IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

BRIMET II, L.L.C.; ME 12, L.L.C., *Petitioners*,

v.

THE HONORABLE DOUGLAS RAYES, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, *Respondent Judge,*

DESTINY HOMES MARKETING, L.L.C., *Real Party in Interest.*

No. 1 CA-SA 13-0297
FILED 12-23-2013

Petition for Special Action from the Superior Court in Maricopa County
No. CV2009-015587
The Honorable Douglas L. Rayes, Judge

JURISDICTION ACCEPTED; RELIEF GRANTED

COUNSEL

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DECISION ORDER

Judge Patricia K. Norris delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Kenton D. Jones joined.

N O R R I S, Judge:

¶1 This special action challenges provisions of a judgment entered by the superior court on remand that Petitioners, Brimet II, L.L.C. and ME 12, L.L.C. (collectively, "Brimet"), argue exceeded the instructions and mandate issued by this court in *Brimet II, L.L.C. v. Destiny Homes Marketing, L.L.C.*, 231 Ariz. 457, 296 P.3d 993 (App. 2013) ("*Brimet II*"). Because the appropriate method of seeking review of a superior court judgment on remand entered pursuant to specific instructions by an appellant court is through special action, *Scates v. Ariz. Corp. Comm'n*, 124 Ariz. 73, 76, 601 P.2d 1357, 1360 (App. 1979) (citation omitted), the court accepts special action jurisdiction and grants relief.

¶2 As explained in *Brimet II*, Northern Bank, N.A., as Brimet's predecessor in interest, filed a quiet title action against the real party in interest, Destiny Homes Marketing, L.L.C. ("Destiny") to obtain "judicial confirmation" that a trustee's sale of certain real property ("Property") had extinguished an option contact ("Option") granted to Destiny by Destiny Holdings II, L.L.C. ("Borrower"). 231 Ariz. at 458-59, ¶¶ 2-6, 296 P.3d at 994-95. Brimet moved for summary judgment and, pursuant to the doctrines of replacement and equitable subrogation, argued Destiny's Option had been "wiped out" through the foreclosure. *Id.* at 459, ¶ 6, 296 P.3d at 995. In response, Destiny cross-moved for partial summary judgment. In its cross-motion, Destiny asserted the Option was senior to the interest acquired by Brimet and had not been extinguished by the trustee's sale. Notably, Destiny did not seek summary judgment on its counterclaims in which it had requested a declaration that the Option remained a "valid, senior interest in the Property enforceable as against Brimet and all subsequent transferees of the Property . . . pursuant to . . . the Option's express terms," and an order "[e]stablishing [its] interests in the Property under the Option."

¶3 The superior court denied Destiny's motion and granted Brimet's motion for summary judgment, ruling "the doctrines of replacement and equitable subrogation apply here and collectively have

the legal effect of wiping out Destiny's option upon Northern Trust's foreclosure of its priority lien position."

¶4 Destiny appealed. We reversed and held Northern's foreclosure had not extinguished the Option:

> Destiny's Option was not extinguished when Northern foreclosed on its deed of trust and purchased the property at the trustee's sale. Therefore, Brimet did not acquire title to the property free and clear of the Option and the Option remains as a senior encumbrance on the property.

Brimet II, 231 Ariz. at 461, ¶ 21, 296 P.3d at 997. We remanded the matter to the superior court "with instructions that summary judgment be entered in favor of Destiny." *Id.* at ¶ 23.

¶5 On remand, over Brimet's objection, the superior court entered a judgment ("remand judgment") that, as relevant here, stated in paragraphs 2(a) and 2(f) the following:

> (a) That title in the real property further described on **Exhibit A** attached hereto**,** also known as Lot Nos. 1, 4-10 and 13-16 of Mountainside Estates, located at the Northwest corner of 19th Street and East Dobbins Road, Phoenix, Arizona ("Property"), is hereby quieted in favor of Destiny Homes Marketing LLC ("Destiny");
>
> (f) That the Option is valid and enforceable according to its terms against all current owners of the Property or lot(s) therein, and their successors and assigns.

¶6 Addressing paragraphs 2(a) and 2(f) in reverse order, we hold these provisions exceeded our instructions on remand. *See Raimey v. Ditsworth*, 227 Ariz. 552, 555, ¶ 6, 261 P.3d 436, 439 (App. 2011) (superior court does not have authority to transgress upon obvious intent of appellate court by contravening on remand decision and mandate previously issued; appellate mandate, along with decision it seeks to

implement, is binding on superior court and enforceable according to its true intent and meaning).

¶7 First, the issue resolved by the superior court on summary judgment was whether the trustee's sale extinguished the Option or whether the Option remained as a senior encumbrance on the Property. Accordingly, that was the only issue we addressed and decided in *Brimet II*. When we instructed that summary judgment be entered in favor of Destiny, the true intent and meaning of our instruction was to direct the superior court to enter a judgment that confirmed the Option remained a senior encumbrance on the Property and that Brimet had not acquired title to the Property free and clear of the Option.[1] We did not address or decide the enforceability of the Option. Accordingly, paragraph 2(f) of the judgment that stated the Option was "valid and enforceable according to its terms against all current owners of the Property or lot(s) therein, and their successors and assigns" exceeded our instructions on remand.

¶8 Paragraph 2(a) of the remand judgment purported to quiet title in the Property in favor of Destiny. Although, as we explained in *Brimet II*, the Option remained a senior encumbrance on the Property, we did not direct the court to quiet title to the property in Destiny. A quiet title action provides a mechanism to determine and quiet title to real property and may be brought by anyone having or claiming an interest therein. *See generally* Ariz. Rev. Stat. ("A.R.S.") § 12-1101 (2003). The interest must be in the title, not merely in the land. *Saxman v. Christmann*, 52 Ariz. 149, 154, 79 P.2d 520, 522 (1938) (criticized on other grounds by *Rundle v. Republic Cement Corp.*, 86 Ariz. 96, 97, 101, 341 P.2d 226, 227, 229 (1959)). A quiet title action may not be brought by a person who does not claim title to or in the property. *Id.* An option, until and unless validly exercised, does not convey title. *Wilson v. Metheny*, 72 Ariz. 339, 344, 236 P.2d 34, 37-38 (1951). Thus, as we recognized in *Brimet II*, the Option is an encumbrance, and an optionee, as Destiny is here, may not bring an action

[1]The remand judgment recited that the Option "is a valid interest in, and encumbrance upon, the Property and each lot therein;" the foreclosure sale "did not extinguish or otherwise invalidate the Option;" the Option "has been and remains superior to all other interests in the Property since November 12, 2004;" and "all subsequent purchasers of the Property, or any lot therein, purchased such Property and/or lot(s) subject to the Option." Brimet has not challenged these provisions of the remand judgment and has conceded they fall within our remand instructions.

to quiet title. *Saxman*, 52 Ariz. at 154, 79 P.2d at 522 ("encumbrancers cannot maintain an action to quiet title, for they have no title"). Although in *Brimet II* we held Destiny's Option remained a senior encumbrance on the property, as a matter of law, Destiny was not entitled to assert a claim to quiet title in the Property, and paragraph 2(a) which purported to quiet title to the property in Destiny was improper.

¶9 For the foregoing reasons, we delete paragraphs 2(a) and 2(f) from the remand judgment. We express no opinion on the enforceability of the Option against all current owners of the Property or lot(s) therein and their successors and assigns. We also deny Brimet's motion to consolidate this special action with its appeal from the remand judgment and the "Notice and Stipulation re: Motion to Consolidate Special Action and Appeal" as moot.

Ruth A. Willingham · Clerk of the Court
FILED: gsh