

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 07/03/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

MOHAVE STATE BANK, an Arizona ) No. 1 CA-CV 11-0235  
banking corporation, )  
) DEPARTMENT B  
Plaintiff/Appellee, )  
) **MEMORANDUM DECISION**  
v. ) (Not for Publication -  
) Rule 28, Arizona Rules  
THYBERG DEVELOPMENT, LLC, a ) of Civil Appellate  
limited liability company; LARRY ) Procedure)  
THYBERG and JANE DOE THYBERG, )  
husband and wife; ROD A. THYBERG )  
and MARY DOE THYBERG, husband )  
and wife, )  
)  
Defendants/Appellants. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Mohave County

Cause No. S8015CV201001221

The Honorable Charles W. Gurtler, Jr., Judge

**REVERSED AND REMANDED**

Law Offices of Stephen M. Lee  
By Stephen M. Lee  
Attorneys for Plaintiff/Appellee

Kingman

Anderson Law Offices  
By Michael C. Anderson  
Attorneys for Defendants/Appellants

Bullhead City

**K E S S L E R**, Judge

¶1 Defendants/Appellants Thyberg Development, L.L.C., Larry Thyberg, and Rod Thyberg ("the Thybergs") appeal from the trial court's decision granting summary judgment to Plaintiff/Appellee Mohave State Bank ("the Bank") on the Bank's action to recover a deficiency judgment. For the following reasons, we reverse the trial court's order and remand for further proceedings consistent with this decision.

**FACTUAL AND PROCEDURAL HISTORY**

¶2 In September 2007, Thyberg Development borrowed \$1,465,500 from the Bank and executed a promissory note secured by a deed of trust on property in Bullhead City, Arizona ("the Property"). Rod and Larry Thyberg also executed personal guarantees on the loan. Thyberg Development stopped making the required payments in October 2009 and defaulted on the loan. In April 2010, the Property was sold to the Bank at a trustee's sale for a credit bid of \$850,000, and a trustee's deed was issued.

¶3 The Bank filed a complaint against the Thybergs to recover a deficiency in the amount of \$763,225.95 plus interest pursuant to Arizona Revised Statutes ("A.R.S.") section 33-814

(Supp. 2011).<sup>1</sup> The Bank then filed a motion for summary judgment, arguing that its credit bid was based on a real estate appraisal of the Property as of the date of the sale. It further argued that if the Thybergs disputed that amount as being the fair market value they would have to produce their own "appraisal by a recognized and competent appraiser." Attached to the Bank's statement of facts in support of its motion for summary judgment was a letter from LS Appraisal Services stating it had inspected the Property and estimated the "as is" leased fee market value to be \$850,000 rounded to the nearest \$10,000. The letter referred to a separate self-contained report disclosing the methodologies used and the supporting data.

¶4 In response, the Thybergs argued that the value of the Property remained a contested issue of fact. They asserted that the Property had two hundred feet of valuable highway frontage, the value of the land alone was \$500,000, and the Property included 10,850 square feet of commercial units valued at \$1,356,250. The Thybergs claimed that the value of the land plus construction was \$1,856,250, and the appraisal attached to the Bank's motion was deficient because its calculations and methodology were not explained. To support their claimed value

---

<sup>1</sup> The statute provides for a deficiency judgment of the amount owed minus the price paid for the property at the sale, or the fair market value of the property at the time of the sale, whichever is greater. A.R.S. § 33-814(A).

of the Property, the Thybergs attached the declarations of Rod Thyberg and Ernest and Irma Hernandez of Cinque Terra Realty.

¶5 In his declaration, Rod Thyberg avowed that he was a developer and investor familiar with Bullhead City real estate prices, and at the time of the trustee's sale the Property had a total value of \$1,856,250.<sup>2</sup> He also stated that the Property was resold within hours of the trustee's sale, and that he was aware of other interested investors unable to present offers because of the quick sale. In their joint declaration, the Hernandezes avowed that they had been selling real estate in Bullhead City for twenty-two years, considered themselves real estate experts in the area, that they had been interested in purchasing one of the units of the Property at \$125 to \$130 per square foot, and that \$850,000, or approximately \$80 per square foot, for the entire Property was "a ridiculously low price." They expressed the belief that had the Property been marketed in a commercially reasonable manner, the Bank would have achieved a return greater than \$125 per square foot.

¶6 In reply, the Bank argued that the declarations of Rod Thyberg and the Hernandezes were insufficient to create a triable issue of fact as to the value of the Property and that the Thybergs needed to present an appraisal prepared by a

---

<sup>2</sup> Rob Thyberg stated that the land had a value of at least \$500,000 and that the completed construction had a value of \$125 per square foot or \$1,356,250.

recognized and competent appraiser. It attached to its reply the full 116 page appraisal report by LS Appraisal Services.

¶7 At oral argument on the motion for summary judgment, the trial court ordered supplemental briefing on whether the declarations of Rod Thyberg and the Hernandezes created a genuine issue of fact sufficient to defeat the Bank's motion for summary judgment.

¶8 The Thybergs argued that A.R.S. § 33-814(A) required a hearing to determine the fair market value of the Property. They argued that summary judgment was not appropriate where a matter was dependent on opinion testimony, and asserted that the Hernandezes' testimony was admissible because of their background, experience, and familiarity with real property values. They further argued that because the testimony was admissible, the trial court had to consider it on summary judgment. They also argued that as an owner of the Property, Rod Thyberg could testify to its value, and that such testimony should also defeat summary judgment. They further contended that property valuation based on opinion was a factual determination that the trial court should not decide without allowing cross-examination of the expert.

¶9 The Bank noted that the declarations of Rod Thyberg and the Hernandezes were dated more than six months after the sale and did not provide the bases of the affiants' valuations

or establish their credentials to offer expert opinions. In contrast, the Bank explained that the appraisal it had presented was prepared by an Arizona certified appraiser as of March 25, 2010, a short time before the sale. The Bank also argued that the appraisal reviewed the sales and listing history of the Property, discussed various valuation methodologies applied in valuing commercial property, and explained why certain methodologies were used and others rejected.

¶10 The trial court granted the Bank's motion for summary judgment. The court first noted that the Thybergs did not request time to complete discovery under Arizona Rule of Civil Procedure 56(f), but instead challenged the appraisal using declarations "containing mere conclusory statements or opinions without specific facts" that "do not establish that the Declarants had personal knowledge of the 'facts' they opined to." Although the trial court explained that neither declaration established a value of the Property as of the date of the sale, it stated the gravamen of the issue was that the declarations consisted only of conclusions of ultimate facts with no analysis or underlying support. The court further noted that the Hernandezes' declaration addressed the fair market value of one unit but did not address the value for the entire Property or take into account how long the Property would have to be on the market before it would be sold in its entirety.

The court found that it would not allow the evidence at trial without proper foundation and a factual basis for the opinions. The court found that the Bank was entitled to a deficiency judgment in the amount of \$763,225.95.

¶11 The trial court entered judgment accordingly, and the Thybergs timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (Supp. 2011).

#### **ISSUES AND STANDARD OF REVIEW**

¶12 The Thybergs argue that: (1) the declarations of Rod Thyberg and the Hernandezes raised sufficient factual issues to defeat the motion for summary judgment; (2) A.R.S. § 33-814 required the trial court to conduct a hearing to determine the fair market value of the Property; and (3) the Bank's motion for summary judgment itself did not demonstrate the absence of a genuine issue of material fact because the appraisal presented several valuation methods, included alternative values, and "rounded" the resulting market value to the nearest \$10,000. We address only the issue of the Thyberg declaration because summary judgment was inappropriate given that declaration.

¶13 Summary judgment may be granted when "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c). Summary judgment should be granted "if the facts produced in support of the claim or defense have so little

probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense.” *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). Consequently, a “scintilla” of evidence or evidence creating the “slightest doubt” about the facts may be insufficient to withstand a motion for summary judgment. *Id.* We determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). We view the facts and any inferences in the light most favorable to the party against whom judgment was entered. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996). Summary judgment must be supported by facts admissible in evidence. *Mason v. Bulleri*, 25 Ariz. App. 357, 359, 543 P.2d 478, 480 (1975). A party opposing a motion for summary judgment must set forth by affidavit or otherwise specific facts showing that a genuine issue of fact exists. Ariz. R. Civ. P. 56(e). Generally, an affidavit by an expert witness offering an opinion in opposition to a motion for summary judgment must provide specific facts to support the opinion. *Florez v. Sargeant*, 185 Ariz. 521, 526-27, 917 P.2d 250, 255-56 (1996). However, an affidavit by an owner of property generally is admissible to dispute the value of the property without any explanation of



facts underlying that opinion. See *Town of Paradise Valley v. Laughlin*, 174 Ariz. 484, 486, 851 P.2d 109, 111 (App. 1992) (“An owner may *always* testify as to the value of his property.”). This is because “[a]n owner of property has, by definition, knowledge of the components of value that are useful in ascertaining value, and an owner, no less than an ‘expert,’ can base his opinion of value on that knowledge.” *United Cal. Bank v. Prudential Ins. Co.*, 140 Ariz. 238, 304, 681 P.2d 390, 456 (App. 1983). “Any explanation of the basis for [the owner’s] opinion of value goes to the weight of the evidence.” *Laughlin*, 174 Ariz. at 486, 851 P.2d at 111.

**¶14** The Thyberg declaration states that the value of the land at the time of the sale was at least \$500,000, construction was selling for \$125 per square foot or \$1,356,250, and the total value of the project at the time of the sale was \$1,856,250. The trial court’s holding that such declaration was factually insufficient was erroneous. Rod Thyberg, as an owner of the Property, was competent to testify to the value of the

Property.<sup>3</sup> Unlike a retained expert witness, he was not required to establish his knowledge of the facts underlying his opinion. Because he is an owner, Rod Thyberg, by definition, has "knowledge of the components of value that are useful in ascertaining value." *United Cal. Bank*, 140 Ariz. at 304, 681 P.2d at 456. If an owner's opinion of value otherwise lacks foundation, it is not inadmissible for that reason, but the trier of fact may take the deficiency into account in determining the weight to give to the opinion. *See Laughlin*, 174 Ariz. at 486, 851 P.2d at 111 (finding an owner's testimony admissible even though it was based upon what others had told him).

¶15 Nor does the trial court's concern about the timing of Thyberg's valuation support its decision to disregard the Thyberg declaration. Although the declaration is dated approximately six months after the trustee's sale and does not provide a specific date for the appraisal, it states the value of the Property as of the time of the trustee's sale. The

---

<sup>3</sup> We note that in *United California Bank*, the court found that the general partner of an Arizona limited partnership qualified as an "owner" and could testify to the valuation of corporate property. 140 Ariz. at 302-03, 681 P.2d at 454-55; *see also Atkinson v. Marquart*, 112 Ariz. 304, 307, 541 P.2d 556, 559 (1975) ("As an officer, director, and shareholder of the corporation [the plaintiff] could be considered an owner. It is well established that an owner may estimate the value of his real or personal property whether he qualified as an expert or not.").

declaration further states the Property was resold within hours of the trustee's sale, and that Thyberg was aware of other interested investors unable to present offers because of the quick sale. We construe the record in the light most favorable to the party opposing summary judgment. *Prince*, 185 Ariz. at 45, 912 P.2d at 49. Given the Thyberg valuation, the assertion that the Property was resold within hours of the sale and the assertion that there were other potential bidders, a factual dispute as to the value of the Property at the time of the sale to the Bank prevented entry of summary judgment.

#### **CONCLUSION**

¶16 For the foregoing reason, we reverse the judgment and remand for further proceedings consistent with this decision. We also reverse the award of attorney's fees and costs below as premature. On remand, the trial court may award fees and costs after the case has been resolved on the merits. See, e.g., *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 204, ¶ 37, 165 P.3d 173, 182 (App. 2007). We do, however, award

the Thybergs their costs on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21. In light of our decision, we do not address the remaining issues.

/s/  
DONN KESSLER, Judge

CONCURRING:

/s/  
DIANE M. JOHNSEN, Presiding Judge

/s/  
LAWRENCE F. WINTHROP, Judge