DIVISION ONE
FILED: 12/20/2012
RUTH A. WILLINGHAM, CLERK
BY: mjt

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

| | | |
|---|---|---|
| BRIAN BARNETT,<br><br>Plaintiff/Appellant,<br><br>v.<br><br>BMO HARRIS BANK,<br><br>Defendant/Appellee. | ) | 1 CA-CV 11-0808<br><br>DEPARTMENT B<br><br>**MEMORANDUM DECISION**<br>(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure) |

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-036966

The Honorable Colleen L. French, Judge Pro Tempore

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED**

---

Kelhoffer, Manolio & Firestone, PLC — Scottsdale
by Veronica L. Manolio
Attorneys for Plaintiff/Appellant

Stinson Morrison Hecker LLP — Phoenix
by Jeffrey J. Goulder
James E. Holland, Jr.
Attorneys for Defendant/Appellee

---

**P O R T L E Y**, Judge

**¶1** Brian Barnett challenges the summary judgment granted to M & I Marshall & Ilsley Bank ("M & I"), the predecessor to BMO Harris Bank. For the reasons that follow, we affirm in part, reverse in part, and remand.

**FACTS AND PROCEDURAL HISTORY**

**¶2** Barnett borrowed $1.5 million from M & I to demolish a house and build a new one in Paradise Valley, Arizona. The loan was secured by a deed of trust on the property. M & I funded Barnett's draw requests for 13 months.

**¶3** Barnett notified M & I in April 2009 that he needed to revise his cost breakdown of estimated expenses. While waiting for approval of his new cost breakdown, Barnett failed to pay his May loan payment. M & I found that he was over-budget and told Barnett that he would need to pay $30,455.36 in over-budget construction costs in order to receive further draws. Barnett refused, and M & I stopped funding the loan after he failed to pay the June loan payment. M & I then declared that the loan was in default and initiated a trustee's sale.

**¶4** Barnett sued M & I to prevent the trustee's sale and asserted claims for negligent misrepresentation and fraud. M & I answered and filed a counterclaim for breach of contract and deficiency. The trial court denied Barnett's request for a preliminary injunction and the house was sold to a third party

at a trustee's sale in August 2010. M & I then amended its deficiency claim for $928,102 and added an additional counterclaim for fraud.

**¶5** The parties filed cross motions for summary judgment. The court granted summary judgment to M & I for breach of contract but found that genuine issues of material fact precluded judgment on any other claim or counterclaim. After M & I made an oral motion for reconsideration, the court reversed itself, granted M & I summary judgment on its deficiency claim and awarded M & I attorneys' fees. The court also allowed M & I to withdraw its fraud claim without prejudice. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (West 2012).

**DISCUSSION**

**I.**

**¶6** Barnett contends the trial court erred when it granted summary judgment to M & I on its deficiency claim.[1] He specifically argues that the court erred when it determined as a matter of law he was not entitled to protection under Arizona's anti-deficiency statute because his home was incomplete.

**¶7** Summary judgment is appropriate if the evidence presented shows no genuine issue of material fact and the movant

[1] Barnett does not challenge the judgment granted on the claim that he breached the loan agreement with M & I.

"is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). We review the ruling de novo, "viewing the evidence and reasonable inferences in the light most favorable to the party opposing the motion." *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003).

**A.**

**¶8** The anti-deficiency provision provides that

> [i]f trust property of two and one-half acres or less *which is limited to and utilized for* either a single one-family or a single two-family dwelling is sold pursuant to the trustee's power of sale, no action may be maintained to recover any difference between the amount obtained by sale and the amount of the indebtedness and any interest, costs, or expenses.

A.R.S. § 33-814(G) (West 2012) (emphasis added).

**¶9** Relying on the holding in *Mid Kansas Federal Savings and Loan Association of Wichita v. Dynamic Development Corp.* that a "property is not utilized as a dwelling when it is unfinished [and] has never been lived in," 167 Ariz. 122, 129, 804 P.2d 1310, 1317 (1991), the trial court found that Barnett was not entitled to anti-deficiency protection because "there was no dwelling that was both finished and/or being lived in by anyone existing on the trust property at any time after the [loan agreement] was executed." The court also noted that Barnett's "inten[tion] to build a new home on the property that would be utilized as a dwelling in the future" was insufficient

to determine that the property was being "utilized" under the statute.

**¶10** Soon after the ruling, a panel of this court addressed this issue in *M & I Marshall & Ilsley Bank v. Mueller*, 228 Ariz. 478, 268 P.3d 1135 (App. 2011). In *Mueller*, we affirmed the finding that the Muellers were entitled to protection under A.R.S. § 33-814(G) even though construction on their home was incomplete because they "purchased the property with the purpose of occupying the dwelling upon completion." *Id.* at 480, ¶ 11, 268 P.3d at 1137. We noted that our supreme court's holding in *Mid Kansas* limited the definition of "utilized" to unfinished properties that were "being held for sale to its first occupant by an owner *who has no intent to ever occupy the property*," and thus, was distinguishable where the builder intended to reside in the home following its completion. *Id.* at 479-80, ¶¶ 8-9, 268 P.3d at 1136-37 (quoting *Mid Kansas*, 167 Ariz. at 129, 804 P.2d at 1317) (emphasis added) (internal quotation marks omitted). Consequently, because "the Muellers intended to live in the single-family home upon its completion," they were entitled to anti-deficiency protection. *Id.* at 480, ¶ 9, 268 P.3d at 1137.

**¶11** Here, Barnett stated in the loan application that he intended to occupy the home as his personal residence upon completion. He confirmed such during his deposition testimony.

He also testified that he had formed a business entity to sell the home when completed because there were several buyers who were interested in purchasing the home. His statement in the loan application and the contradictions in his testimony demonstrate a genuine issue of material fact about whether he intended to occupy the home at the time he completed the loan agreement that a jury will have to resolve. Consequently, M & I was not entitled to summary judgment on its deficiency claim.

**¶12** Because we have reversed the ruling on the deficiency claim, we also vacate the award of attorneys' fees to M & I. Once the case has been resolved, the court can then consider any award of attorneys' fees and costs.

**B.**

**¶13** Barnett also contends that the court erred by dismissing his claim for breach of the implied covenant of good faith and fair dealing. He contends that a genuine issue of material fact precludes summary judgment. We disagree.

**¶14** "Arizona law implies a covenant of good faith and fair dealing in every contract." *Bike Fashion Corp. v. Kramer*, 202 Ariz. 420, 423, ¶ 13, 46 P.3d 431, 434 (App. 2002) (internal quotation marks omitted). The purpose of the covenant is to ensure that "neither party will act to impair the right of the other to receive the benefits which flow from their agreement or contractual relationship." *Id.* A party can breach the covenant

"by exercising express discretion [under the contract] in a way inconsistent with a party's reasonable expectations." *Id.* at 424, ¶ 14, 46 P.3d at 435.

**¶15** The loan agreement gave M & I the right to stop disbursing funds if Barnett failed to make timely loan payments or comply with any other contractual term. The agreement also provided that M & I could require Barnett to contribute his own money if there were insufficient funds to cover the revised construction costs.

**¶16** There is no dispute that Barnett failed to pay his May and June loan payments and refused to pay the over-budget costs. M & I then elected to stop disbursing funds pursuant to the agreement and accelerated payment of the debt. Barnett produced no evidence to suggest he reasonably expected M & I to continue to fund the project despite his failure to make loan payments or comply with M & I's cost breakdown request. Additionally, he provided no evidence to suggest that he reasonably expected M & I not to exercise its right to require out-of-pocket contributions on over-budget costs before funding any additional draws. Consequently, the court did not err in granting summary judgment to M & I by dismissing Barnett's claim for breach of the implied covenant of good faith and fair dealing.

**C.**

**¶17** Additionally, Barnett argues that the court erred by dismissing his claim that M & I had a duty to mitigate its damages because there were genuine issues of material fact. "The party in breach has the burden of proving that mitigation was reasonably possible but not reasonably attempted." *Fairway Builders, Inc. v. Malouf Towers Rental Co.*, 124 Ariz. 242, 255, 603 P.2d 513, 526 (App. 1979). When there is conflicting evidence as to whether the injured party violated his duty to mitigate damages, it is "a question of fact for the trier of fact." *Id.* at 256, 603 P.2d at 527. However, when the injured party fails to provide evidence to support its mitigation claim, a court may decide the issue as a matter of law. *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 8, 795 P.2d 827, 834 (App. 1990).

**¶18** Here, Barnett failed to offer any evidence to show that continued funding of the project despite his breach would have reduced his deficiency or resulted in a sufficient return in value on the project.[2] The evidence submitted demonstrated that the property was sold at trustee's sale to a third party,

[2] Barnett claims that M & I rejected two short sale offers that would have netted more money than the trustee sale. Because he did not make that argument to the trial court we will not address it for the first time on appeal. *K.B. v. State Farm Fire & Cas. Co.*, 189 Ariz. 263, 268, 941 P.2d 1288, 1293 (App. 1997).

which reduced the debt and any potential deficiency. Consequently, the trial court did not err by dismissing the claim for failure to mitigate damages by summary judgment.

**II.**

**¶19** Barnett also contends that the court erred by allowing M & I to voluntarily dismiss its fraud claim without prejudice. He argues that it should have been dismissed with prejudice. "Generally, when a court enters judgment in favor of a party, that party is not 'aggrieved' and thus has no standing to appeal." *Douglas v. Governing Bd. of Window Rock Consol. Sch. Dist. No. 8*, 221 Ariz. 104, 108, ¶ 8, 210 P.3d 1275, 1279 (App. 2009); *see also Finck v. Finck*, 9 Ariz. App. 382, 385, 452 P.2d 709, 712 (1969) ("A party who accepts an award or legal advantage under an order, judgment, or decree, waives his right to any such review of the adjudication as [m]ay again put in issue his right to the benefit which he has accepted.") (internal quotation marks omitted). Accordingly, we have no jurisdiction to review a dismissal without prejudice.

**III.**

**¶20** Finally, both parties seek an award of attorneys' fees and costs on appeal. Neither party, however, articulates a basis for an award of fees on appeal. *See Neal v. Brown*, 219 Ariz. 14, 20, ¶ 22, 191 P.3d 1030, 1036 (App. 2008). Moreover, because neither party was completely successful, we will not

award fees or costs to either. We will, however, allow the trial court to consider the issue of fees and costs on appeal once this case has been resolved. *See Liristis v. Am. Family Mut. Ins. Co.*, 204 Ariz. 140, 146, ¶ 25, 61 P.3d 22, 28 (App. 2002).

**CONCLUSION**

**¶21** Based on the foregoing, we affirm in part, reverse in part and remand this matter back to the trial court for further proceedings.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
PATRICIA A. OROZCO, Judge

/s/
_____
RANDALL M. HOWE, Judge