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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 10/30/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

RES-AZ SDL, LLC, a Florida ) 1 CA-CV 11-0817  
limited liability company, )  
) DEPARTMENT B  
Plaintiff/Appellant, )  
) **MEMORANDUM DECISION**  
v. ) (Not for Publication -  
) Rule 28, Arizona Rules  
STEVEN J. LENZMEIER and DEBRA M. ) of Civil Appellate  
LENZMEIER, as husband and wife, ) Procedure)  
)  
Defendants/Appellees. )  
\_\_\_\_\_)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-031644

The Honorable John Christian Rea, Judge

**AFFIRMED**

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Gordon Silver Phoenix  
By Thomas E. Littler  
And Loren A. Morris  
Attorneys for Appellant

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By Stockton D. Banfield  
Attorneys for Appellee Steven J. Lenzmeier

Law Office of Mark Bregman Phoenix  
By Mark A. Bregman  
Attorneys for Appellee Debra M. Lenzmeier

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O R O Z C O, Judge

¶1 Appellant, RES-AZ SDL, LLC (RES-AZ) appeals from the trial court's grant of summary judgment in favor of Steven Lenzmeier and Debra Lenzmeier (collectively, the Lenzmeiers) on its claim for a deficiency judgment. Additionally, RES-AZ requests that this Court reverse the trial court's finding that RES-AZ's predecessor-in-interest breached the loan agreement and that the Federal Deposit Insurance Corporation (FDIC) and the Lenzmeiers' loan modification was a product of duress. For the reasons set forth below, we affirm.

#### **PROCEDURAL AND FACTUAL HISTORY**

¶2 The Lenzmeiers entered into a construction-to-permanent loan agreement with Choice Bank in the amount of \$2,475,000.00, with the intention of building a custom home that would become their primary residence. The loan agreement allowed for draws as construction progressed. The Lenzmeiers began to make draws to construct their home; but were exempt from making payments until the residence was completed.

¶3 Choice Bank merged with Silver State Bank (Silver State) and Silver State initially continued to allow the Lenzmeiers to take draws. Subsequently, Silver State failed and discontinued the draws to the Lenzmeiers. The Lenzmeiers had drawn \$1,400,000.00 of the loan when Silver State stopped issuing draws.

¶4 The FDIC was subsequently appointed Receiver for Silver State and refused to honor the original loan agreement. The FDIC and the Lenzmeiers entered into a loan modification agreement, decreasing the loan amount from \$2,475,000.00 to \$1,919,968.11.<sup>1</sup> Before the loan modification agreement took place, the Lenzmeiers used \$262,400.80 of their own money to fund construction. After the Lenzmeiers received the loan modification amount from the FDIC (approximately \$500,000.00), they reimbursed themselves for the money spent out of pocket and used the remainder on the construction of the house.

¶5 Shortly thereafter, the Lenzmeiers defaulted on the loan with the FDIC.<sup>2</sup> At the time of the default, the Lenzmeiers had not made any payments towards the principal balance but had made one payment of \$107,978.20 towards interest on the loan. The residence was unfinished when they defaulted on the loan.

¶6 The FDIC assigned its interest in the loan to Multibank 2009-1 RES-ADC Venture, LLC (Multibank), and Multibank assigned its interest in the loan to RES-AZ. The real property was sold at a trustee's sale to RES-AZ for its credit bid. At the time of

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<sup>1</sup> This new amount reflected an approximate \$500,000.00 difference between the original loan amount and the modification.

<sup>2</sup> The trial court found that this was in part due to the FDIC's unwillingness to honor the original loan agreement's interest reserve provisions.

the sale, the Lenzmeiers owed \$2,186,384.01,<sup>3</sup> and the market value of the real property was valued at \$880,004.00. This resulted in a total loan deficiency in the amount of \$1,311,578.15 after adding \$5,198.14 in fees associated with the sale.

¶17 RES-AZ filed a complaint against the Lenzmeiers seeking a deficiency judgment for the difference. The Lenzmeiers filed an answer and counterclaimed for breach of contract, breach of the covenant of good faith and fair dealing and wrongful foreclosure. The Lenzmeiers subsequently moved for summary judgment contending that they were entitled to protection under the anti-deficiency statute. They also alleged that their duty to perform on the note was discharged due to the doctrine of frustration of purpose.

¶18 The trial court granted summary judgment to the Lenzmeiers, finding that they would have completed construction and used the dwelling as their primary residence but for the breach by the lender Silver State and the FDIC's refusal to honor the original loan agreement. It also found that the anti-deficiency statute applied, protecting the Lenzmeiers from a judgment on the loan's remaining balance. Additionally, the

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<sup>3</sup> The discrepancy between the loan modification amount of \$1,919,968.11 and the final debt owed of \$2,186,384.01 was due to interest and attorney fees associated with the debt.

court noted that the the FDIC and the Lenzmeiers' loan modification agreement was not done under general economic pressure but was a product of duress.

¶9 RES-AZ timely appealed. We have jurisdiction under Arizona Revised Statutes (A.R.S.) section 12-2101.A.1 (Supp. 2011).<sup>4</sup>

## DISCUSSION

### Application of the Anti-Deficiency Statute

¶10 We review the trial court's entry of summary judgment de novo, viewing all evidence and reasonable inferences in the light most favorable to RES-AZ as the party opposing summary judgment. *Desert Mountain Props Ltd. P'ship v. Liberty Mut. Fire Ins. Co.*, 225 Ariz. 194, 214, ¶ 87, 236 P.3d 421, 441 (App. 2010). A motion for summary judgment should be granted if "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)(1). Arizona Revised Statutes § 33-814.G (Supp. 2011) states

If 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

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<sup>4</sup> Absent material revisions to this decision, we cite the current version of applicable statutes.

of the indebtedness and any interest, costs and expenses.

¶11 RES-AZ relies on *Mid Kansas Fed. Sav. & Loan Ass'n of Wichita v. Dynamic Dev. Corp.*, 167 Ariz. 122, 804 P.2d 1310 (1991), to argue that Arizona's anti-deficiency statute does not bar its claim. RES-AZ also asserts that property consisting of a lot with unfinished property on it does not qualify for anti-deficiency protection afforded by A.R.S. § 33-814.G. because the structure itself cannot be "utilized" as a dwelling, as the language of the statute requires.

¶12 In *Mid Kansas*, a commercial homebuilder defaulted on a loan that was to be used to construct homes for resale. 167 Ariz. at 124-25, 804 P.2d at 1312-13. The homebuilder sought protection under the anti-deficiency statute, and the lender argued that because the homes were not fully constructed, they were not being "utilized" for a single-family home. *Id.* at 125, 804 P.2d at 1313. Our supreme court, however, focused on the commercial nature of the property in finding that commercial residential property was not the type of dwelling that was protected under the anti-deficiency statute's language. *Id.* at 129, 804 P.2d at 1317. Specifically, the court found that properties limited to and utilized for single-family dwellings does not include commercial residential properties. *Id.* To qualify for protection under the statute, a property must be: (1)

property of two and one-half acres or less; (2) limited to and utilized for a dwelling; and (3) single one-family or single two-family in nature. A.R.S. § 33-814.G.

¶13 The *Mid Kansas* court also held that property was not *utilized as a dwelling* if it was unfinished *and* was being held for sale by an owner who does not have the intent to occupy the property. *Mid Kansas*, 167 Ariz. at 129, 804 P.2d at 1317. Furthermore, the court limited its holding to commercial residential properties that the mortgagor held for construction and eventual resale. *Id.*

¶14 *Mid Kansas* recognized a difference between property intended for eventual use as a dwelling and property currently utilized as a dwelling. *Id.* However, its holding did not stand for the proposition that a lot with unfinished *residential* property on it that has not been occupied would never satisfy the “utilized for a dwelling” requirement of the anti-deficiency statute.

¶15 The Lenzmeiers argue that this case is distinguishable from *Mid Kansas* and comparable to this court’s recent decision in *M & I Marshall & Ilsley Bank v. Mueller*, 228 Ariz. 478, 268 P.3d 1135 (App. 2011), *review denied*, No. CV-120019-PR. In *Mueller*, we held that although the home was not completed and the Muellers never occupied the home, the anti-deficiency statute applied

because they intended to use it as their primary residence upon its completion. *Id.* at 480, ¶ 11, 268 P.3d at 1137.

¶16 We agree with the Lenzmeiers that the present case is distinguishable from *Mid Kansas* and similar to *Mueller* because the property in this case was unfinished *residential* property intended for private residential use and was not being held out for resale.

### **Contractual Issues**

¶17 In addition, RES-AZ contends that the trial court erred in finding that its predecessor-in-interest, Silver State, breached the original loan agreement and that the the Lenzmeiers and the FDIC's loan modification was a product of duress. Because we find that the anti-deficiency statute applies, we need not address these issues.

### **Attorney Fees**

¶18 RES-AZ also requests that we reverse the trial court's award of \$17,164.25 in attorney fees. Because we uphold the trial court's application of the anti-deficiency statute, we need not address this issue. We also deny RES-AZ's request for attorney fees related to this appeal because they are not the prevailing party.

¶19 The Lenzmeiers request attorney fees incurred in this appeal pursuant to A.R.S. §§ 12-341.01 (2003) and 12-349 (2003) and Arizona Rule of Civil Appellate Procedure 21. As the



successful party on appeal, we award the Lenzmeiers their reasonable attorney fees and costs under A.R.S. §12-341.01 upon compliance with Arizona Rule of Civil Appellate Procedure 21. We do not find that RES-AZ acted in bad faith in bringing this appeal and therefore do not award attorney fees under A.R.S. §12-349.

**CONCLUSION**

¶20 For the foregoing reasons, we affirm the trial court's grant of summary judgment.

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PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

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MAURICE PORTLEY, Presiding Judge

/S/

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RANDALL M. HOWE, Judge