IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

R & F INVESTORS, LLC, an Arizona limited liability company,
Plaintiff/Appellant,

v.

FRANK A. CIOLLI and ANITA CIOLLI, his wife, *Defendants/Appellees*.

No. 1 CA-CV 14-0157
FILED 10-6-2015

Appeal from the Superior Court in Maricopa County
No. CV2010-029905
The Honorable Lisa Daniel Flores, Judge

AFFIRMED IN PART AND REMANDED IN PART

COUNSEL

The Law Office of Libby Banks, PLLC, Phoenix
By Libby Banks
Counsel for Plaintiff/Appellant

Berens, Kozub, Kloberdanz & Blonstein, PLC, Phoenix
By Richard W. Hundley
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Randall M. Howe and Judge Andrew W. Gould joined.

S W A N N, Judge:

¶1 This is an appeal from a deficiency judgment. The lender's successor-in-interest, R & F Investors, LLC ("R & F"), contends that the judgment should have included delinquent property taxes that it paid after the trust property was sold at a trustee's sale. We disagree. The court properly excluded the amount of the taxes from its calculation of the amount owed as of the date of the trustee's sale, and R & F waived the taxes' inclusion in the calculation of the property's fair market value. We further hold that R & F failed to comply with contractual provisions that could have allowed for default interest to accrue as of the date of the tax delinquency.

¶2 R & F also contends that it was entitled to recover additional attorney's fees, and its expert's fees. We find no abuse of discretion in the amount of attorney's fees awarded, but we agree that under the broad terms of the promissory note, R & F was entitled to recover its expert's fees. We therefore remand for entry of an award of expert's fees to R & F, but we otherwise affirm.

FACTS AND PROCEDURAL HISTORY

¶3 In March 2007, Webber & Associates loaned $725,000 to Frank and Anita Ciolli ("the Ciollis"), and the Ciollis executed a promissory note secured by a deed of trust against commercial property ("the Property"). Soon thereafter, Webber & Associates transferred its interests in the note and the deed of trust to a group of entities: Leonard A. Frankel, Trustee of the Leonard A. Frankel Trust; Reiss/Excelsior, LLC; and Barry Reiss and Leni Sue Reiss as Trustees of the Excelsior Trust (collectively, "Frankel").

¶4 The note required the Ciollis to pay Frankel monthly interest payments starting in May 2007, a principal installment payment in April 2010, and a final payment in April 2011. Under the deed of trust, the Ciollis were also required to pay all taxes and assessments affecting the Property in a timely manner. The deed of trust provided that if the Ciollis

failed to pay the property taxes, Frankel could do so to protect the security and the Ciollis would be liable to repay Frankel for the expenditure, with interest. Further, the note provided that if the Ciollis defaulted on any of their obligations under the note or the deed of trust, Frankel could declare all unpaid principal and accrued interest immediately due, and default-rate interest would apply. The note also provided that if a collection action were brought, the Ciollis would be responsible for all costs.

¶5 The Ciollis failed to pay the taxes on the Property starting in June 2008, failed to make the principal installment payment in April 2010, and were sometimes late in making the monthly interest payments. Accordingly, in May 2010, Frankel recorded a notice of trustee's sale. At the August 2010 sale, Frankel purchased the Property for $500,000. Frankel subsequently assigned title to the Property, and the right to pursue a deficiency claim, to R & F. R & F promptly brought an action against the Ciollis under A.R.S. § 33-814, seeking a deficiency judgment of over $450,000.

¶6 While the deficiency action was pending, R & F paid the delinquent property taxes. R & F included this expenditure, plus default interest dating from the Ciollis' initial failure to pay the taxes, in its calculation of the amount due under the note. The Ciollis moved for summary judgment with respect to these aspects of the calculation, arguing that they were not liable for the delinquent taxes, or for interest related thereto, because Frankel did not pay the taxes before the trustee's sale. In response, R & F argued that it was entitled to recover its tax expenditure under an unjust enrichment theory, and was in any event entitled to default interest based on the unpaid taxes and late interest payments.

¶7 The Ciollis filed a reply and the superior court scheduled oral argument. Before the time set for oral argument, R & F filed a "Bench Memorandum" purporting to address "new arguments" raised in the reply. The court declined to consider the memorandum, concluding that the summary judgment motion had been fully briefed and that the memorandum was not authorized by the Rules of Civil Procedure. After hearing oral argument, the court granted partial summary judgment for the Ciollis, ruling that the amount due under the note included neither the delinquent property taxes nor default interest. The court denied as futile R & F's oral motion to amend its complaint to allege an unjust enrichment claim.

¶8 The matter proceeded to trial on the issue of the Property's fair market value. At trial, the parties presented valuation experts'

reports, deposition transcripts, and testimony. After considering the evidence, the court concluded that as of the date of the trustee's sale, the Property's fair market value was $765,000 and the amount due under the note was approximately $817,000. The court further concluded that R & F was entitled to reasonable attorney's fees and costs under the note and A.R.S. §§ 12-341 and -341.01.

¶9 R & F applied for approximately $15,000 in attorney's fees billed by Barry Allen Reiss, P.C. ("the Reiss firm"), and $39,000 in attorney's fees billed by Davis, McKee P.L.L.C. ("the Davis firm"). R & F also applied for over $9,000 in costs, including $7,750 attributed to its valuation expert. The Ciollis objected to R & F's applications. The Ciollis argued that R & F could not recover fees billed by the Reiss firm because Mr. Reiss was one of R & F's two members, and in any event could not recover all fees sought because some of the fees were unreasonable and R & F was only partially successful in the litigation. The Ciollis also argued that the note did not provide for the recovery of non-taxable costs such as expert's fees.

¶10 The court entered a signed, final judgment in favor of R & F for a deficiency of $52,720. The judgment also awarded R & F attorney's fees of $36,340 and costs of approximately $1,300. R & F filed a motion to vacate and correct the judgment, arguing that the judgment misidentified the date from which interest began to accrue on the deficiency, and that the judgment erroneously failed to award fees for the work done by the Reiss firm. Before the court ruled on the motion, R & F timely filed a notice of appeal. We suspended the appeal and the superior court amended the judgment *nunc pro tunc* to reflect that interest began to accrue on the deficiency as of the date of the trustee's sale. The appeal was then reinstated.

DISCUSSION

¶11 R & F raises a number of issues on appeal. We address them in turn.

I. THE SUPERIOR COURT CORRECTLY EXCLUDED THE DELINQUENT TAXES FROM R & F'S RECOVERY.

¶12 R & F contends that it was entitled to recover the amount it paid in delinquent property taxes.[1] In support of this contention, R & F makes several alternative arguments. Each of these arguments fails.

¶13 Under A.R.S. § 33-814(A), a lender (or, as here, a lender's assignee) may recover a post-trustee's-sale deficiency judgment of "an amount equal to the sum of the total amount owed the beneficiary as of the date of the sale, as determined by the court less the fair market value of the trust property on the date of the sale as determined by the court or the sale price at the trustee's sale, whichever is higher." The statute defines fair market value as "the most probable price, as of the date of the execution sale, . . . after deduction of prior liens and encumbrances with interest to the date of sale, for which the real property or interest therein would sell after reasonable exposure in the market under conditions requisite to fair sale, with the buyer and seller each acting prudently, knowledgeably and for self-interest, and assuming that neither is under duress."

¶14 R & F first contends that the property taxes were part of "the total amount owed the beneficiary as of the date of the sale" because the Ciollis agreed to pay the taxes. But the property taxes were owed to the state, not to Frankel. *See* A.R.S. § 42-1004. Under the terms of the deed of trust, the Ciollis would be responsible for paying the amount of the taxes to Frankel only if Frankel elected to pay the taxes in the Ciollis' stead. Frankel did not do so. The amount of the taxes therefore was not part of the amount owed Frankel as of the date of the trustee's sale. And R & F's later payment of the taxes did not create retroactive liability. At the time R & F paid the taxes, the deed of trust was no longer effective because the trustee's sale had been completed. *See* A.R.S. § 33-811(B), (E) (providing that trustee's deed raises presumption of compliance with deed of trust and operates to convey title, interest, and claim in trust property subject only to liens, claims, and interests senior in priority to the deed of trust). Further, as we observed in *Hanley v. Pearson*,

---

[1] R & F also contends that the superior court erred by declining to address R & F's Bench Memorandum, which discussed several issues related to its payment of the taxes. The trial court was correct. The Bench Memorandum was effectively a sur-reply. Nothing in Ariz. R. Civ. P. 56(c)(2) authorizes such a filing in summary judgment proceedings.

> [a] trustor's obligations are placed in a deed of trust to protect the beneficiary, not a future purchaser of the encumbered property. . . . [A] purchaser at a trustee's sale does not need protection from the trustor's failure to satisfy his obligations under the deed of trust. The purchaser is expected and presumed to take into account existing senior liens in calculating an appropriate bid for the property.

204 Ariz. 147, 150, ¶ 13 (App. 2003).

¶15 R & F next contends that the property taxes were a "prior lien and encumbrance" on the property and therefore should have been deducted in the fair-market-value calculation. To be sure, a tax levied on real property constitutes a lien that is prior and superior to most other liens and encumbrances. A.R.S. § 42-17153(A), (C)(3). But R & F did not argue in the trial proceedings that the taxes were improperly omitted from the valuation calculation.[2] A party may waive aspects of the calculation. *See CSA 13-101 Loop, LLC v. Loop 101, LLC*, 236 Ariz. 410, 415, ¶ 24 (2014) ("[O]ur holding [that a borrower cannot prospectively waive the right to a hearing on fair market value] does not preclude a borrower from agreeing, after a non-judicial foreclosure commences, not to seek a fair market value determination."). R & F did so here. We will not address the issue for the first time on appeal. *See Richter v. Dairy Queen of S. Ariz., Inc.*, 131 Ariz. 595, 596 (App. 1982) ("It is settled that an appellate court cannot consider issues and theories not presented to the court below.").

¶16 R & F finally contends that it was entitled to recover its tax expenditure under an unjust enrichment theory. We hold that the court correctly denied R & F's motion to amend its complaint to allege unjust enrichment. The court may deny amendment if it would be futile. *Bishop v. State Dep't of Corrs.*, 172 Ariz. 472, 474-75 (App. 1992). A claim for unjust enrichment requires an enrichment, an impoverishment, a connection between the enrichment and the impoverishment, the absence of a justification for the enrichment and the impoverishment, and the absence of a legal remedy. *Trustmark Ins. Co. v. Bank One, Arizona*, 202

---

[2] The record on appeal does not include a transcript of the hearing on fair market value, but the parties' joint pretrial statement does not set forth any argument regarding deduction of the taxes. The responsibility to order relevant transcripts was R & F's. ARCAP 11(b), (c). "When a party fails to include necessary items, we assume they would support the court's findings and conclusions." *Baker v. Baker*, 183 Ariz. 70, 73 (App. 1995).

Ariz. 535, 541, ¶ 31 (App. 2002). Here, R & F had a legal remedy under § 33-814(A): the deduction of the taxes in the fair-market-value calculation. Accordingly, an unjust enrichment claim would have been futile.

II. THE SUPERIOR COURT CORRECTLY DECLINED TO AWARD DEFAULT INTEREST RELATED TO THE DELINQUENT TAXES.

¶17 R & F next contends that under the terms of the note, it was entitled to recover default interest dating from the Ciollis' initial failure to pay the property taxes. In considering this argument, we look to the plain meaning and the context of the note's terms, *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 259 (App. 1983), giving effect to every part of the note and harmonizing its provisions, *Chandler Med. Bldg. Partners v. Chandler Dental Group*, 175 Ariz. 273, 277 (App. 1993).

¶18 The note provides, in relevant part:

> Upon default made in the payment of any installment when due, or in any of the agreements contained in the Deed of Trust or other instruments securing this Note, Holder may without notice, at its sole option declare the entire sum of unpaid principal and accrued interest to become immediately due and payable. In such event the entire unpaid principal balance and accrued interest shall bear interest from the date of default at a rate equivalent to the interest rate herein set forth [12.25% per annum] (or as such interest rate may be modified, from time to time) plus six percent (6%) per annum, (the "default rate"). The default rate shall also be applied to the unpaid principal balance at all times that any portion of the debt evidenced hereby is past due.

R & F contends that under this provision, any event of default entitled Frankel to silently accelerate the debt and begin applying the default interest rate to the accelerated amount. We disagree. Under the plain language of the note, default interest would automatically accrue on the principal balance whenever "any portion of *the debt*" was past due. (Emphasis added.) Though the Ciollis agreed to pay the property taxes, the taxes were not part of the debt. Accordingly, nonpayment of the taxes could trigger default interest on the loan only if Frankel chose, with or

without prior notice, to "declare" acceleration based on the nonpayment.[3] Though the note provides that in such circumstances interest will accrue on the accelerated amount retroactively "from the date of default," the context of that quoted phrase makes clear that such interest actually accrues from the date of *declaration of* default (and acceleration) -- any other reading would render the separate automatic-accrual provision superfluous and the declaration requirement meaningless. Frankel did not make any declaration of default or acceleration before initiating the trustee's sale proceedings. The court therefore properly concluded that R & F was not entitled to recover default interest dating from the Ciollis' nonpayment of property taxes.

¶19 R & F further contends that it was entitled to default interest dating from the Ciollis' failure to make the initial principal payment in April 2010.[4] The Ciollis conceded as much in the summary judgment proceedings. The court recognized the concession and, accordingly, precluded default interest through March 2010 only. Based on the court's ruling, the parties agreed in a joint pretrial statement as to the amount due under the note as of the date of the trustee's sale, "including all foreclosure costs and interest accrued through [the date of the trustee's sale]." R & F did not thereafter seek to revise the agreed-upon value, and the court used that value in calculating the deficiency amount. Any objection to the default-interest aspect of the value was waived. *See*

---

[3] Contrary to the Ciollis' contention, Frankel was not required to have paid the taxes and sought reimbursement before the Ciollis could be found in default. The deed of trust obligated the Ciollis to pay the taxes, and allowed Frankel to *elect* whether to pay the taxes if the Ciollis did not do so.

[4] R & F also contends that the Ciollis "repeatedly paid the monthly [interest] payments late" -- a fact that the Ciollis partially conceded. The superior court declined to assess default interest based on the late payments because it concluded that they could not trigger default interest in the absence of a declaration of acceleration. This analysis was faulty. Under the terms of the note, overdue portions of the debt (including interest) caused default interest to accrue on the principal balance automatically, with or without a declaration of default or acceleration. A separate term also provided for imposition of a late charge of $0.10 for each dollar more than ten days overdue. But R & F has never specified the periods during which interest was past due, and does not now seek default interest or late charges related to past-due interest payments.

Leathers v. Leathers, 216 Ariz. 374, 378, ¶ 19 (App. 2007) (issue not identified as contested in joint pretrial statement or at pretrial hearing was not properly before trial court); *Loya v. Fong*, 1 Ariz. App. 482, 485 (1965) (parties may waive pretrial stipulations if both voluntarily join in litigating stipulated issue).

III. THE SUPERIOR COURT ERRED BY DENYING R & F'S REQUEST FOR EXPERT'S FEES, BUT DID NOT ABUSE ITS DISCRETION BY DECLINING TO AWARD R & F ALL OF THE ATTORNEY'S FEES IT REQUESTED.

¶20 R & F contends that under the terms of the note, it was entitled to recover its valuation expert's fees and all of the attorney's fees it requested. We review de novo a party's entitlement to fees and costs under a contractual provision. *See Camelback Plaza Dev., L.C. v. Hard Rock Café Int'l (Phoenix), Inc.*, 200 Ariz. 206, 208, ¶ 4 (App. 2001).

A. Under the Terms of the Note, R & F Was Entitled To Recover Its Expert's Fees.

¶21 Ordinarily, expert's fees do not qualify as taxable costs recoverable under A.R.S. §§ 12-332(A) and -341. *See State v. McDonald*, 88 Ariz. 1, 13 (1960). The parties may, however, agree as to how such non-taxable costs shall be allocated. *See* A.R.S. § 12-332(A)(6); *Schritter v. State Farm Mut. Auto. Ins. Co.*, 201 Ariz. 391, 394, ¶ 17 n.5 (2001); *Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Bach*, 193 Ariz. 401, 404, ¶ 13 (1999). Here, the Ciollis and Frankel agreed in the note that: "Should suit be brought to recover on this Note, or should same be placed in the hands of an attorney for collection, Maker promises to pay *all* costs thereof, *including* reasonable attorney's fees." (Emphases added.) Under the plain language of this provision, R & F was entitled to recover "all costs." The note did not purport to limit "all costs" to all statutorily recoverable costs, and in fact expressly noted that the phrase encompassed attorney's fees, which are not taxable costs under A.R.S. § 12-332. Under the broad terms of the note, R & F was entitled to recover its expert's fees as a cost. The Ciollis contend that R & F's application for the fees was insufficient because it set forth several cost entries labeled with the expert's name but did not detail the services associated with each entry. We hold that such explanation was not required because the application was supported by affidavit.

¶22 The superior court erred by declining to award R & F its expert's fees. We remand for determination of the fees to be awarded.[5]

B. The Superior Court Acted Within Its Discretion To Determine a Reasonable Attorney's Fees Award.

¶23 R & F applied for approximately $54,000 in attorney's fees and was awarded $36,340. R & F contends that the award improperly excluded the fees billed by the Reiss firm based on Mr. Reiss's membership in R & F. A self-represented attorney has no right to recover attorney's fees because in such circumstances he is not engaged in the practice of law and has no attorney-client relationship. *Connor v. Cal-AZ Props., Inc.*, 137 Ariz. 53, 56 (App. 1983). In *Hunt Investment Co. v. Eliot*, however, we held that a partnership could recover attorney's fees billed by one of its general partners because that individual acted for the benefit of the other general partner's members as well as for his own benefit, and therefore did not represent *only* himself in the litigation. 154 Ariz. 357, 359, 362-63 (App. 1987). The case before us is analogous to *Hunt*. Mr. Reiss did not represent only himself in the litigation; he also represented the other member of R & F. Contrary to the Ciollis' contentions, it would be inappropriate to preclude recovery of the fees billed by the Reiss firm based on Mr. Reiss's interest in R & F.

¶24 There were, however, other grounds on which the court properly could reduce the attorney's fees award. "A contractual provision for attorney's fees will be enforced according to its terms." *Chase Bank of Ariz. v. Acosta*, 179 Ariz. 563, 575 (App. 1994). The note provided that R & F was entitled to recover "reasonable attorney's fees." Under the terms of the note, the court had discretion to determine the reasonableness of the fees requested. *See id.* We will not disturb the court's determination if there is any reasonable basis for it. *See id.*; *see also State Farm Mut. Auto. Ins. Co. v. Arrington*, 192 Ariz. 255, 261, ¶ 27 (App. 1998).

¶25 In response to R & F's applications for attorney's fees, the Ciollis argued that certain entries were unreasonable. The Ciollis argued that both the Reiss firm's application and the Davis firm's application included fees that did not relate to the litigation, fees for unsuccessful endeavors, fees that reflected an excessive expenditure of time, and fees that were duplicative. Based on these objections, the Ciollis argued that

---

[5] We note that R & F no longer contends that it was entitled to $7,750 in expert's fees; R & F instead argues that it was entitled to $7,450 in expert's fees.

"[i]f Mr. Reiss's fees are to be allowed, the total fee amount incurred becomes $36,340." That amount is what the court awarded. On this record, we must affirm. The note authorized the recovery of fees related to "suit" and "collection" only, so the court did not abuse its discretion by declining to award fees unrelated to the litigation. Further, the court had discretion to deny duplicative fees and excessive fees, and, in view of R & F's limited success, had discretion to deny fees related to unsuccessful efforts. *See Furtado v. Bishop*, 635 F.2d 915, 924 (1st Cir. 1980); *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 188-89 (App. 1983).

IV. THE SUPERIOR COURT PROPERLY AMENDED THE JUDGMENT'S INTEREST PROVISION.

¶26 In its written briefs on appeal, R & F contended that, contrary to A.R.S. § 33-814(A), the judgment improperly imposed interest on the deficiency starting on a date other than the date of the trustee's sale. This argument has been made moot by the amended judgment. Further, we reject R & F's related argument that we must adjust the interest rate. The court used the interest rate that R & F itself identified in its proposed forms of judgment.

CONCLUSION

¶27 We remand for entry of an award of expert's fees to R & F. We otherwise affirm.

¶28 R & F requests an award of attorney's fees on appeal under the note and A.R.S. § 12-341.01, and the Ciollis request an award of attorney's fees under § 12-341.01. Under the terms of the note, R & F is entitled to its costs and reasonable attorney's fees. We note, however, that in view of R & F's very limited success on appeal, it is not likely that all of the fees that R & F incurred will be awarded. In exercise of our discretion, we also award the Ciollis reasonable attorney's fees under § 12-341.01.

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