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See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
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RUTH A. WILLINGHAM,
CLERK
BY: mjt

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

WHITMOR CAPITAL MANAGEMENT, LLC, a) 1 CA-CV 12-0719
Massachusetts limited liability)
company,) DEPARTMENT C
)
Plaintiff/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules
) of Civil Appellate
JAE S. PARK and HOLLIE H. PARK,) Procedure)
husband and wife,)
)
Defendants/Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-028122

The Honorable Lisa Daniel Flores, Judge

AFFIRMED

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H O W E, Judge

¶1 Whitmor Capital Management, LLC ("Whitmor") appeals from the trial court's dismissal of Whitmor's complaint for breach of contract against Jae S. Park and Hollie H. Park ("the Parks"). Whitmor contends that the court erred in dismissing the complaint and abused its discretion in awarding attorneys' fees to the Parks. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In 2008, the Parks executed a Construction Loan Note for \$1,170,000 in future advances through GMAC Mortgage LLC (f/k/a GMAC Mortgage Corporation) ("GMAC"). The Parks obtained the loan to pay off an existing loan they used to purchase property located in Scottsdale, Arizona (the "property") and to construct a home on that property. The Parks secured the loan with a deed of trust on the property. The Parks defaulted on the loan before they began construction on the home.

¶3 On February 26, 2010, GMAC assigned its interest under the deed of trust and the loan to Whitmor. The trustee then conducted a duly noticed trustee's sale under the terms of the deed of trust and Arizona law, conveying the property to Whitmor, which made a credit bid. Whitmor then filed a complaint against the Parks for the deficiency balance, claiming breach of contract. The Parks answered the complaint and then filed a third-party complaint against GMAC for breach of contract and breach of covenant of good faith and fair dealing.

¶4 In December 2011, this Court issued an opinion in *M & I Marshall & Ilsley Bank v. Mueller*, 228 Ariz. 478, 269 P.3d 1135 (App. 2011), interpreting Arizona's anti-deficiency statute, Arizona Revised Statutes ("A.R.S.") section 33-814(G) (West 2013).¹ This Court held that the statute's requirement that property be "limited to and utilized for either a single one-family or a single two-family dwelling" is satisfied if the borrower purchased the property with the intent of constructing a dwelling and occupying it when completed. See A.R.S. § 33-814(G); *M & I Marshall*, 228 Ariz. at 480, ¶ 11, 268 P.3d at 1137. Based on this decision, the Parks moved to dismiss Whitmor's complaint, arguing that § 33-814(G) barred Whitmor's deficiency claim. The Parks asserted that they took out a loan intending to build a dwelling and occupy it upon its completion. In support, the Parks cited the loan documents Whitmor referenced in the complaint and attached to their motion a copy of the Loan Application, which indicated the residence would be the Parks' primary residence upon completion. Whitmor agreed that the *M & I Marshall* decision disposed of its claim, but moved to stay the proceedings pending review of the *M & I Marshall* decision.

¹ We cite the current version of the applicable statutes because no revisions material to this decision have since occurred.

¶15 On May 31, 2012, the trial court denied Whitmor's motion to stay and dismissed its complaint with prejudice. The court found that pursuant to *M & I Marshall*, "the anti-deficiency provisions of A.R.S. § 33-814 preclude recovery for any alleged deficiency owed."

¶16 After the court dismissed Whitmor's complaint, the Parks submitted their Application for Attorneys' Fees and Costs. In their application, the Parks contended that all the factors courts consider in awarding attorneys' fees favored awarding fees. Specifically, the Parks argued that Whitmor's claim had no merit, they had prevailed on Whitmor's only claim, Whitmor had not presented a novel issue, and granting fees would not discourage other parties from bringing valid claims. Whitmor responded that its claim had merit and the remaining factors weighed against awarding the Parks their attorneys' fees. Based on the Parks' application, the court awarded them \$7,955 in attorneys' fees. However, the court did not allow the Parks the fees associated with their third-party complaint against GMAC.

¶17 Whitmor timely appeals. We have jurisdiction under A.R.S. § 12-2101(A).

DISCUSSION

¶18 Whitmor argues that the court erred in dismissing the complaint pursuant to a change in Arizona's anti-deficiency

statute and abused its discretion in awarding the Parks attorneys' fees.

I. Anti-Deficiency Statute

¶9 Because the trial court considered evidence extrinsic to the complaint in dismissing the claim, and Whitmor does not argue the court erred in considering this as a motion to dismiss, we treat this as a motion for summary judgment. See Ariz. R. Civ. P. 12(b); *Smith v. CIGNA HealthPlan*, 203 Ariz. 173, 176, ¶ 8, 52 P.3d 205, 208 (App. 2002); *Blanchard v. Show Low Planning & Zoning Comm'n*, 196 Ariz. 114, 117, ¶ 11, 993 P.2d 1078, 1081 (App. 1999). We review a grant of summary judgment to determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *CIGNA*, 203 Ariz. at 176, ¶ 8, 52 P.3d at 208. "[W]e view all facts and reasonable inferences therefrom in the light most favorable to the party against whom the judgment was entered." *Blanchard*, 196 Ariz. at 117, ¶ 11, 993 P.2d at 1081.

¶10 By failing to argue this anti-deficiency issue to the trial court, arguing instead that the court should stay the proceedings, Whitmor has waived the issue on appeal. *Maher v. Urman*, 211 Ariz. 543, 548, ¶ 13, 124 P.3d 770, 775 (App. 2005). However, even if Whitmor had not waived this issue on appeal, its argument has no merit. The anti-deficiency statute, A.R.S. §

33-814(G), lays out the requirements an owner must meet for protection:

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 of the indebtedness and any interest, costs and expenses.

This Court interpreted § 33-814(G) in *M & I Marshall* to protect individual homeowners even though their homes are not complete so long as they "purchased the property with the purpose of occupying the dwelling upon completion." 228 Ariz. at 480, ¶ 11, 268 P.3d at 1137. This interpretation satisfied the anti-deficiency statute's primary purpose to protect homeowners from deficiency judgments. *Id.* at ¶¶ 9-11.

¶11 The record supports the trial court's conclusion that the Parks fell within the statute based on *M & I Marshall*. The Loan Application indicated the Parks intended to use the home as their primary residence upon completion. Instead of arguing that the Parks did not intend to use the home for this purpose, Whitmor agreed that *M & I Marshall* disposed of the deficiency action.

¶12 We disagree with Whitmor's argument that the Parks were not protected under the statute because they had not begun construction. The focus in *M & I Marshall* was on the homeowner's

intent, not on the extent of the dwelling's construction. *Id.* at ¶ 10-11 ("M & I's argument that a person has to physically inhabit the dwelling would create a blurry and artificial line. An individual facing the possibility of foreclosure may camp out in the unfinished home, claiming to be 'utilizing' the dwelling.")

¶13 We also disagree with Whitmor's argument that *Independent Mortgage Co. v. Alaburda*, 230 Ariz. 181, 281 P.3d 1049 (App. 2012) is relevant to this case. While this Court in that case did interpret the definition of dwelling under the statute, the interpretation was for the limited purpose of a vacation home. *Independent Mortg. Co.*, 230 Ariz. at 182, ¶ 2, 281 P.3d at 1050. Whitmor does not argue that the Parks' dwelling was to be a vacation home. Moreover, the Parks' dwelling was unfinished, whereas the home in *Independent Mortgage Co.* was complete. *Id.* at 184, ¶ 9, 281 P.3d at 1052. Thus, we agree with the trial court that the anti-deficiency statute protects the Parks from a deficiency judgment.

II. Attorney Fees under A.R.S. § 12-341.01

¶14 "[W]e review a trial court's award or denial of attorney fees for an abuse of discretion." *Democratic Party of Pima Cnty. v. Ford*, 228 Ariz. 545, 547, ¶ 6, 269 P.3d 721, 723 (App. 2012). Under A.R.S. § 12-341.01(A), "[i]n any contested action arising out of a contract, express or implied, the court

may award the successful party reasonable attorney fees." A court's awarding of fees "is discretionary with the trial court, and if there is any reasonable basis for the exercise of such discretion, its judgment will not be disturbed." *Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 569, ¶ 9, 155 P.3d 1090, 1093 (App. 2007). Some factors the court should consider in deciding whether to award fees include the merits of the unsuccessful party's claim, whether the claim could have been avoided or settled, whether the successful party's efforts were completely superfluous to the result, whether fees against the unsuccessful party would cause extreme hardship, whether the successful party did not prevail with respect to all of the relief sought, the novelty of the legal question, and whether an award would discourage other parties with tenable claims. *Uyleman v. D.S. Rentco*, 194 Ariz. 300, 305-06, ¶ 27, 981 P.2d 1081, 1086-87 (App. 1999). Our analysis of the factors shows that the court had a reasonable basis for awarding the Parks their attorneys' fees.

¶15 First, the Parks' actions were not superfluous to the result. While Whitmor's claim was eventually dismissed because of *M & I Marshall*, the Parks' efforts before this decision in answering the complaint and conducting discovery were necessary in defending against Whitmor's claim. Second, Whitmor has not shown that granting attorneys' fees to the Parks would cause

extreme hardship. Whitmor cites *Scottsdale Memorial Health System, Inc. v. Clark*, 164 Ariz. 211, 217, 791 P.2d 1094, 1100 (App. 1990), in arguing that substantial hardship occurs when a court awards attorneys' fees against a party that already suffered a loss in the inability to enforce a lien. In that case, this Court found that the trial court did not abuse its discretion in refusing to assess attorneys' fees in excess of \$188,000. *Id.* Here, the court approved only \$7,955 in attorneys' fees. Moreover, other than arguing that this award would result in a windfall, Whitmor provided no financial records or any other evidence to the court to support this argument.

¶16 Third, the Parks were the successful party. The court has substantial discretion in determining "who is a 'successful party.'" *Fulton Homes Corp.*, 214 Ariz. at 572, ¶ 25, 155 P.3d at 1097. While the court ruled in the Parks' favor, Whitmor argues that the Parks were not the successful party because the Parks did not succeed on their third-party action. But "[p]artial success does not preclude a party from 'prevailing' and receiving a discretionary award of attorneys' fees." *Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9, 14, ¶ 24, 261 P.3d 784, 789 (App. 2011). Moreover, "[w]hen a case involves several claims based upon different facts or legal theories," "the court may decline to award fees for those unsuccessful separate and distinct claims." *Id.* at ¶ 23 (internal quotation marks

omitted). Here, the Parks prevailed on the only claim Whitmor brought against them, and the court did not award the Parks any of the attorneys' fees associated with their third-party claim.

¶17 Fourth, Whitmor did not advance a novel legal question. Whitmor argues its claim was novel because it advanced in good faith the same claim as raised in *M & I Marshall*, which resolved an issue of first impression. As Whitmor admits in its argument, however, it brought forth the same deficiency claim as advanced in *M & I Marshall*. The novelty that arose in *M & I Marshall* was the defense. Furthermore, A.R.S. § 12-341.01(A) allows fees to the "successful party" in an action arising out of contract without regard to the good faith of the unsuccessful party. Fifth, we find that the court's award will not discourage parties from bringing valid claims for fear of incurring substantial amounts of attorneys' fees. The award of \$7,955 in this case is not so substantial that it will deter a party from bringing a valid claim. While some of the factors may not have supported an award of fees, the trial court did not abuse its discretion in awarding the Parks their attorneys' fees.

III. Costs on Appeal

¶18 The Parks request an award of attorneys' fees on appeal pursuant to A.R.S. § 12-341.01 and Arizona Rule of Civil Appellate Procedure 21. Whitmor requests attorneys' fees and costs under Rule 21, A.R.S. § 12-341.01, and -341. Section 12-

341.01(A) provides that attorneys' fees may be awarded to the successful party in a contested action arising out of contract. While the Parks have prevailed, we decline to award attorneys' fees. However, pursuant to § 12-341, we award the Parks their costs on appeal upon compliance with Rule 21.

CONCLUSION

¶19 For the reasons stated above, we affirm the trial court's dismissal and award of attorneys' fees.

_____/s/_____
RANDALL M. HOWE, Judge

CONCURRING:

_____/s/_____
PETER B. SWANN, Presiding Judge

_____/s/_____
DIANE M. JOHNSEN, Judge