maclean to present evidence controverting her material facts and demonstrating a need for trial.

Maclean did not specifically controvert any of the material facts stated by Hiss in any of the motions for summary judgment filed against him. Instead, Maclean began his response to the last motion for summary judgment by listing his own material facts.[4] Maclean then made two arguments against summary judgment. The first is that he and Tatum had entered an oral agreement for Tatum to sell his one-third interest to Maclean and Maclean had made a down payment to Tatum. Maclean alleged that Hiss, an employee of Sundowner, knew this when she purchased Tatum's share. Maclean alleges that this somehow resulted in Hiss obtaining Tatum's share by fraud against Maclean. The second argument is that Maclean should have received more than one-third of the property because he actually paid more than one-third of the purchase price.

Even assuming these arguments might be viable if properly supported on summary judgment, Maclean's response was critically lacking such support. In

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[4] Hiss properly disputed Maclean's material facts in her response to his reply to the motion for summary judgment.

fact, it contains no affidavit by Maclean supporting his numerous allegations of fact;[5] rather, it contains only statements of counsel as to the critical facts.[6] Therefore, it was left to Maclean's exhibits to show a question of material fact.

A.

The documentary evidence attached to Maclean's response fails entirely to show a question of fact as to his allegations of fraud. An Exhibit "F" was cited as showing fraud by Hiss. The trial court properly rejected this exhibit as evidencing any fraud. It found that Maclean, rather than proving fraud or any of his other claims by setting out specific facts or providing the court with affidavits, merely submitted

> approximately two hundred and fifty pages of bank records, and various other instruments in his response to the Hiss motion for summary judgment, presumably to supplement his responses to discovery. These include, but are not limited to, purported financial documents from Sundowner Research Industries, LLC, a supposed company by the name of Nature's Unique, a presumed company by the name of Mandala Holdings, Cal Fed Banking, Citibank and Wells Fargo. Many of the documents are unreadable and in no discernable order. Moreover, the documents contain transactions involving numerous people and corporations that are not part of these proceedings. Additionally, the documents contain handwritten notes, and photocopies of documents with post-it notes also containing handwritten notes (nothing indicates who made the notations).

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[5] The only affidavit attached was one by a Dr. Stan Wolfe, essentially stating that Maclean's interest in the property had been transferred to Lobo Tejas Ministries to avoid its potential seizure by the Food and Drug Administration as part of an "enforcement action" against Sundowner Research. However, it appears the sale was illusory, and Dr. Wolfe (Lobo) was merely holding the property on Maclean/Sundowner's behalf to disguise its ownership.

[6] "Generally, argument of counsel is not a form of evidence." *Carbajal v. Precision Builders, Inc.*, 2014 OK 62, ¶ 24 n.20, 333 P.3d 258. "Unsworn statements of counsel ... do not constitute evidence." *In re Guardianship of Stanfield,* 2012 OK 8, ¶ 27 n.55, 276 P.3d 989.

The court also noted that while these documents showed general disbursements of money by Sundowner Research, there was no evidence that the disbursements were made outside the regular business dealings of the company. We agree.

As stated above, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must, by affidavits or other means, set out specific facts creating a genuine issue for trial. *See also Willis v. Sequoyah House, Inc.*, 2008 OK 87, ¶ 12, 194 P.3d 1285 (explaining that merely inserting facts or statements in a court-filed paper is not an acceptable evidentiary substitute of testimony or affidavit). Despite attaching some 200 pages of documents to his response to summary judgment, Maclean offered no discernable evidence in support of his fraud claim, and instead relied on the bald contentions of his pleadings and statements of his counsel in his response.

Specifically, Maclean argued in his response that "Hiss's fraud was the fact that she had purchased Paul Tatum's interest while knowing that there was an agreement already in place for Maclean to purchase that interest."[7] As support for this contention, Maclean vaguely cites exhibits A-G, the "purported financial documents" attached to the motion in "no discernable order."

These documents show payments between the parties to this lawsuit and many other individuals and entities, none of which are identified or explained by

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[7] Maclean notes in his response to summary judgment that he filed a separate action against Tatum for fraud in Atoka County Case No. CJ-2019-29. Because Maclean effectively alleged that this matter might properly be before another court, we take judicial notice of docket sheet of Case No. CJ-2019-29. We find that Maclean's April 4, 2023, response to Hiss's motion for summary judgment failed to reveal that the court dismissed his fraud claim in Case No. CJ-2019-29 without prejudice nine months earlier, on June 7, 2022, because Maclean's petition twice failed to allege facts sufficient to show fraud with particularity.

Maclean, with the exception of those to Tatum and Richad, LLC. Importantly, none of the documents provided evidence any sort of fraudulent or otherwise problematic activity by Hiss. Most of the documents also contain handwritten descriptions, denoting that certain purchases were for "land." Neither the maker of these annotations nor the land in question is identified. None of these documents show that Hiss knew of the purported agreement between Tatum and Maclean or even that, if she did know of the agreement, she somehow committed fraud.

Actionable fraud in Oklahoma requires proof that the defendant made a material representation that was false, that the defendant knew when he made that representation that it was false, that the defendant made it with the intention that it should be acted upon by the plaintiff, and that the plaintiff acted in reliance upon it and they thereby suffered to their detriment. *Silk v. Phillips Petroleum Co.*, 1988 OK 93, ¶ 2, 760 P.3d 174, 176-77. Maclean's allegation of fraud does not connect Hiss's alleged knowledge of the supposed oral agreement between Maclean and Tatum with the elements of fraud. Maclean does not show that Hiss made any material representation to him regarding the sale of Tatum's interest, nor does he show that she knew it was false, intended for Maclean to act on it, or that Maclean actually acted on it.

Maclean could have attached affidavits from himself, Tatum, and others, attesting to the alleged conversations between Maclean and Tatum regarding the conveyance that was to allegedly have taken place. Yet, Maclean presents no evidence of any agreement between Tatum and Maclean aside from making the

allegations in his pleadings and pointing to bank records which show nothing other than money changing hands between a variety of individuals and corporate entities. Therefore, we find that the trial court correctly determined that there was insufficient evidence of any fraud to withstand summary judgment.

B.

Next Maclean alleges that the court erred in denying his claim for equitable division of the property. Maclean argues that he is entitled to equitable division greater that his one-third share in partition because he made a variety of payments on the contract for deed on behalf of Hiss and Tatum. Maclean, in his answer to the Hiss's 2016 petition that was later dismissed without prejudice, maintained that he had bank records in his possession which would prove that he made such payments on behalf of Hiss and Tatum; however, we, like the trial court, can find nothing in the financial documentation provided which proves Maclean paid any more or less than a one-third share.[8] The contract for deed did not require that each party must pay a contract price commensurate to their individual share of the property. Therefore, we find as the trial court did that liability for the contract price was presumed by Oklahoma law to be joint and several. *See* 15 O.S. § 175 ("[W]here all the parties who unite in a promise to receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several"). The contract does not create unequal shares based on contribution.

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[8] Maclean's response is unclear whether these alleged payments were made by Sundowner Research Industries, LLC, or Maclean personally.

Maclean contends that he is still entitled to an equitable share greater than one-third because, by oral agreement, he had taken over part of Tatum's payments, and also made some of Hiss's payments. The only evidence of this oral agreement is a discovery response included by Hiss in her motion for summary judgment. Hiss attached a portion of Maclean's response to her first set of discovery requests where Maclean described an oral agreement with Tatum to take over making Tatum's payments on the property mortgage in exchange for Tatum's interest in the property.

Hiss argued that introduction of such an oral agreement between the parties is invalid pursuant to the statute of frauds. Maclean, in turn, argued that because Maclean made payments on behalf of her and Tatum, it constitutes partial performance on the contract, which creates an exception to the statute of frauds. However, we reiterate that there is nothing in the record which could properly be construed as evidence of Maclean making payments on Hiss or Tatum's behalf, or any agreement for him to do so. Therefore, we agree with the district court that the evidence of Maclean paying for more the one-third of the property was insufficient to create a question of fact for a jury.

C.

Maclean finally argues that the trial court erred in determining Origin owned a one-third interest in the property and that Maclean did not have any interest. Although Origin was the record owner at the time Hiss filed her motion for summary judgment, Origin, or apparently Maclean as a "corporation sole," transferred Origin's interest to himself personally on March 30, 2023, during the

pendency of the summary judgment motion.[9] Because of this record transfer during the pendency of the motion, we find the court's determination that Origin was the owner of the interest was harmless error. We hold that whatever interest Origin had in the property was conveyed back to Maclean, and he now owns that interest individually.

AFFIRMED

HUBER, P.J., and HIXON, J., concur.

March 21, 2024

[9] Maclean executed a quitclaim deed conveying the interest in the land from "William Maclean d/b/a The Origin of Love, Truth, and Health" to Maclean individually. Origin is also described at other times in various deeds as a "corporation sole" and a "non-profit corporation," however. The "corporation sole" is rooted in English common law. "Such corporations were mostly employed to hold in succession the rights and property of the ecclesiastical establishments" and enable immediate devolution of the establishment's property to a new ecclesiastical office holder. *Corporations Sole,* 1 Fletcher Cyc. Corp. § 50. "[I]f a state statute so allows, a sole corporation can take and hold real property." There is a "clear distinction, however, between the corporation sole and the individual who happens to be the current office holder." *Id.* "[T]he assets of the individual currently holding office are not the assets of the corporation sole, and vice versa. *Id.*