

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

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COURT OF APPEALS  
DIVISION TWO

KINO MEADOWS HOMEOWNERS	)	
ASSOCIATION, an Arizona nonprofit	)	2 CA-CV 2007-0120
corporation,	)	DEPARTMENT A
	)	
Plaintiff/Appellant,	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
v.	)	Rule 28, Rules of Civil
	)	Appellate Procedure
HOWARD KASHMAN,	)	
	)	
Defendant/Appellee.	)	
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APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20060341

Honorable John E. Davis, Judge

REVERSED IN PART; AFFIRMED IN PART;  
VACATED IN PART AND REMANDED

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Tucson  
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and

Howard A. Kashman  
Tucson  
Attorneys for Defendant/Appellee

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B R A M M E R, Judge.

¶1 Appellant Kino Meadows Homeowners Association (Kino) appeals from the trial court’s award of summary judgment in favor of appellee Howard Kashman on Kino’s claims against him, the court’s denial of Kino’s request for leave to amend its complaint, and the court’s imposition of sanctions pursuant to Rule 11, Ariz. R. Civ. P., against Kino’s attorney, Stephen Weeks. We reverse the court’s grant of summary judgment, affirm its denial of Kino’s request for leave to amend, vacate the Rule 11 sanctions, and remand the case to the trial court for further proceedings.

### **Factual and Procedural Background**

¶2 In January 2006, Kino sued attorney Tanis Duncan; her husband Kashman; Professional Homeowners Association Managers, LLC (PHAM); and Linda and Gino Iniguez, PHAM’s owners. The gravamen of the claim against Duncan was that, while serving as an attorney for Kino and PHAM, she had “filed numerous unauthorized and improper lawsuits against [Kino] homeowners.” Kino’s complaint alleged that Duncan had engaged in fraud, “breach[ed] [her] duty of good conduct and loyalty,” committed professional malpractice, breached the covenant of good faith and fair dealing, and breached her fiduciary duty to Kino. According to Kino, it named Kashman as a defendant as well because he is Duncan’s spouse and her actions “benefit[t]ed and bound [their] marital community.”

¶3 Kashman moved to dismiss the complaint pursuant to Rule 12(b), Ariz. R. Civ. P., asserting “the Court lack[ed] jurisdiction over [him], as he has been sued in a

derivative capacity [only], and there is no marital community. Thus, [Kino] failed to state a claim upon which relief can be granted.” He filed contemporaneously an unsworn, unsigned document in support of the motion to dismiss; only later, after Kino had filed its response to the motion, did he then file a signed affidavit. In it, Kashman asserted, inter alia, that he lived in Colorado, which was not a community property state; that he and Duncan treated their respective law practices “as separate entities”; and that Duncan “owns her office building in Tucson as her sole and separate property.” He admitted that he “occasionally practice[d] law in Pima County” and that he and Duncan “jointly own[]” a house in Tucson. The court granted the motion, stating “[t]he facts supporting . . . Kashman’s argument” that there was no marital community “are uncontradicted by affidavit or authority.”

¶4 Immediately after the court granted his motion, Kashman filed a motion requesting his attorney fees as a sanction pursuant to Rule 11(a), asserting Weeks “knowingly and intentionally, with malicious motives, erroneously sued [Kashman].” He also asked the court to award him his expenses and double damages pursuant to A.R.S. § 12-349(A). In his request for sanctions, Kashman stated that, before Kino filed its complaint, he had sent Weeks a letter containing citations to facts and authority, urging Weeks not to name him as a defendant “on the very grounds urged in the Motion to Dismiss.” He also asserted that “Weeks’s response was to claim that Kashman had the indicia of being subject to Arizona’s community property laws” and to “ignore[] the facts and the law submitted to him.” Kashman attached to his motion for sanctions a redacted copy of his letter to Weeks.

¶5 The trial court found Weeks had not acted in bad faith by naming Kashman as a defendant and denied sanctions under § 12-349. The court did, however, award Kashman attorney fees under Rule 11, stating it was “troubled by the fact that Mr. Kashman’s . . . letter apparently went unanswered by Mr. Weeks and [Weeks’s] response to the motion [for sanctions] does not mention it.” The court stated Kashman “is a member of long standing good reputation in our legal community,” his letter to Weeks “deserved some responsive communication,” and, “[a]t a minimum Mr. Weeks[’s] response to this motion [for sanctions] should have addressed [the] significance [of Kashman’s letter] to the pending motion.”

¶6 Kino filed two motions to reconsider the Rule 11 sanctions, two motions to reconsider the trial court’s order dismissing Kino’s claims against Kashman, and a motion seeking leave to amend its complaint. The court denied those motions and entered final judgment in favor of Kashman, pursuant to Rule 54(b), Ariz. R. Civ. P., dismissing him from the action and ordering Weeks to pay \$2,000 in sanctions. This appeal followed.

## **Discussion**

### Motion to Dismiss—Grant of Summary Judgment

¶7 Kino asserts the trial court erred by granting Kashman’s motion to dismiss him from the lawsuit.<sup>1</sup> “We review a trial court’s grant of a motion to dismiss for an abuse of

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<sup>1</sup>Kashman’s motion stated he sought dismissal pursuant to both Rule 12(b)(6) for failure to state a claim and Rule 12(b)(2) on jurisdictional grounds. The trial court’s determination that there was no community property, however, is relevant to the assertion in Kino’s complaint that Duncan acted for the benefit of the marital community, not to the issue of the court’s jurisdiction over Kashman.

discretion, but review issues of law de novo.” *Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, ¶ 11, 158 P.3d 232, 236 (App. 2007). “The Arizona rule is that [a marital] community is liable for the intentional torts of either spouse if the tortious act was committed with the intent to benefit the community, regardless of whether in fact the community receives any benefit.” *Selby v. Savard*, 134 Ariz. 222, 229, 655 P.2d 342, 349 (1982). Thus, a plaintiff who intends that any judgment be satisfied from community property must sue the spouses jointly. *See* A.R.S. § 25-215(D); *Eng v. Stein*, 123 Ariz. 343, 345, 599 P.2d 796, 798 (1979). It necessarily follows that, if there is no community property, there is no purpose in naming the alleged tortfeasor’s spouse as a defendant in the lawsuit.

¶8 Kino contends the trial court was required to “take the allegations of the complaint as true” in deciding Kashman’s motion to dismiss. *See Cullen v. Koty-Leavitt Ins. Agency, Inc.*, 216 Ariz. 509, ¶ 2, 168 P.3d 917, 919 (App. 2007). Because the court considered Kashman’s affidavit in granting his motion, however, it effectively converted the motion to one for summary judgment pursuant to Rule 56(c), Ariz. R. Civ. P. *See* Ariz. R. Civ. P. 12(b). Before it could properly do so, however, the court was required to give the parties a “reasonable opportunity to present all material made pertinent to such a motion.” Ariz. R. Civ. P. 12(b); *Parks v. Macro-Dynamics, Inc.*, 121 Ariz. 517, 519-20, 591 P.2d 1005, 1007-08 (App. 1979); *see Gibb v. Scott*, 958 F.2d 814, 816 (8th Cir. 1992) (trial court’s failure “to provide the parties with notice [that it would consider matters outside the pleadings] and an opportunity to provide further materials requires reversal”); *Mack v. S. Bay*

*Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (“It is reversible error for a court to grant a motion to dismiss that has been converted to one for summary judgment, without providing all parties a reasonable opportunity to present material relevant to a Rule 56 motion.”), *overruled on other grounds by Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104 (1991); *see also Cullen*, 216 Ariz. 509, ¶ 8, 168 P.3d at 921 (Arizona courts give great weight to federal courts’ interpretation of Rule 12).

¶9 Nothing in the record suggests the trial court gave Kino an opportunity to submit affidavits or other evidence in opposition to Kashman’s motion. Kino argued in its response to the motion to dismiss that the court was required to “look solely to the allegations [in the complaint]” and take those allegations as true. This, of course, is the court’s responsibility in deciding a motion to dismiss. *See Cullen*, 216 Ariz. 509, ¶ 7, 168 P.3d at 921; Ariz. R. Civ. P. 12(b). The court’s reliance on *Payne v. Pennzoil Corp.*, 138 Ariz. 52, 672 P.2d 1322 (App. 1983), in concluding it could “take the facts stated in . . . Kashman’s affidavit as true” was misplaced. In *Payne*, we determined a trial court could properly convert a motion to dismiss to one for summary judgment and consider affidavits in support of that motion because “[n]o objection appear[ed] to have been made” to the court’s doing so. *Id.* at 53, 672 P.2d at 1323. Thus, we concluded, the trial court could “accept [the facts stated in the affidavits] as true” because the opposing party “ha[d] not controverted” those facts. *Id.* at 57, 672 P.2d at 1327. Unlike the nonmoving party in *Pennzoil*, Kino specifically urged the court to consider only the pleadings, as is appropriate for a motion to dismiss. *See*

*Cullen*, 216 Ariz. 509, ¶ 7, 168 P.3d at 921. And Kino had no notice the court would treat Kashman’s motion as one for summary judgment until it received the minute entry granting the motion. For the court to disregard Kino’s urging and convert Kashman’s motion to one for summary judgment without notice to the parties and without giving Kino a reasonable opportunity to respond with evidence and affidavits of its own, was error.<sup>2</sup> Accordingly, we reverse.<sup>3</sup>

### Second Motion for Reconsideration/Motion to Amend the Complaint

¶10 In Kino’s second motion for reconsideration of the trial court’s grant of summary judgment in favor of Kashman, Kino asserted Kashman was a proper defendant because he was “an attorney employee and/or partner” of Duncan’s and “act[ed] in a fiduciary capacity regarding claims at issue in this lawsuit.” In the alternative, Kino requested leave to amend its complaint. Attached to that motion was a copy of a check payable to Kino, drawn on Duncan’s trust account and signed by Kashman. The trial court denied the motion without comment, which Kino asserts on appeal was error. Because we

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<sup>2</sup>Kashman asserted at oral argument that the trial court need not have given the parties notice it would convert the motion to dismiss to one for summary judgment because Rule 12(b) states the court “shall” treat the motion as one for summary judgment if matters outside the pleadings are presented to the court. Kashman misreads the rule, which requires the court to treat the motion as one for summary judgment only if “matters outside the pleading are presented to *and not excluded* by the court.” Ariz. R. Civ. P. 12(b) (emphasis added). The court has discretion whether to exclude such matters. *See Cullen*, 216 Ariz. 509, ¶ 10, 168 P.3d at 922.

<sup>3</sup>Because we are reversing, we need not address Kino’s further argument that the trial court erred by denying its first motion for reconsideration.

reverse the court’s order dismissing Kashman based on his potential derivative liability as a member of his and Duncan’s marital community, we need not address the court’s denial of the motion for reconsideration and instead address only its denial of Kino’s request for leave to amend its complaint.

¶11 We review the denial of leave to amend a complaint 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). Thus, “amendments to pleadings should be liberally granted,” and a trial court abuses its discretion if it “den[ies] without reason a motion for leave to amend.” *Dewey*, 159 Ariz. at 68, 764 P.2d at 1127. Indeed, “[a]mendments will be permitted unless the court finds undue delay in the request, bad faith, undue prejudice, or futility in the amendment.” *MacCollum v. Perkinson*, 185 Ariz. 179, 185, 913 P.2d 1097, 1103 (App. 1996).

¶12 Kino’s motion for leave to amend its complaint, however, did not comply in any meaningful way with Rule 7.1(a), Ariz. R. Civ. P., providing that motions shall state grounds for relief “with particularity” and include “precise legal points, statutes and authorities relied on.” A motion that “does not conform in all substantial respects with the requirements of this rule . . . may be deemed a consent to the denial . . . of the motion, and the court may dispose of the motion summarily.” Ariz. R. Civ. P. 7.1(b). Although Kino’s motion was titled “Third Motion for Reconsideration; Alternative Motion to Amend Complaint,” its only discussion of Kino’s request for leave to amend is found in a sentence

requesting leave to amend “[i]f the Court does not believe reconsideration is warranted absent amendment of the complaint.” Nor did the motion cite any relevant legal authority. And although it stated that Kashman’s signature authority on Duncan’s trust account suggested Kashman had “act[ed] in a fiduciary capacity regarding claims at issue in this lawsuit,” it did not explain why that fact alone would permit amendment of the complaint. Therefore, the trial court did not err in denying it.<sup>4</sup> See *Blumenthal v. Teets*, 155 Ariz. 123, 131, 745 P.2d 181, 189 (App. 1987) (statement “in last sentence of [appellant’s] response to appellee’s motion to dismiss” requesting leave to amend not a proper motion because it did not comply with procedural rules, and trial court did not err by “fail[ing] . . . to allow plaintiff to amend the complaint”).

#### Rule 11 Sanctions

¶13 Weeks appeals from the trial court’s imposition of sanctions against him pursuant to Rule 11(a).<sup>5</sup> We review a court’s imposition of Rule 11 sanctions for an abuse of discretion. See *State v. Shipman*, 208 Ariz. 474, ¶ 3, 94 P.3d 1169, 1170 (App. 2004). “[I]f the court decides to award sanctions, it must make proper findings to support its conclusion.” *Resolution Trust Corp. v. W. Techs., Inc.*, 179 Ariz. 195, 205, 877 P.2d 294, 304 (App. 1994). Rule 11(a) permits sanctions when an attorney or party files a “pleading,

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<sup>4</sup>Indeed, the trial court did not explicitly deny the motion for leave to amend, stating only that it denied the accompanying motion for reconsideration.

<sup>5</sup>In a separate order filed contemporaneously with this decision, we deny Kashman’s motion to dismiss this portion of the case.

motion, [or] other paper” that is not “well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law” and is “interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless[ly] increase . . . the cost of litigation.” Thus, by its terms, the rule does not contemplate sanctioning counsel for failing to respond to a letter from another attorney written before litigation began. Nor, significantly, did the record support the trial court’s conclusion that Weeks had failed to respond to Kashman’s letter: Kashman admitted in his motion for sanctions that Weeks had, in fact, responded.<sup>6</sup> Finally, we cannot agree Weeks violated Rule 11 by failing to address Kashman’s letter in his response to the motion for sanctions when Kashman’s letter was already before the trial court, particularly given the court’s finding that Weeks had acted in good faith in naming Kashman as a defendant.<sup>7</sup> We

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<sup>6</sup>Moreover, Weeks filed a motion for reconsideration of the award of sanctions to which he attached his response to Kashman’s letter as an exhibit. He also attached an unredacted copy of Kashman’s letter.

<sup>7</sup>Indeed, the trial court’s award of sanctions against Weeks under Rule 11 is difficult to reconcile with its rejection of sanctions under A.R.S. § 12-349 and its finding that Weeks’s “reasons [for filing the lawsuit] could satisfy an objective good faith standard” and that there was no bad faith. *See James, Cooke & Hobson v. Lake Havasu Plumbing & Fire Prot.*, 177 Ariz. 316, 319, 868 P.2d 329, 332 (App. 1993) (in considering motions under Rule 11, “[w]e evaluate the attorney’s conduct under an objective standard of reasonableness”). And, although Kashman asserted at oral argument in this court that the trial court actually had awarded sanctions for Weeks’s failure to investigate the assertions Kashman had made in his letter, the trial court made no such finding. *See Resolution Trust Corp. v. W. Techs., Inc.*, 179 Ariz. 195, 205, 877 P.2d 294, 304 (App. 1994). Even if it had, if the complaint was otherwise filed in good faith—as the court found it was—then any failure to investigate Kashman’s assertions did not violate Rule 11 because investigation would not have been necessary to justify Weeks’s filing the complaint.

conclude the court abused its discretion in imposing sanctions against Weeks and therefore vacate the sanctions. *See Shipman*, 208 Ariz. 474, ¶ 3, 94 P.3d at 1170.

¶14 Kino requested Rule 11 sanctions in the trial court based on Kashman's representation concerning his ownership with Duncan of their home in Tucson. The court never addressed that request, instead denying the accompanying motion for reconsideration. Although Kino does not discuss its request for sanctions on appeal, the trial court on remand may investigate Kashman's representations, determine whether the sanctions Kino requested under Rule 11 are appropriate, and make any necessary factual findings in support of its determination.

¶15 We do not prejudge the issue nor do we usurp the trial court's broad discretion in evaluating a request for Rule 11 sanctions. We note two representations in Kashman's affidavit in support of his motion to dismiss and his representation in his motion to dismiss that "there is no marital community." In the affidavit, Kashman asserted he and Duncan "jointly own[]" a house in Tucson. Their deed to that house, filed as an attachment to Kino's first motion for reconsideration of the trial court's grant of summary judgment, belies that assertion. It shows Kashman and Duncan hold title to the house "as community property with the right of survivorship." The deed also states the property was conveyed to them "not as tenants in common and not as community property estate, and not as joint tenants with right of survivorship, but as community property with right of survivorship." We need not determine the merits of Kashman's remarkable legal position that he and Duncan do not own

this property as community property as A.R.S. §§ 25-211 and 25-215(D) contemplate, based on A.R.S. § 33-431(C). We note, however, the last sentence of § 33-431(D), which states that property titled as community property with the right of survivorship under subsection (C) does not lose its community character even when the right of survivorship is extinguished.

¶16 We leave to the trial court the task of deciding Kino’s request for sanctions under Rule 11 on a more complete record than is before us.<sup>8</sup> We merely note that, however Kashman’s and Duncan’s title to this property may fairly be described, it clearly is not held in joint tenancy. See § 33-431(B) (describing joint tenancy); *State v. Superior Court*, 188 Ariz. 372, 373, 936 P.2d 558, 559 (App. 1997) (“Married joint tenants are not agents of one another and each holds his or her ownership interest as separate property”); *Valladee v. Valladee*, 149 Ariz. 304, 308-09, 718 P.2d 206, 210-11 (App. 1986) (contrasting joint

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<sup>8</sup>Although Arizona law presumes that all property acquired by either spouse during marriage is community property, we also recognize that personal property acquired by spouses “is governed by the law of their matrimonial domicile at the time of its acquisition.” *Nationwide Res. Corp. v. Massabni*, 143 Ariz. 460, 463, 694 P.2d 290, 293 (App. 1984). And when personal property is used to purchase real property within Arizona, it generally retains its original character as either separate or community. See *Rau v. Rau*, 6 Ariz. App. 362, 364, 432 P.2d 910, 912 (1967). However, when spouses domiciled outside Arizona explicitly title real property in Arizona as community property pursuant to Arizona law, we know of no reason to ignore their apparent intent and characterize that property as separate property. See *Spurlock v. Santa Fe Pac. R.R. Co.*, 143 Ariz. 469, 474, 694 P.2d 299, 304 (App. 1984) (“[I]n construing deeds, the court’s role is to give effect to the intent of the contracting parties”; “[i]f the instrument is unambiguous, the intent of the parties must be ascertained from the four corners of the document.”); *Nationwide Res. Corp.*, 143 Ariz. at 465, 694 P.2d at 295 (“Separate property can be transmuted into community property by agreement . . . .”); see also 16 Am. Jur. 2d *Conflict of Laws* § 33 (1998) (“It is a universal principle that real . . . property is exclusively subject to the laws of the country or state within which it is situated.”); Restatement (Second) of Conflict of Laws § 224(2) (1971).

tenancy and community property). Thus, without considerable additional explanation, Kashman's use of the term "jointly owned" in his affidavit appears to be misleading. Kashman's affidavit also asserts that he and Duncan treat their respective law practices "as separate entities." That Kashman has authority to sign checks from Duncan's client trust account, and in fact signed at least one, however, is some evidence inconsistent with his assertion.

#### Rule 11 Sanctions on Appeal

¶17 Kino asks us to award it attorney fees "at both the trial level and in this appeal" pursuant to Rule 11(a) "or other applicable law." It asserts we may award fees against Kashman as a sanction for the "misleading representations in his affidavit [in support of his motion to dismiss] and the motions that ultimately gave rise to this appeal." We find no authority, however, and Kino has cited none, permitting an appellate court to impose Rule 11 sanctions based upon a party's actions before the trial court. Rule 11 applies only to proceedings "in the superior courts," Ariz. R. Civ. P. 1, and Kino has not asked for sanctions pursuant to Rule 11's appellate counterpart in Rule 25, Ariz. R. Civ. App. P, or under § 12-349. Indeed, a court imposing sanctions under Rule 11 must "make proper findings to support its conclusion," which is a task better left to the trial court. *Resolution Trust Corp.*, 179 Ariz. at 205, 877 P.2d at 304. Under these circumstances, we decline to impose sanctions against Kashman under Rule 11 based on his representations to the trial court. Accordingly, we decline to impose sanctions on appeal.

## Disposition

¶18 We reverse the trial court's order dismissing Kashman from the action but affirm its denial of Kino's motion for leave to amend its complaint. We vacate its imposition of Rule 11 sanctions against Weeks and remand the case to the trial court for further proceedings consistent with this decision.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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JOHN PELANDER, Chief Judge