

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

GERARD W. FLACKE AND DEANNA FLACKE,
HUSBAND AND WIFE,
Plaintiffs/Counterdefendants/Appellants,

v.

ALVIN WILLIAMS AND LJUBICA WILLIAMS, HUSBAND AND WIFE,
INDIVIDUALLY AND AS PRINCIPALS AND TRUSTEES OF
THE ALVIN LANE WILLIAMS AND LJUBICA WILLIAMS TRUST,
DATED AUGUST 2, 1996,
Defendants/Counterclaimants/Appellees.

No. 2 CA-CV 2014-0051
Filed October 3, 2014

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NOT FOR PUBLICATION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); Ariz. R. Civ. App. P. 28(c).

Appeal from the Superior Court in Pima County
No. C20134436
The Honorable Leslie Miller, Judge

AFFIRMED

COUNSEL

Gerard W. Flacke and Deanna Flacke, Tucson
In Propria Personae

FLACKE v. WILLIAMS
Decision of the Court

Udall Law Firm, LLP, Tucson
By Marc Cullen Goldsen
Counsel for Defendants/Counterclaimants/Appellees

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

ECKERSTROM, Chief Judge:

¶1 Appellants Gerard and Deanna Flacke (“Flackes”) appeal from the trial court’s order granting summary judgment in favor of Alvin and Ljubica Williams and the Williams Trust (collectively “Williamses”) on the Flackes’ claim for adverse possession. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In August 2013, the Flackes filed a suit to quiet title to a strip of land belonging to the Williamses, alleging they had acquired title through adverse possession. The Williamses filed a counterclaim seeking to quiet title in the same strip of land, along with recovery of lands.¹ The Williamses filed a motion for summary judgment, asserting the Flackes could not establish several elements of their claim. The Williamses also requested their costs and attorney fees pursuant to A.R.S. §§ 12-341 and 12-1103(B). The Flackes opposed the award of costs and fees and asked the court, in the event costs and fees were awarded, to stay the award during the pendency of the appeal. The trial court granted summary judgment, awarded the Williamses their costs and attorney fees, and declined to stay the award. After the entry of judgment, the Flackes filed a

¹ The Williamses’ counterclaim also included a claim for equitable relief, in the event the Flackes were found to have acquired title to the strip of land through adverse possession. This claim was dismissed as moot and is not at issue in this appeal.

FLACKE v. WILLIAMS
Decision of the Court

motion to depose a witness under Rule 27(b), Ariz. R. Civ. P. The court denied this motion as untimely. This timely appeal followed.

Summary Judgment

¶3 The Flackes claim the trial court erred by (1) relying on inadmissible evidence and (2) granting summary judgment even though the Williamses did not submit supporting affidavits. As to the first claim, the Flackes failed to timely object to the evidence they now challenge, and have therefore waived this claim. *See A. Uberti & C. v. Leonardo*, 181 Ariz. 565, 568, 892 P.2d 1354, 1357 (1995) (“[E]videntiary and foundational objections to sufficiency of supporting documents attached to summary judgment pleadings are necessary to allow offering party an opportunity to cure defects.”), *citing Ancell v. Union Station Assocs.*, 166 Ariz. 457, 460, 803 P.2d 450, 453 (App. 1990); *see also Airfreight Express, Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, ¶ 26, 158 P.3d 232, 241 (App. 2007); *Johnson v. Svidergol*, 157 Ariz. 333, 335, 757 P.2d 609, 611 (App. 1988).

¶4 As to the second claim, contrary to the Flackes’ position, a “party may move for summary judgment, with or without supporting affidavits,” Ariz. R. Civ. P. 56(b), and “merely because a motion for summary judgment is not supported by affidavits, is not, in and of itself, grounds for denying the motion.” *Brooker v. Hunter*, 22 Ariz. App. 510, 514, 528 P.2d 1269, 1273 (1974), *approved*, 111 Ariz. 578, 535 P.2d 1051 (1975) (per curiam). We conclude no error occurred in the trial court’s grant of summary judgment.

Deposition

¶5 The Flackes next claim the trial court erred in denying their motion to depose a witness pursuant to Rule 27(b), Ariz. R. Civ. P. “A trial court has broad discretion in ruling on disclosure and discovery matters, and this court will not disturb that ruling absent an abuse of discretion.” *Marquez v. Ortega*, 231 Ariz. 437, ¶ 14, 296 P.3d 100, 104 (App. 2013). In this case, the trial court denied the Rule 27(b) motion as untimely because it was filed after the court had entered a final judgment. But Rule 27(b) states: “If an appeal has been taken from a judgment of a superior court . . . the court in which the judgment was rendered may allow the taking of

FLACKE v. WILLIAMS
Decision of the Court

the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the court.” Therefore, a deposition pursuant to this rule may be taken after a final judgment.

¶6 We will affirm a trial court’s decision, however, if it was correct for any reason. *Glaze v. Marcus*, 151 Ariz. 538, 540, 729 P.2d 342, 344 (App. 1986). As noted above, a trial court may allow post-judgment depositions “to perpetuate . . . testimony for use in the event of further proceedings in the court.” In seeking leave to do so, however, a party must show “the reasons for perpetuating” that testimony, and the court may grant the motion only upon a finding that doing so “is proper to avoid a failure or delay of justice.” Rule 27(b). This requires some showing that the testimony will not be available at future proceedings if the deposition is not taken. See *Penn Mut. Life Ins. Co. v. United States*, 68 F.3d 1371, 1375 (D.C. Cir. 1995) (under Rule 27, Fed. R. Civ. P., petitioner must “demonstrate an immediate need to perpetuate testimony”);² compare *Texaco, Inc. v. Borda*, 383 F.2d 607, 609-10 (3d Cir. 1967) (trial court abused discretion in denying deposition because “[i]t would be ignoring the facts of life to say that a 71-year old witness will be available . . . to give his deposition or testimony . . . at an undeterminable future date”), with *Lombard’s, Inc. v. Prince Mfg., Inc.*, 753 F.2d 974, 976 (11th Cir. 1985) (no abuse of discretion in denying motion to depose where party made no showing of need to perpetuate testimony). The Flackes’ post-judgment motion to depose Anita Katz does not list any reason Ms. Katz would be unavailable in the future and therefore fails to show a need to “perpetuate” her testimony. Accordingly, the trial court did not abuse its discretion in implicitly finding that perpetuating the testimony was not necessary “to avoid a failure or delay of justice.”³ Ariz. R. Civ. P. 27(b).

²Although Arizona case law apparently has not addressed this issue, “[w]e may look to federal court interpretations of the Federal Rules of Civil Procedure when they are similar to the Arizona Rules of Civil Procedure.” *Marquette Venture Partners II, L.P. v. Leonesio*, 227 Ariz. 179, n.6, 254 P.3d 418, 421 n.6 (App. 2011).

³The Flackes have also asserted the trial court erred in denying their motion to stay the award of costs and attorney fees. But

FLACKE v. WILLIAMS
Decision of the Court

Costs and Attorney Fees

¶7 The Williamses have requested their costs and attorney fees on appeal pursuant to §§ 12-341 and 12-1103(B). We award them their reasonable costs and attorney fees upon compliance with Rule 21, Ariz. R. Civ. App. P. *See Lewis v. Pleasant Country, Ltd.*, 173 Ariz. 186, 195, 840 P.2d 1051, 1060 (App. 1992) (recognizing § 12-1103 as ground for award of attorney fees on appeal).

Disposition

¶8 For the foregoing reasons, the judgment of the trial court is affirmed.

although they argue a court has discretion to defer an award of costs and fees, they do not explain how the court here abused that discretion. We therefore deem this claim waived. *See* Ariz. R. Civ. App. P. 13(a)(6) (opening brief “shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on”); *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (“Failure to argue a claim usually constitutes abandonment and waiver of that claim.”).