DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

NORTHERN TRUST, NA, Plaintiff/Appellee, v. BARNEY F. KOGEN and ELLEN KOGEN, husband and wife, Defendants/Appellants.	1 CA-CV 11-0549 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-015320

The Honorable Jeanne M. Garcia, Judge

AFFIRMED

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N O R R I S, Judge

¶1 This appeal arises out of summary judgment in a deficiency action filed against Appellants Barney F. Kogen and Ellen Kogen by Appellee Northern Trust, NA. The Kogens argue we should vacate the judgment for Northern because the superior court misapplied preclusion principles and abused its discretion in refusing to grant them relief under Arizona Rule of Civil Procedure ("Rule") 56(f). The Kogens also argue the superior court should not have required them to respond to Northern's summary judgment motion before they had answered the complaint, and by doing so, prejudiced them. As we explain, the superior court correctly granted summary judgment in favor of Northern regardless of whether any preclusion doctrine applied. And, as we also explain, the superior court neither abused its discretion in denying the Kogens' request for discovery nor prejudiced them when it ordered them to respond to Northern's motion before they had answered. Therefore, we affirm the superior court's judgment.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 2007, Northern loaned $2.14 million to a limited liability company, Destiny Holdings II ("Destiny"). Barney Kogen and Barney Feldman –- who is not a party in this appeal –- were Destiny's members. As security for the loan, Destiny

executed a deed of trust on real property, designating Northern as trustee and beneficiary. Kogen and Feldman and their wives also personally guaranteed the loan. Destiny defaulted on the loan, and in November 2008, filed for relief under Chapter 11 of the Bankruptcy Code. After obtaining relief from the bankruptcy court's automatic stay, Northern bought the real property at the trustee's sale on February 17, 2009 with a credit bid of $496,706.11.

¶3 On February 26, 2009, Destiny filed an adversary complaint against Northern in the bankruptcy proceeding. It asked the bankruptcy court to invalidate the trustee's sale, alleging, in part, that Northern's credit bid was "'grossly inadequate' given that the current value of the Lots is no less than $3,400,000." In support, Destiny attached to its complaint an appraisal valuing the property as of January 2008 at a "discounted bulk value" of $2,995,000 and an "'as is' market value" of $3,690,000 ("2008 appraisal"). Destiny also attached to its complaint a November 2004 option agreement ("option agreement") in which it had granted a third party an option to purchase the property for $924,000, plus other consideration, at any time before November 2014. In June 2009, the bankruptcy court granted summary judgment to Northern on Destiny's adversary complaint.

¶4 On May 14, 2009, Northern sued Kogen, Feldman, and their respective spouses, to obtain a deficiency judgment based on their personal guarantees of the loan. Northern served the Feldmans on May 26, 2009 and the Kogens on March 30, 2010. On December 8, 2009, after Northern had served the Feldmans, but before it had served the Kogens, it moved for summary judgment against the Feldmans, and argued undisputed evidence established it was entitled to a deficiency judgment as a matter of law. Northern also argued that preclusion doctrines barred the Feldmans from contesting the validity and adequacy of its credit bid.

¶5 As discussed below, after Northern served the Kogens, but before they had answered the complaint, the superior court ordered the Feldmans and the Kogens to respond to Northern's summary judgment motion. In their responses, the Feldmans and the Kogens principally argued Northern had engaged in "appraisal shopping." They also argued the appraisal of the property Northern submitted in support of its motion did not accurately reflect the property's fair market value as of the date of the trustee's sale. They did not, however, submit an appraisal or other evidence of the property's value as of the date of the sale. After oral argument, the superior court granted Northern's summary judgment motion, finding "Defendants are

barred from litigating [the fair market value of the property] in this court because they should have addressed the fair market value in the Bankruptcy [adversary] proceedings," and "[r]es judicata prevents them from attempting to do so now."

DISCUSSION[1]

¶6 On appeal, the Kogens argue the "adversary judgment has no preclusive effect in this case as a matter of law." Because our review of the record reflects Northern met its evidentiary burden in support of its summary judgment motion and the Kogens failed to provide any evidence establishing the existence of a genuine issue of material fact, we affirm the superior court's grant of summary judgment on that basis and do not address whether the court correctly applied preclusion principles. *See Logerquist v. Danforth*, 188 Ariz. 16, 18, 932 P.2d 281, 283 (App. 1996) (appellate court will affirm the

[1]After the superior court granted summary judgment, but before it entered judgment in Northern's favor, Ellen Kogen died. Subsequently, Northern moved to dismiss this appeal as to Ellen Kogen, asserting we did not have jurisdiction over her appeal because her attorney and not a personal representative had filed the notice of appeal on her behalf. Death of a party, however, does not deprive this court of jurisdiction; instead, it may cause an appeal to abate. *See* ARCAP 27(a). Further, abatement is not required in such a situation "unless otherwise required by law." Northern has failed to identify any law requiring this appeal to abate as to Ellen Kogen; its citation to ARCAP 9(a), which extends time for an appeal if a party dies during the time he or she is entitled to appeal, does not constitute such a law. We therefore deny Northern's motion to dismiss Ellen Kogen's appeal.

superior court's grant of summary judgment for any basis apparent from the record).

I. No Genuine Issue of Material Fact

¶7 A summary judgment motion

> sets in play shifting burdens. Initially, a party moving for summary judgment has the burden of showing there are no genuine issues of material fact and it is entitled to summary judgment as a matter of law. Only if the moving party satisfies this burden will the party opposing the motion be required to come forward with evidence establishing the existence of a genuine issue of material fact that must be resolved at trial.

Nat'l Bank of Ariz. v. Thruston, 218 Ariz. 112, 114-15, ¶ 12, 180 P.3d 977, 979-80 (App. 2008). "We must determine *de novo* whether there are any genuine issues of material fact and whether the trial court erred in applying the law." *Logerquist*, 188 Ariz. at 18, 932 P.2d at 283.

¶8 Here, to obtain summary judgment as a matter of law on its deficiency claim, Northern was required to establish the Kogens were "liable on the contract for which the trust deed was given as security," and the amount of their debt was in excess of "the greater of the sales price or the fair market value of the real property." Arizona Revised Statutes ("A.R.S.") section 33-814(A) (Supp. 2011). Accordingly, in its motion and supporting materials, Northern presented evidence establishing

(1) the Kogens were liable to Northern as guarantors of the loan, which as of the date of the trustee's sale had an unpaid balance of $2,303,714.46; and (2) the "discounted bulk value" of the property at the time of the sale, $635,000, as established by a May 29, 2009 "retrospective value opinion" appraisal,[2] exceeded Northern's credit bid of $496,706. Based on this evidence, Northern met its initial burden of showing it was entitled to a deficiency judgment against the Kogens as a matter of law for no less than $1,668,714.46 ($2,303,714.46 minus $635,000). *See Thruston,* 218 Ariz. at 114-15, ¶ 12, 180 P.3d at 979-80*; see also United Bank of Ariz. v. Allyn,* 167 Ariz. 191, 196, 805 P.2d 1012, 1017 (App. 1990) (moving party that has burden of proof at trial must carry burden of providing uncontroverted prima facie evidence in support of its summary judgment motion).

¶9 The burden then shifted to the Kogens "to present sufficient evidence demonstrating the existence of a genuine factual dispute as to a material fact." *Thruston,* 218 Ariz. at 119, ¶ 26, 180 P.3d at 984. "To defeat the motion, the non-moving party must call the court's attention to evidence

[2]The May 2009 appraisal also included "individual retail lot value[s]" totaling $926,000. For reasons not apparent from the record, the May 2009 appraisal described the property as containing 12 separate lots, while the 2008 appraisal described the property as containing 13 separate lots.

overlooked or ignored by the moving party or must explain why the motion should otherwise be denied." *Id.* The record does not reflect the Kogens did so. Although the Kogens argued in their response to Northern's summary judgment motion that "the key fact issue necessary to a determination in this case –- valuation of the property –- is in dispute," and adopted the Feldmans' response, which asserted they were "in the process of obtaining an expert and independent appraisal of the Property to establish its true fair market value," neither the Kogens nor the Feldmans submitted an appraisal, an affidavit, or other evidence of the property's fair market value which would have "demonstrat[ed] the existence of a *genuine* factual dispute." *Id*. (emphasis added).

¶10 Nevertheless, relying principally on *United Bank*, the Kogens argue on appeal that even though they did not submit any conflicting evidence regarding the property's value as of the sale date, Northern's summary judgment materials included such evidence. Specifically, they point out that, in moving for summary judgment, Northern gave the court a copy of Destiny's adversary complaint and its two attachments, the option agreement and 2008 appraisal, which they argue raised fact questions about the property's fair market value. We reject this argument.

¶11 First, the Kogens did not make this argument in the superior court. Indeed, they made no reference at all to either the option agreement or the 2008 appraisal in responding to Northern's summary judgment motion or in requesting Rule 56(f) relief. Instead, as discussed, their primary opposition to summary judgment rested on the argument (not supported by any facts) that Northern had appraisal shopped. Further, the Kogens did not even argue Northern had failed to meet its initial prima facie burden on summary judgment.[3] *See supra* ¶ 8. Accordingly, the Kogens are not entitled to make this argument on appeal. *See Van Loan v. Van Loan*, 116 Ariz. 272, 274, 569 P.2d 214, 216 (1977) (failure to raise issue at trial court level constitutes waiver).

¶12 Moreover, unlike the situation in *United Bank* –- where a dispute over a material issue of fact was apparent in the moving party's motion papers -- neither the option agreement nor the 2008 appraisal addressed the fair market value of the property as of the date of the sale. Nothing in the option agreement suggested it was intended to represent the property's fair market value as of the date of the sale, and the 2008

[3]In their reply brief and citing A.R.S. § 33-814(A), the Kogens argue the court was required to conduct an evidentiary hearing "to resolve the disputed FMV issue." Because the evidence presented to the superior court did not demonstrate a "disputed FMV issue," the court was not required to conduct such a hearing.

appraisal evaluated the property over a year before the trustee's sale -- before, as noted by Northern's 2009 appraisal, the residential housing market had experienced a "slowdown" and the "sub-prime lending crisis" had impacted the economy. Under the circumstances, for these materials to constitute evidence sufficient to justify a trial, *see Norwest Bank (Minn.), N.A. v. Symington,* 197 Ariz. 181, 185-88, 3 P.3d 1101, 1105-08 (App. 2000), the Kogens needed to provide the superior court with facts admissible in evidence explaining why these materials were capable of creating a material issue of fact regarding the fair market value of the property as of the date of the sale. The Kogens utterly failed to do this. Therefore, we disagree with the Kogens' argument that disputed fact issues precluded summary judgment.

II. Discovery and Rule 56(f)

¶13 Next, the Kogens argue the superior court abused its discretion in refusing to grant relief under Rule 56(f). Under that Rule, a trial court may postpone consideration of a summary judgment motion if the party opposing the motion states it cannot provide facts to justify its position and "informs the court of what information it is looking for, where it thinks the information is, and how it plans on obtaining that information." *See Simon v. Safeway, Inc.*, 217 Ariz. 330, 333, ¶ 8, 173 P.3d

1031, 1034 (App. 2007). Relying on the Rule, the Kogens argue the superior court should not have ruled on Northern's summary judgment motion without giving them additional time to conduct discovery and obtain information from Northern to support their position it had engaged in "appraisal shopping" and the property's value exceeded $635,000. On the record before us, the superior court did not abuse its discretion in denying the Kogens' request for Rule 56(f) relief. *Id*. at 332, ¶ 4, 173 P.3d at 1033 (appellate court reviews ruling on Rule 56(f) motion for abuse of discretion).

¶14 First, the record reflects the Kogens obtained the discovery they said they needed from Northern. Northern exchanged Rule 26.1 disclosure with the Kogens' co-defendants, the Feldmans, and this disclosure was equally available to the Kogens as they and the Feldmans were represented by the same attorneys ("defense counsel"). Further, during oral argument on the summary judgment motion and the Kogens' request for Rule 56(f) relief, Northern's attorney stated -- without objection or dispute from defense counsel -- that Northern had disclosed to defense counsel "all of the appraisals, the entire loan file" in another case involving the parties and the property.

¶15 Second, as noted by the superior court in denying relief under Rule 56(f), the Kogens received an "opportunity to

address the fair market value [of the property] in the Bankruptcy proceedings." Although the Kogens argue on appeal this statement implies the court denied them relief under Rule 56(f) based on its application of preclusion principles, we understand the court's statement to mean simply that in challenging the adequacy of the credit bid in the adversary proceeding, Destiny would have been required by necessity to investigate and evaluate the fair market value of the property, and, as one of Destiny's co-members, Barney Kogen would have had access to the information produced in that investigation.[4] *See In re Krohn*, 203 Ariz. 205, 212, ¶ 29, 52 P.3d 774, 781 (2002) (gross inadequacy of credit bid is generally defined as the sales price being less than 20% of fair market value). Indeed, presumably that is why Destiny attached the 2008 appraisal and the option agreement to its adversary complaint.[5]

¶16 Finally, in May 2010, the Kogens, through defense counsel, represented they were in the process of retaining an expert to determine the value of the property as of the date of

[4]At oral argument on Northern's summary judgment motion, defense counsel did not draw any distinction between Destiny and its members.

[5]We also note that in early May 2010 the Kogens served Northern with interrogatories and a request to produce. Yet, they agreed to Northern's request to postpone its discovery response deadline pending the court's resolution of Northern's summary judgment motion.

sale. Yet, the Kogens presented no expert testimony to the court, even though the court did not hear argument on Northern's motion until September 30, 2010 and did not rule until November 29, 2010. The record, therefore, reflects Northern disclosed information regarding its appraisals and the Kogens had an opportunity to develop evidence concerning the fair market value of the property. Accordingly, under the circumstances, the superior court did not abuse its discretion in denying the Kogens relief under Rule 56(f).

III. Timing of the Kogens' Response to Northern's Summary Judgment Motion

¶17 Finally, the Kogens argue the superior court should not have required them to respond to Northern's summary judgment motion before they had answered the complaint. In support of this argument, they rely on Rule 56(a), which states a party may move for summary judgment "no sooner than the date on which the answer is due." They further assert that because Northern filed its motion before their answer was due, the motion was "fatally defective" and this defect "preclude[d] summary judgment as a matter of law." *See Morrison v. Shanwick Int'l Corp.*, 167 Ariz. 39, 42, 804 P.2d 768, 771 (App. 1990) (citing in dicta federal case law applying analogous federal rule of civil procedure and

holding summary judgment motion filed before answer date fatally defective). We reject these arguments.

¶18 First, the Kogens did not raise their "fatally defective" argument in the superior court and thus, are not in a position to raise it on appeal. *Cf. Moretto v. Samaritan Health Sys.*, 190 Ariz. 343, 346, 947 P.2d 917, 920 (App. 1997) (party "had an opportunity to raise any procedural irregularity during oral argument or by motion for new trial, but he failed to do so"). Second, the Kogens agreed to respond to the summary judgment motion, even though Northern had filed it before they were required to answer the complaint. And third, the superior court's order did not prejudice them.

¶19 On April 12, 2010, the superior court held a telephonic status conference with counsel. By then, Northern had served the Kogens on March 30, 2010 and thus, the Kogens were required to answer on or before April 29, 2010. At the conference, the same defense counsel represented both the Kogens and Feldmans (collectively, "Defendants"). Defense counsel told the court, with regard to the summary judgment motion Northern filed against the Feldmans, the Kogens were "going to have to deal with these identical issues. And it just sort of makes sense from a judicial economy perspective that the Defendants respond to this motion for summary judgment at the same time

after a reasonable period to conduct meaningful discovery." Defense counsel further told the court they were "ready to go ahead and proceed. We just need time to conduct . . . discovery."

¶20 After further discussion, the superior court asked "if both counsel are going to consent that the motion for summary judgment that has been pending against Feldman only would apply to Kogen as well?" Defense counsel replied "if I could just have some time to maybe confer with my clients on that and see what they say about it." The court then instructed the Defendants' attorney to file a response to Northern's summary judgment motion on behalf of both the Feldmans and the Kogens and to file a motion under Rule 56(f) if he needed more time for discovery. Accordingly, on May 19, 2010[6] the Defendants responded to the summary judgment and filed a Rule 56(f) motion asserting they needed time "to conduct some additional discovery" to support their position Northern had "appraisal shopp[ed]."

¶21 Thus, the record reflects the Kogens, through defense counsel, advised the court they were "ready to go ahead and proceed" with a response to Northern's motion for summary

[6]The parties stipulated to extend the May 17, 2010 due date to May 19, 2010.

judgment, despite not having answered the complaint and initially asking for additional time to conduct discovery.

¶22 In addition, the record does not reflect the Kogens were prejudiced by the superior court's order requiring them to respond to Northern's summary judgment motion, or were denied "notice and an opportunity to be heard at a meaningful time or in a meaningful manner as provided by established rules of procedure." *Morrison,* 167 Ariz. at 42, 804 P.2d at 771. First, as noted, as of the date of the status conference, the Kogens were required to file an answer to the complaint on or before April 29, 2010. The court gave the Kogens until May 17, 2010 to respond to the summary judgment motion. Although the Kogens never filed an answer, if they had done so by April 29, 2010, they would have responded to the motion after answering the complaint. Second, defense counsel informed the court the Kogens' position was "identical" to that of the Feldmans and it "ma[de] sense" for the Kogens to "respond to this motion for summary judgment at the same time" as the Feldmans. As the superior court noted in rejecting this same argument, the Kogens were "not denied the opportunity to be heard on the motion for summary judgment; they filed a written response and participated in oral argument before the ruling was rendered." Third, the timetable ordered by the court did not deprive the Kogens of

disclosure from Northern, as they argue on appeal. *See supra* ¶ 14.

¶23 Thus, we hold the record fails to demonstrate the Kogens were prejudiced because the superior court scheduled a date for them to respond to Northern's summary judgment motion before they had answered the complaint. *See Neyens v. Donato*, 67 Ariz. 1, 4-5, 188 P.2d 588, 590 (1948) ("[T]he appellants were in nowise harmed or prejudiced by the procedure followed, even though it was irregular.").

IV. Attorney's Fees on Appeal

¶24 Both sides have requested an award of attorneys' fees on appeal under A.R.S. § 12-341.01(A), as well as costs on appeal. As the prevailing party, we award Northern its attorneys' fees (with the exception of fees incurred in moving to dismiss this appeal) and costs on appeal subject to its compliance with ARCAP 21. Pursuant to A.R.S. § 12-341.01(C), we award the Kogens their attorneys' fees incurred in responding to Northern's motion to dismiss this appeal, *see supra* note 1, and those fees only.

CONCLUSION

¶25 For the foregoing reasons, we affirm the judgment of the superior court against the Kogens.

/s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Judge

/s/
JON W. THOMPSON, Judge