IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ARIZONA FEDERAL CREDIT UNION, a federally chartered credit union, *Plaintiff/Appellee*,

v.

LA SHAUNA COLEMAN, an individual, *Defendant/Appellant*.

No. 1 CA-CV 13-0004
FILED 11-19-2013

Appeal from the Superior Court in Maricopa County
No. CV2011-096840
The Honorable Mark F. Aceto, Judge

AFFIRMED

COUNSEL

Mark A. Kirkorsky, PC, Tempe
By Mark A. Kirkorsky

Counsel for Plaintiff/Appellee

La Shauna Coleman, Gilbert

Defendant/Appellant In Propria Persona

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Maurice Portley and Judge John C. Gemmill joined.

C A T T A N I, Judge:

¶1 La Shauna Coleman appeals from entry of summary judgment in favor of Arizona Federal Credit Union ("Lender"). For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In August 2003, Coleman obtained title to real property in Phoenix by a gift quitclaim deed. In November 2005, she used the property as collateral for a loan, and in May 2006, she again used the property as collateral, this time for a home equity line of credit from Lender. Coleman executed deeds of trust in favor of both creditors, with the 2005 loan holding senior position. Over the next several years, Coleman used the line of credit for cash advances.

¶3 In September 2009, after Coleman had defaulted on both loans, a successor to the first position lender exercised its rights under its deed of trust to initiate a trustee's sale of the property. The property was sold at the trustee's sale in December 2009.

¶4 Lender subsequently filed a complaint against Coleman for breach of contract for failing to make timely payments against the outstanding balance owed on the line of credit. After Coleman answered the complaint, Lender moved for summary judgment. Lender argued that summary judgment was appropriate because (1) Coleman did not deny the validity of the contract and her breach thereof and (2) the loan is not subject to Arizona's anti-deficiency provisions. Coleman moved to dismiss, arguing that Lender's complaint failed to state a claim. Alternatively, Coleman requested summary judgment in her favor on the basis that Lender's complaint was barred by estoppel and laches because Lender failed to object to the amount of the trustee's sale and failed to assert its rights as a junior lien holder under the deed of trust.

¶5 After reviewing the pleadings and the supporting record, the superior court granted summary judgment in favor of Lender, denied

Coleman's motions to dismiss and for summary judgment, and awarded Lender its reasonable attorney's fees and costs.

¶6 Coleman timely appealed. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) and -2101(A)(1).[1]

DISCUSSION

¶7 Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a); *Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). We review de novo the superior court's grant of summary judgment, viewing the facts in the light most favorable to the party against which judgment is entered. *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 193, 195, 805 P.2d 1012, 1014, 1016 (App. 1990). We will affirm summary judgment "if the facts produced in support of the claim [] have so little probative value, given the quantum of evidence required," that no reasonable person could find for its proponent. *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008. We can affirm summary judgment if it is correct on any basis supported by the record, even if not explicitly considered by the superior court. *See Mutschler v. City of Phx.*, 212 Ariz. 160, 162, ¶ 8, 129 P.3d 71, 73 (App. 2006); *Gibson v. Boyle*, 139 Ariz. 512, 517 n.1, 679 P.2d 535, 540 n.1 (App. 1983).

¶8 Coleman argues that Lender was barred from pursuing its breach of contract claim under the doctrine of collateral estoppel because Lender failed to initiate any action, other than filing its proof of claim during her prior bankruptcy proceeding. Coleman did not raise this issue in the superior court, however, and she has thus waived her right to raise it on appeal. *See Lansford v. Harris*, 174 Ariz. 413, 419, 850 P.2d 126, 132 (App. 1992) (noting that "[o]n appeal from summary judgment, the appellant may not advance new theories or raise new issues to secure a reversal").

¶9 Coleman further contends that Lender waived its right to sue for breach of contract when it failed to present any claims or defenses during the trustee's sale under A.R.S. § 33-811(C). Section 33-811(C) provides that a trustor and anyone who receives a notice of a trustee's sale

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[1] Absent material revisions after the relevant date, we cite to the current version of the statute.

"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" prior to the scheduled date of sale. But by its terms, this provision only applies to defenses or objections *to the sale* and does not operate as a waiver of every right or claim that a junior lien holder may otherwise have. *See Resolution Trust Corp. v. Segel*, 173 Ariz. 42, 46, 839 P.2d 462, 466 (App. 1992).

¶10 Coleman also asserts that Lender voluntarily waived its "deed of trust contract" by allowing its security to be wiped away during the trustee's sale. But the deed of trust related only to the Lender's security for the loan; the deed of trust did not otherwise change Coleman's contractual obligation. *See id.* (holding that a lender's right to waive its security and sue on a promissory note secured by a junior non-purchase money deed of trust is not affected by a senior deed holder's decision to exercise its right to non-judicial foreclosure).

¶11 Finally, Coleman contends that Arizona's anti-deficiency statutes preclude Lender from suing on its promissory note. Arizona's deed of trust anti-deficiency statute, A.R.S. § 33-814(G), states that if certain real property "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 anti-deficiency statute only applies, however, to the sale of property pursuant to the trustee's power of sale, *id.*, and the beneficiary may elect instead to foreclose on the deed of trust "in the manner provided by law for the foreclosure of mortgages," A.R.S. § 33-807(A).

¶12 A beneficiary of a deed of trust may "elect to waive the security and sue directly on the promissory note." *Wells Fargo Credit Corp. v. Tolliver*, 183 Ariz. 343, 345, 903 P.2d 1101, 1003 (App. 1995). If the beneficiary elects to sue on the promissory note, A.R.S. § 33-814(E) provides that the rules governing foreclosure of mortgages, including the mortgage anti-deficiency statute set forth in Section 33-729(A), apply. This anti-deficiency provision, which limits recovery beyond the value of the property securing the mortgage, is only applicable, however, to loans that "secure the payment of the balance of the purchase price." A.R.S. § 33-729(A); *Baker v. Gardner*, 160 Ariz. 98, 106, 770 P.2d 766, 774, *as supplemented*, (1989).

¶13 Here, Coleman acquired the subject property prior to the loan through a gift quitclaim deed, so the loan was not used as purchase money for the subject property. Accordingly, Lender was entitled to sue

for the outstanding balance owed on its note, and the superior court did not err by granting summary judgment in favor of Lender.

CONCLUSION

¶14 For the foregoing reasons, we affirm the superior court's grant of summary judgment in favor of Lender.