

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: 11/15/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ANNA LEAFTY, Real Party in) 1 CA-CV 11-0366
Interest,)
) DEPARTMENT A
Plaintiff/Appellant,)
) **MEMORANDUM DECISION**
v.)
) (Not for Publication -
AUSSIE SONORAN CAPITAL, LLC fna) [Rule 28](#), Arizona Rules of
DOS MATES LLC; KONDAUR CAPITAL) Civil Appellate Procedure)
CORPORATION; STEPHEN D. COCHRAN;)
LIQUIDATION PROPERTIES; CITI)
RESIDENTIAL LENDING, INC.; CR)
TITLE SERVICES, INC.,)
)
Defendants/Appellees.)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-015409

The Honorable J. Kenneth Mangum

APPEAL DISMISSED IN PART; AFFIRMED IN PART

Anna Leafy) Scottsdale
In Propria Persona

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T I M M E R, Presiding Judge

¶1 Anna Leafy appeals the superior court's dismissal of her second amended complaint. For the reasons that follow, we dismiss the appeal to the extent it challenges dismissal of the second amended complaint as to all defendants except Aussie Sonoran Capital, LLC ("Aussie"). We lack jurisdiction to consider this aspect of the court's ruling. We affirm dismissal as to Aussie.

BACKGROUND

¶2 In June 2007, Leafy executed a promissory note ("Note") for more than \$300,000 in favor of Argent Mortgage Company, LLC ("Argent"). The Note was secured by a deed of trust ("DOT") recorded against Leafy's home located in Scottsdale (the "Property"). Leafy stopped paying on the Note in August 2008. Four months later, Argent assigned the Note and DOT to Citigroup Global, which immediately recorded a notice of trustee's sale. Before the scheduled sale date, the Note and DOT were sequentially assigned to a number of entities ending

with Aussie.¹ Leafy filed for Chapter 13 bankruptcy protection, and the trustee's sale was delayed due to the automatic stay.

¶3 In June 2010, after the bankruptcy court had lifted its stay, Leafy initiated this lawsuit asserting a myriad of claims against several entities and individuals all concerning the propriety of the trustee's sale. Leafy simultaneously obtained ex parte a temporary restraining order preventing the sale until a hearing for a preliminary injunction. In September, after Leafy had amended her complaint, the court dismissed the amended complaint but granted Leafy another opportunity to amend her complaint.

¶4 In October, Leafy filed a second amended complaint (the "Complaint") that again alleged multiple claims against several parties in an effort to both stop the trustee's sale then scheduled for March 2011 and recover damages. On the defendants' motions filed pursuant to Arizona Rule of Civil Procedure ("Rule") 12(b)(6), the court entered an unsigned minute entry dismissing the Complaint with prejudice as against all defendants. After a series of filings, the court ultimately entered a signed judgment in March 2011 dismissing the Complaint as to Aussie only, awarding Aussie \$24,000 in attorney's fees,

¹ Specifically, Citigroup Global assigned the Note and DOT to Liquidation Properties, which assigned the documents to Kondaur Capital, which assigned them to Dos Mates. Dos Mates later changed its name to Aussie.

and stating pursuant to Rule 54(b) that no reason existed to delay entry of final judgment as to Aussie. That same month, Aussie purchased the Property at a trustee's sale. In April, Leafy filed her notice of appeal challenging the court's dismissal of the Complaint as to all defendants.

JURISDICTION

¶15 Pursuant to our independent duty to ensure our jurisdiction over a particular appeal, *Catalina Foothills Unified Sch. Dist. No. 16 v. La Paloma Prop. Owners Ass'n, Inc.*, 229 Ariz. 525, 528, ¶ 6, 278 P.3d 303, 306 (App. 2012), we determine this court has jurisdiction only to review dismissal of the Complaint as to Aussie. With exceptions not applicable here, we only have jurisdiction to consider appeals taken from final judgments disposing of all claims and all parties, unless the court includes Rule 54(b) language in the judgment. *Id.* at ¶ 7; Ariz. Rev. Stat. ("A.R.S.") § 12-2101(A)(1) (West 2012); Ariz. R. Civ. P. 54(b).² Although the judgment dismissing the Complaint as to Aussie did not dispose of all claims and all parties, because it included Rule 54(b) language, we have jurisdiction to consider Leafy's appeal from that judgment.

¶16 The court never entered a judgment regarding the remaining defendants. To constitute a "judgment," a final

² Absent material revisions after the relevant date, we cite a statute's current version.

ruling must be in writing and signed by a judicial officer. Ariz. R. Civ. P. 58(a). Thus, the court's unsigned minute entry dismissing the Complaint against all defendants does not constitute an appealable judgment. We issued an order pursuant to *Eaton Fruit Co. v. California Spray-Chemical Corp.*, 102 Ariz. 129, 426 P.2d 397 (1967), allowing Leafy an opportunity to obtain a final signed judgment as to the other defendants. To date, Leafy has not obtained such a judgment, and we therefore dismiss this appeal as to all defendants, except Aussie, for lack of jurisdiction.

DISCUSSION

¶7 We review the superior court's dismissal of the Complaint pursuant to Rule 12(b)(6) de novo as an issue of law. *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7, 284 P.3d 863, 866 (2012). We accept as true all facts alleged in the Complaint, and we will affirm the dismissal only if Leafy would not be entitled to relief under any interpretation of the facts susceptible of proof. *Id.* at 356, ¶¶ 8-9, 284 P.3d at 867. But we do not accept as true allegations consisting of legal conclusions, unfounded inferences, or unreasonable conclusions. *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389, ¶ 4, 121 P.3d 1256, 1259 (App. 2005). With these principles in mind, we consider Leafy's arguments in turn.

I. Insufficient review

¶18 Leafy initially argues the superior court erred by either failing to read the Complaint and attached exhibits or by “[misunderstanding] the facts of the case.” For support, she points to the court’s misstatement in the minute entry ruling that the Note and DOT were assigned twice rather than four times. But Leafy fails to explain the significance of this factual error, and we do not discern any. The court’s analysis in its ruling did not turn on the number of assignments. Additionally, the detailed analysis set forth in the court’s ruling belies Leafy’s assertion the court did not read the Complaint or misunderstood the facts of the case. We therefore reject her argument.

II. Challenge to foreclosure sale

¶19 Leafy devotes most of her brief to arguing that the trustee’s sale held in March 2011 was invalid. Specifically, she argues the sale was “irregular” due to fraudulent and forged documents underlying the sale, multiple assignments of the Note and DOT without her knowledge, and abuses of the foreclosure process that deprived her of substantive and procedural due process. She concludes these “irregularities” “clearly establish[] that the lower court should overturn the Trustee’s Sale.” We reject Leafy’s argument for two reasons.

¶10 First, Leafy's argument concerning the "irregularity" of the trustee's sale was not raised to the superior court, and is therefore waived. We generally do not consider issues, even constitutional issues, raised for the first time on appeal. *Englert v. Carondelet Health Network*, 199 Ariz. 21, 26, ¶ 13, 13 P.3d 763, 768 (App. 2000). We decline to do so here, particularly as the trustee's sale had not occurred at the time the court ruled on the motion to dismiss.

¶11 Second, although Leafy asserted similar and other arguments to the superior court in an attempt to preliminarily enjoin and eventually cancel the trustee's sale, those arguments were mooted by completion of the sale. As Aussie points out, A.R.S. § 33-811(C) provides as follows:

The trustor [Leafy] . . . shall waive all defenses and objections to the sale not raised in an action that results in the issuance of a court order granting relief pursuant to rule 65, Arizona rules of civil procedure, entered before 5:00 p.m. mountain standard time on the last business day before the scheduled date of the sale.

Although Leafy sought to obtain a preliminary injunction of the trustee's sale, she was not successful. Consequently, she has waived all defenses and objections to the sale, and her arguments are therefore moot. Upon issuance of the trustee's deed to Aussie, Leafy's interest in and claims to the Property

were extinguished. *Madison v. Groseth*, 230 Ariz. 8, 13, ¶ 15, 279 P.3d 633, 638 (App. 2012).

¶12 Leafy argues § 33-811(C) cannot be applied to waive her defenses to the trustee's sale because to do so would "open[] the door to fraud with no recourse" and conflict with the principle that the deed-of-trust statutes must be strictly construed to favor the borrower.³ We disagree. Nothing in § 33-811(C) precludes a borrower from obtaining relief from a sale for fraud committed by a lender; § 33-811(C) simply provides that grounds for such relief must be sufficiently shown to convince the superior court to preliminarily enjoin the trustee's sale. Leafy had that opportunity in this case but failed to obtain a preliminary injunction. Also, nothing in § 33-811(C) prevents a claim for damages based on a lender's fraud committed in making or servicing a loan.

¶13 Although § 33-811(C) must be strictly construed to favor the borrower, *Patton v. First Fed. Sav. & Loan Ass'n*, 118 Ariz. 473, 477, 578 P.2d 152, 156 (1978), we also are bound to interpret the provision according to its plain language.

³ Leafy cites Judge Neil Wake's order in *Martenson v. RG Financing*, CV09-1314-PHX-NVW, 2010 WL 334648 (D. Ariz. Jan. 22, 2010), to support her argument. But the order is an "unpublished decision" and, consequently, "shall not be regarded as precedent nor cited in any court." ARCAP 28(c); *Hourani v. Benson Hosp.*, 211 Ariz. 427, 435, ¶ 27, 122 P.2d 6, 14 (App. 2005) (applying prohibition to an unpublished federal court decision).

Mathews ex rel. Mathews v. Life Care Ctrs. of Am., Inc., 217 Ariz. 606, 608, ¶ 6, 177 P.3d 867, 869 (App. 2008) (stating court looks first to the plain language of a statute to discern its meaning). The plain language of § 33-811(C) provides for a waiver of all defenses and objections to a sale by a trustor unless a preliminary injunction is timely secured. *Madison*, 230 Ariz. at 12, ¶¶ 11-12, 279 P.3d at 637.

¶14 Leafy also argues that § 33-811(C) cannot act as an absolute bar to a challenge to a trustee's sale because the rebuttable presumption set forth in § 33-811(B) would be rendered meaningless. In interpreting a statute, we must give "each word, phrase, clause, and sentence . . . meaning so that no part of the statute will be void, inert, redundant, or trivial." *Walker v. City of Scottsdale*, 163 Ariz. 206, 210, 786 P.2d 1057, 1061 (App. 1989); see also *Resolution Trust Corp. v. Foust*, 177 Ariz. 507, 512, 869 P.2d 183, 188 (App. 1993) (holding courts construe subsections "to harmonize rather than to contradict one another"). Thus, we must interpret § 33-811(C), if possible, in a manner that does not render § 33-811(B) superfluous.

¶15 Section 33-811(B) provides, in relevant part, as follows:

The trustee's deed shall raise the
presumption of compliance with the

requirements of the deed of trust and this chapter relating to the exercise of the power of sale and the sale of the trust property, including recording, mailing, publishing and posting of notice of sale and the conduct of the sale. A trustee's deed shall constitute conclusive evidence of the meeting of those requirements in favor of purchasers or encumbrancers for value and without actual notice. Knowledge of the trustee shall not be imputed to the beneficiary.

We disagree with Leafly that the plain-meaning interpretation of § 33-811(C) cannot be harmonized with § 33-811(B).⁴ Subsection (C) only applies to the trustor, its successors or assigns, and those persons to whom the trustee mailed a notice of sale pursuant to § 33-809. Consequently, other persons outside these categories and who have standing to contest the sale do not waive all defenses and objections to the sale pursuant to subsection (C), but will have to overcome the subsection (B) presumption in any challenge to the sale proceedings. See, e.g., *Sec. Sav. & Loan Ass'n v. Milton*, 171 Ariz. 75, 76, 828 P.2d 1216, 1217 (App. 1991) (applying the presumption to preclude a guarantor in a deficiency action from challenging the

⁴ The legislative history for A.R.S. § 33-811 does not assist us in determining legislative intent. Subsection (B) existed in 2002 when § 33-811 was amended on the floor of the Arizona Senate to add what is currently subsections (C) and (D). Martin Floor Amendment to H.B. 2071, 45th Leg., 2d Reg. Sess. (Ariz. 2002) (proposed on Apr. 19, 2002). We have not found any records reflecting the legislature's intent in adding these provisions or describing their interaction with subsection (B).

propriety of the sale proceedings); *BT Capital, LLC v. TD Serv. Co. of Ariz.*, 229 Ariz. 299, 301, ¶ 11, 275 P.3d, 598, 600 (2012) (holding that after a trustee's sale, "a person subject to § 33-811(C) cannot later challenge the sale based on pre-sale defenses or objections"). Under the plain-language interpretation of subsection (C), subsection (B) remains viable.

¶16 Next, Leafy argues § 33-811(C) applies only to waive defenses and objections if asserted against bona fide purchasers for value. We recently rejected this argument in *Madison*. 230 Ariz. at 13, ¶ 14, 279 P.3d at 638 (holding § 33-811(C) "does not condition the applicability of the waiver provision on the existence of a bona fide purchaser").

¶17 Leafy also argues that the plain-language interpretation of § 33-811(C) would "abrogate hundreds of years of case law as reflected in the Uniform Commercial Code." The cases Leafy relies on do not support her position. *Schaeffer v. Chapman*, 176 Ariz. 326, 861 P.2d 611 (1993), was decided nine years before the legislature amended § 33-811 to add subsection (C), so that court did not have an opportunity to address § 33-811(C). *In re Krohn*, 203 Ariz. 205, 214, ¶ 38, 52 P.3d 774, 783 (2002), held a trustee's sale can be set aside if the bid price was grossly inadequate. See also *Mason v. Wilson*, 116 Ariz. 255, 257, 568 P.2d 1153, 1155 (App. 1977) (noting court may set

aside an execution sale when bid price is shockingly inadequate or is inadequate and other inequitable circumstances exist). Because a challenge on this basis would not depend on events occurring prior to the sale, § 33-811(C) would not apply to preclude this challenge.

¶18 Finally, Leafy argues that the plain-language interpretation of § 33-811(C) violates the separation of powers between the legislature and the judiciary. Because Leafy failed to raise this argument to the superior court, however, she has waived it. *Englert*, 199 Ariz. at 26, ¶ 13, 13 P.3d at 768. She has also waived this argument by failing to develop it in her brief. *Polanco v. Indus. Comm'n of Ariz.*, 214 Ariz. 489, 491 n.2, ¶ 6, 154 P.3d 391, 393 n.2 (App. 2007) (holding appellant's failure to develop and support argument waives issue).

III. Attorney's fees

¶19 Leafy lists as an issue whether the superior court erred by awarding Aussie \$24,000 in attorney's fees but only argues the court acted unjustly by awarding fees. The record does not reflect that Leafy filed any objections to Aussie's application for attorney's fees. She has therefore waived the challenge on appeal. *Englert*, 199 Ariz. at 26, ¶ 13, 13 P.3d at 768. She has also waived her challenge by failing to develop it

in her brief. *Polanco*, 214 Ariz. at 491 n.2, ¶ 6, 154 P.3d at 393 n.2.

ATTORNEY'S FEES ON APPEAL

¶20 Aussie requests an award of attorney's fees pursuant to A.R.S. § 12-341.01. Because the issues on appeal arise from contract, we grant this request subject to Aussie's compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶21 For the foregoing reasons, we dismiss the appeal to the extent it seeks review of the superior court's dismissal of the Complaint as to all parties except Aussie. We affirm dismissal of the Complaint as to Aussie and award it reasonable attorney's fees as set forth above.

/s/
Ann A. Scott Timmer, Presiding Judge

CONCURRING:

/s/
Margaret H. Downie, Judge

/s/
Patricia K. Norris, Judge