NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

JOHNSON BANK, a banking corporation organized and existing under the laws of the State of Wisconsin, *Plaintiff/Appellee*,

v.

DONALD R. LEO, SR., and PAULA V. LEO, husband and wife; GILBERT G. CYPHERT and DAVID B. WALLER, *Defendants/Appellants*.

No. 1 CA-CV 16-0087
FILED 6-6-2017

Appeal from the Superior Court in Maricopa County
No. CV2013-011336
The Honorable J. Richard Gama, Retired Judge

VACATED AND REMANDED

COUNSEL

Fennemore Craig, P.C., Phoenix
By William G. Ridenour, Timothy J. Berg, Janice Procter-Murphy, Carrie Pixler Ryerson
Counsel for Plaintiff/Appellee

Sacks Tierney P.A., Scottsdale
By James W. Armstrong
Counsel for Defendants/Appellants Leo

Jeffrey M. Proper, P.L.L.C., Phoenix
By Jeffrey M. Proper
Counsel for Defendants/Appellants Cyphert & Waller

MEMORANDUM DECISION

Presiding Judge Kenton D. Jones delivered the decision of the Court, in which Judge Patricia K. Norris and Judge Paul J. McMurdie joined.

J O N E S, Judge:

¶1 Appellants (the Guarantors) appeal the trial court's order awarding Johnson Bank (the Bank) a deficiency judgment in the amount of $12,536,259.82. Specifically, the Guarantors argue insufficient evidence existed to support the court's finding regarding the amount of the indebtedness as of the date of the trustee's sale. For the following reasons, we vacate the court's order and remand for further proceedings.

FACTS[1] AND PROCEDURAL HISTORY

¶2 In December 2007, two non-parties (the Borrowers) obtained a $21,000,000 loan from the Bank for the purpose of acquiring and developing approximately 455 acres located in Peoria (the Property), which thereafter served as security for the loan. The Guarantors executed guaranties on the loan.[2] The loan was modified in March 2010, at which time the principal balance remaining unpaid was $18,489,514.79, plus $196,521.44 interest.

¶3 The Borrowers eventually defaulted on the loan. However, in November 2012, the Bank and Borrowers executed a Forbearance Agreement, wherein the Bank promised not to pursue a trustee's sale so

---

[1] We view the facts in the light most favorable to upholding the trial court's ruling. *Bennett v. Baxter Grp., Inc.*, 223 Ariz. 414, 417, ¶ 2 (App. 2010) (citing *Sabino Town & Country Estates Ass'n v. Carr*, 186 Ariz. 146, 148 (App. 1996)).

[2] Within the guaranties, the Guarantors authorized the Bank "to alter, compromise, renew, extend, accelerate, or otherwise change one or more times the time for payment or other terms of the Indebtedness or any part of the Indebtedness." The Guarantors therefore gave advance consent to modifications of the original loan agreement. *See Data Sales Co. v. Diamond Z Mfg.*, 205 Ariz. 594, 599, ¶¶ 20-22 (App. 2003) (confirming the guarantor may contractually waive suretyship defenses in advance).

long as the Borrowers abided by certain payment conditions. The Forbearance Agreement establishes "[the Bank] ha[d] filed Proofs of Claim stating that as of the [Borrowers'] bankruptcy petition filing date of April 13, 2011, [the] Borrower[s] w[ere] indebted or liable to [the Bank] in the principal amount of $18,490,247.78, with accrued and unpaid interest of $844,739.63, together with attorneys' fees and costs." Furthermore, the Forbearance Agreement states: "Borrower hereby acknowledges that each Borrower is in default under the terms of the Loan Documents."

¶4 The Borrowers failed to comply with the payment conditions of the Forbearance Agreement, and a trustee's sale was held in July 2013. At the sale, the Bank purchased the Property through a credit bid of $7,210,000. One month later, the Bank sought a deficiency judgment against the Guarantors in the amount of $15,659,004.16, alleging the Bank was owed a total of $22,869,004.16 in unpaid principal and interest as of the date of the trustee's sale. In turn, the Guarantors requested a hearing to determine the fair market value of the Property (FMV hearing), which the trial court granted and ultimately scheduled for November 2014.

¶5 In advance of the FMV hearing, the Bank moved for partial summary judgment on the issue of the Guarantors' liability, asserting there was no dispute that the Borrowers defaulted on the underlying loan and that the Guarantors had unconditionally guaranteed the loan. The Bank attached the affidavit of Robert Parsons to its motion, which declared he was the Bank's representative "responsible for administering and collecting the debt owed by [the Guarantors]," and that "[a]s of July 3, 2013, the date of the Trustee's Sale, the Borrowers were indebted to the Bank under the Loan Documents for principal in the amount of $18,490,247.78 plus accrued interest, late fees, attorneys' fees, and sale costs." Furthermore, Parsons confirmed the Bank's credit bid of $500,000 at an October 2013 UCC sale would be applied against the deficiency balance. After finding the Guarantors had failed to submit a timely response, the trial court granted the Bank's motion, ruling the Guarantors had failed to pay all sums due under the loan and guaranties and breached their payment obligations under the guaranties.

¶6 The Guarantors requested the trial court either vacate or reconsider its ruling, arguing they had filed a timely response to the Bank's motion. Within that request, the Guarantors admitted the Borrowers' default, that they guaranteed the Borrowers' obligations to the Bank, and that the Borrowers signed the Forbearance Agreement. However, the Guarantors argued genuine factual disputes existed as to both the fair market value of the Property and the amount owed on the loan, thereby

precluding summary judgment on the issue of liability. Specifically, the Guarantors alleged the Bank had not sufficiently supported its calculations of indebtedness. Moreover, the Guarantors attached a $675,000 judgment related to condemnation proceedings on the Property and asserted the proceeds of the condemnation action were to be credited against the Borrowers' indebtedness. At the FMV hearing, the court affirmed its ruling of partial summary judgment on the issue of liability.

¶7 The FMV hearing was held over three days in November 2014, January 2015, and March 2015. The Bank's appraisal expert, Ralph Brekan, testified the total value of the Property was $7,020,000 on the date of the trustee's sale. The Bank also called Parsons as a witness to authenticate the various loan documents, *see supra* ¶¶ 2-3, that were admitted into evidence. But Parsons never testified regarding the amount of the Borrowers' indebtedness on the date of the trustee's sale.

¶8 After taking the matter under advisement, the trial court found Brekan's fair market value appraisal credible. The court therefore concluded the value of the Property on the date of the trustee's sale was the amount of Johnson Bank's credit bid, or $7,210,000, because that figure was greater than the actual fair market value of the Property. *See* Ariz. Rev. Stat. (A.R.S.) § 33-814(A).[3]

¶9 The trial court also adopted the Bank's proposed findings of fact and conclusions of law and decided the Borrowers were indebted to the Bank, as of the date of the trustee's sale, in the principal amount of $18,035,205.54 plus accrued interest of $2,537,980.89, with after-accruing interest at a rate of 4.25%. The court based this conclusion upon the loan agreement, the promissory note, the guaranties, the loan modification agreement, and the Forbearance Agreement. The court therefore entered a deficiency judgment in favor of the Bank for the sum of $13,363,186.43, less credit amounts of $500,000 and $326,926.61 corresponding to the October 2013 UCC sale and the condemnation action, respectively, for a net award of $12,536,259.82.[4]

---

[3] Absent material changes from the relevant date, we cite a statute's current version.

[4] Along with its proposed findings of fact and conclusions of law, the Bank attached a copy of a check in the amount of $326,926.61 that derived from the condemnation action.

¶10 The Guarantors timely filed a motion for new trial or to amend the judgment, arguing the trial court's findings of fact and judgment were not supported by the evidence. *See* Ariz. R. Civ. P. 52(b), 59(a)(1)(H), (d). In response, the Bank explained the discrepancy between the principal indebtedness established in the Forbearance Agreement and the figure adopted by the court resulted from payments received from the Guarantors totaling $128,115.63, after deducting interest and taxes, together with an initial deduction of the condemnation proceeds.[5] The court denied the Guarantors' motion. The Guarantors timely appealed, and this Court has jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1), (5)(a).

DISCUSSION

¶11 In an action to recover a deficiency balance, A.R.S. § 33-814(A) provides:

> [T]he deficiency judgment shall be for an amount equal to the sum of the total amount owed the [Bank] as of the date of the [trustee's] sale, as determined by the court less the fair market value of the [foreclosed] 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 Guarantors do not challenge the trial court's determination of the Property's value, but rather assert the Bank did not present any evidence establishing the amount of the Guarantors' loan indebtedness on the date of the trustee's sale.

¶12 To the extent the Guarantors argue the trial court erred in granting partial summary judgment, we determine *de novo* whether any genuine issues of material fact exist, viewing the evidence presented to the court when it addressed the motion in the light most favorable to the Guarantors. *See Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, 55, ¶ 8 (App. 2007). To prove breach of a guaranty contract, the Bank bore the burden of proving the existence of a contract, breach of that contract, and resulting damages. *See, e.g.*, *Chartone, Inc. v. Bernini*, 207 Ariz. 162, 170, ¶ 30 (App. 2004). "[T]he mere occurrence of a trustee's sale, though predicated on an *allegation* of breach, does not constitute a judicial determination that the

---

[5] The Bank further explained that the condemnation proceeds were erroneously credited twice but that it was not seeking to recover the inadvertent credit.

borrower has breached or that the note is enforceable." *Morgan AZ Fin., L.L.C. v. Gotses*, 235 Ariz. 21, 24, ¶ 9 (App. 2014). Additionally, summary judgment affidavits must sufficiently describe or include, as attachments, the records on which declarations in the affidavit are based. *See* Ariz. R. Civ. P. 56(c)(5); *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 213-14, ¶¶ 18-19 (App. 2012).

¶13 In support of its motion for partial summary judgment, the Bank submitted evidence — primarily in the form of Parsons' affidavit and the Forbearance Agreement — that the Guarantors signed guaranties corresponding with the Borrowers' loan from the Bank, and the Borrowers subsequently defaulted. In response, the Guarantors admitted the Borrowers' default.[6] The trial court therefore properly found the Bank proved the existence and breach of the guaranties, with resulting damages as the sole issue remaining to be determined.

¶14 Regarding the trial court's determination of damages, we will affirm the court's factual findings, express or implied, "where there is evidence from which a reasonable man could draw the same conclusions." *Bass Inv. Co. v. Banner Realty, Inc.*, 103 Ariz. 75, 79 (1968). However, "we are not bound by the trial court's conclusions of law" and are free to draw our own conclusions based upon the facts found by the court. *Ariz. Bd. of Regents v. Phx. Newspapers, Inc.*, 167 Ariz. 254, 257 (1991) (citing *Gary Outdoor Adver. Co. v. Sun Lodge, Inc.*, 133 Ariz. 240, 242 (1982), and *Land v. Bisceglia*, 15 Ariz. App. 269, 270-71 (1971)). Moreover, we "review the entire record to determine whether the trial court abused its discretion in denying a motion for new trial." *Matcha v. Winn*, 131 Ariz. 115, 116-17 (App. 1981) (citing *Adroit Supply Co. v. Elec. Mut. Liab. Ins.*, 112 Ariz. 385, 389 (1975), and *Pima Cty. v. Bilby*, 87 Ariz. 366, 375 (1960)).

¶15 "The burden [i]s on the plaintiffs to show the amount of their damages with reasonable certainty . . . [although] 'certainty in amount' of damages is not essential to recovery when the *fact* of damage is proven." *Gilmore v. Cohen*, 95 Ariz. 34, 36 (1963) (citations omitted). Mere conjecture or speculation cannot provide the basis for an award of damages; rather, "the evidence must make an 'approximately accurate estimate' possible." *Id.* (quoting *McNutt Oil & Refining Co. v. D'Ascoli*, 79 Ariz. 28, 34 (1955), and *Martin v. La Fon*, 55 Ariz. 196, 200 (1940)). However, the defendant bears

---

[6] We agree with the Guarantors when they assert the trial court improperly found their response to the Bank's motion for partial summary judgment untimely, and therefore that response is part of the record on review of the court's granting partial summary judgment.

the burden of proving the affirmative defense of payment. Ariz. R. Civ. P. 8(c)(1)(L); *see also B & R Materials, Inc. v. U.S. Fid. & Guar. Co.*, 132 Ariz. 122, 124 (App. 1982) (citing *Hegel v. O'Malley Ins.*, 122 Ariz. 52, 56 (1979)).

¶16 The trial court relied upon the loan agreement, the promissory note, the guaranties, the loan modification agreement, and the Forbearance Agreement as evidence of the total amount owed the Bank. The Forbearance Agreement reasonably establishes that, as of the Borrowers' bankruptcy in April 2011, the amount of Borrowers' principal indebtedness was $18,490,247.78.[7] Yet, in the course of the court's analysis of that Agreement, it found the Borrowers' principal indebtedness on the date of the trustee's sale was $18,035,205.54, a difference of $455,042.24. Given the Guarantors' failure to affirmatively provide evidence of payments made upon the principal indebtedness, we may assume the indebtedness remained the same between April 2011 and the July 2013 trustee's sale, but the court provided no explanation for the $455,042.24 discrepancy. The Bank attempted to explain the discrepancy in its response to the Guarantors' motion for a new trial, but this explanation was offered after the court adjudicated the Guarantors' deficiency and thus could not be considered by the trial court in rendering judgment. *See Brookover*, 215 Ariz. at 55, ¶ 8 ("We review the decision on the record made in the trial court, considering only the evidence presented to the trial court when it addressed the motion.") (citations omitted); *see also GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 5 (App. 1990) ("As a general rule, an unsworn and unproven assertion is not a fact that a trial court can consider in ruling on a motion . . . .") (citations omitted). The court's findings and resultant deficiency judgment are irreconcilable with the evidence presented at or before the FMV hearing and therefore clearly erroneous.[8]

---

[7] The loan modification agreement, also admitted at trial, establishes a similar figure of principal indebtedness in the amount of $18,489,514.79.

[8] Because the Bank presented evidence of the credit derived from the UCC sale with its motion for partial summary judgment, the trial court could properly consider this credit when issuing its deficiency judgment following the FMV hearing. *See GM Dev. Corp.*, 165 Ariz. at 4 ("[T]he transcripts were not part of the record before the trial court during its deliberations on the motion for partial summary judgment *or at any time prior to trial court's order granting partial summary judgment*.") (emphasis added). However, the Bank provided no evidence to support its calculation of interest, such as how application of the credit from the UCC sale would

¶17 The Guarantors ask that we "direct the entry of a judgment of no liability in their favor." The Guarantors would only be entitled to such a remedy if there was a complete lack of evidence as to the amount of indebtedness on the date of the trustee's sale. *See, e.g.*, *United Dairymen of Ariz. v. Schugg*, 212 Ariz. 133, 139, ¶ 21 (App. 2006); *Shetter v. Rochelle*, 2 Ariz. App. 607, 609 (1966).

¶18 Because the Bank provided sufficient evidence to establish the Borrowers owed the Bank at least $18,490,247.78 in principal in April 2011, and the Guarantors have provided no affirmative evidence of payments since that time, we cannot say the Bank failed to present *any* evidence regarding the indebtedness owed. A ruling vacated for insufficient evidence or improper findings of fact is appropriately remanded for more accurate or specific findings "based upon evidence already adduced — or the taking of such additional testimony as may be deemed advisable by the trial court — on the[] vital points." *Fritts v. Ericson*, 87 Ariz. 227, 234 (1960). Accordingly, we vacate the deficiency judgment and remand the matter to the trial court for entry of findings of fact and conclusions of law to support its calculations concerning the amount of principal and interest the Guarantors owed the Bank on the date of the trustee's sale.

CONCLUSION

¶19 Based upon the foregoing, we vacate the deficiency judgment and remand the case to the trial court for further proceedings consistent with this Decision.

---

affect that calculation, and the evidence introduced at or before the FMV hearing regarding the amount of the condemnation credit does not support the condemnation credit ordered by the trial court.

¶20 Both parties request attorneys' fees and costs incurred on appeal and in the trial court pursuant to A.R.S. §§ 12-341 and -341.01. In our discretion, we deny attorneys' fees to both parties, without prejudice, such that they may reassert their claims for fees, for the trial court's consideration, at the conclusion of the case below. However, we award the Guarantors their costs on appeal upon their compliance with ARCAP 21(b).

AMY M. WOOD • Clerk of the Court
FILED: AA