

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA11-242

ARCHIE WALLS ET AL.

APPELLANTS

V.

NOBLE HUMPHRIES ET AL.

APPELLEES

Opinion Delivered January 4, 2012

APPEAL FROM THE VAN BUREN
COUNTY CIRCUIT COURT
[NO. CV-09-69]

HONORABLE RHONDA K. WOOD,
JUDGE

AFFIRMED IN PART; REVERSED IN
PART

JOHN MAUZY PITTMAN, Judge

Appellants brought this action against appellees seeking to have a mineral lease declared void based on fraud. The trial court granted summary judgment in favor of appellees. Appellants appeal, contending that the trial court erred in entering summary judgment in favor of appellees and erred in awarding attorney's fees to appellees. We affirm in part and reverse in part.

The property at issue comprises 100 acres of land in Van Buren County, Arkansas. It was originally owned by appellee Humphries, who sold to appellant Hernandez, who sold to appellant Walls. Although the contract of sale from Humphries to Hernandez contained no reservation of mineral rights, Humphries subsequently purported to lease the mineral rights to appellee New Century Production (succeeded by SEECO) in January 2004, and then to sell the mineral rights outright in December 2004 by mineral deed to appellees Paraclifta and



Claughton. Walls and Hernandez sued Humphries and the mineral companies, alleging that the purported transactions following Humphries's contract to sell the land to Hernandez were in breach of that contract and fraudulent. Although the contract had not been filed of record and the mineral companies had no actual notice of it, the complaint alleged that they were put on inquiry notice by Hernandez's possession of the land at the time that the leases were executed and prayed that the leases and purchase be rescinded. The trial court entered summary judgment in favor of the appellee mineral companies and awarded them attorney's fees as the prevailing parties in a contract action.

On appeal, appellants contend that the summary judgment was improper because the appellee mineral companies were put on inquiry notice of Hernandez's title by virtue of his occupation of the property and that the award of attorney's fees was improper because appellants' action against the mineral companies was not based on contract. We affirm the summary judgment on the merits but reverse the award of attorney's fees.

Summary judgment should be granted only when it is clear that there is no issue of fact to be litigated and the moving party is entitled to judgment as a matter of law. *Hanners v. Giant Oil Co.*, 373 Ark. 418, 284 S.W.3d 468 (2008). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, responses to requests for admission, and affidavits show that there is no genuine issue of material fact to be litigated and the moving party is entitled to judgment as a matter of law. *Id.* The burden of proving that there is no genuine issue of material fact is upon the moving party. *Id.* On appellate review, we must determine if summary judgment was proper based on whether the evidence



presented by the moving party left a material question of fact unanswered. *Id.* On appeal, we view the proof in a light most favorable to the party resisting the motion, resolving any doubts and inferences against the moving party, to determine whether the evidence presented left a material question of fact unanswered. *Id.*

We hold that the trial court did not err in granting summary judgment. If an instrument affecting title to real property is not recorded in the clerk's office of the county where the real estate is situated, then it shall not be valid against a subsequent purchaser of the real estate unless that purchaser has actual notice of the prior interest. *Killam v. Texas Oil & Gas Corp.*, 303 Ark. 547, 798 S.W.2d 419 (1990). The burden of proving actual notice of the prior interest is on the party asserting it. *Id.* A subsequent purchaser is deemed to have actual notice of a prior interest in the property if he is aware of such facts and circumstances as would put a person of ordinary intelligence and prudence on such inquiry that, if diligently pursued, would lead to knowledge of these prior interests. *Id.* Here, it is undisputed that the instrument creating Hernandez's interest in the real estate was not recorded, and appellants failed to allege that appellees were in fact aware of any facts that would give rise to a duty to inquire. Appellants' suggestion that appellees probably had agents drive near the property and see signs written in Spanish is unsupported by any allegation of fact or offer of proof. Appellants' argument that the occupation of the property by Hernandez was "notice to the world" and itself gave rise to a duty to inquire would completely defeat the purpose of the recordation statute by requiring an investigation in virtually every case. We find no error on this point.



However, we conclude that the award of attorney's fees to be paid by appellants Walls and Hernandez to the appellee mineral companies must be reversed. In Arkansas, attorney's fees are not awarded unless expressly provided for by statute or rule. *Lawrence v. Barnes*, 2010 Ark. App. 231. Arkansas Code Annotated section 16-22-308 (Repl. 1999) gives the trial court discretion in awarding attorney's fees in cases based upon contracts. Here, however, appellants' action against the appellee mineral companies was not based on breach of contract. No contract existed between these parties, and the remedy sought by appellants against the mineral companies was not to enforce any contractual obligation but instead sought to have contracts between the mineral companies and third parties (Humphries) be voided so as to quiet title. While a warranty deed is considered a contract between the grantor and his grantee permitting an attorney's fee award under section 16-22-308, *see Murchie v. Hinton*, 41 Ark. App. 84, 848 S.W.2d 436 (1993), the mineral companies that were awarded attorney's fees in this case were strangers to the contract between Humphries and Hernandez that was alleged to have been breached. The situation here is similar to that in *Hanners v. Giant Oil Co.*, *supra*, where the supreme court disallowed attorney's fees in a declaratory-judgment action to interpret a purchase-option provision in a lease where no claim was made to recover for breach of contract, no claim was made for the recovery of contract damages, and no contract damages were recovered. Under these circumstances, we hold that the trial court erred in awarding attorney's fees, and we reverse that part of the order.

Affirmed in part; reversed in part.

VAUGHT, C.J., and GRUBER, J., agree.



Cite as 2012 Ark. App. 4

Brett Blakney, for appellants.

Daily & Woods, P.L.L.C., by: *Jerry L. Canfield* and *C. Michael Daily*, for appellees Southwestern Energy Production Company and New Century Production Company.

Danielson Law Firm PLLC, by: *Erik P. Danielson*, for appellees Paraclifta Land & Minerals Limited Partnership and James A. Cloughton.