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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



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

FIDELITY NATIONAL TITLE) 1 CA-CV 09-0422
INSURANCE COMPANY, a California)
corporation,) DEPARTMENT B
)
Plaintiff/Counter-) **MEMORANDUM DECISION**
defendant/Appellee,) (Not for Publication
) - Rule 28, Arizona
v.) Rules of Civil
) Appellate Procedure)
HANNAH LEE KODATT, as Successor)
Trustee of the Terry Lee Kodatt)
Trust, established June 4, 1993,)
)
Defendant/Counter-)
claimant/Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-020133

The Honorable Edward O. Burke, Judge

REVERSED AND REMANDED

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N O R R I S, Judge

¶1 This appeal arises out of the superior court's grant of summary judgment in favor of Fidelity National Title Insurance Company ("Fidelity"), requiring the Terry Lee Kodatt Trust ("Trust") to reimburse Fidelity for monies paid to satisfy a balance owed on a line of credit, thereby preventing the foreclosure of property securing the line of credit. Because language in the pertinent documents was ambiguous and reasonably susceptible to conflicting interpretations, the superior court should not have granted summary judgment in Fidelity's favor. Accordingly, we reverse and remand for further proceedings consistent with this decision.

FACTS AND PROCEDURAL BACKGROUND

¶2 In October 2004, Terry Lee Kodatt ("Kodatt") obtained from Bank of America ("bank") a \$75,000 revolving line of credit ("Credit Agreement") secured by a Deed of Trust on residential property in Mesa owned by the Trust. In November 2004, Kodatt contracted to sell the property to a third party buyer for \$162,500, Kodatt agreed to convey title to the property to the third party through a general warranty deed, and the parties selected Fidelity as their escrow agent.

¶3 As Trustee of the Trust, Kodatt executed various documents pertaining to the transaction. As discussed below, these documents reflected Fidelity was to disburse \$73,395.79 to

the bank to "payoff" the credit line secured by the Deed of Trust. An "Estimated Settlement Statement" signed by the parties reflects escrow was to close on or before January 15, 2005. On January 13, Fidelity disbursed \$73,395.79 to the bank, but because Kodatt made two "draws" totaling \$2,100 against the credit line in December 2004, the \$73,395.79 Fidelity sent to the bank failed to "pay off" the credit line in full.¹ Accordingly, the bank did not release its lien on the property.

¹Fidelity calculated the \$73,395.79 amount using a "Payoff Quote" the bank faxed to Fidelity on December 2, 2004, which was "Good through 12/03/04." Fidelity added Kodatt's "Variable Principal Balance" as of December 2, 2004 (\$72,700), the "Variable Interest Due" (\$247.73), plus a "Per Diem Accrual" of \$10.42 through January 15, 2005. Kodatt's two draws in December 2004 were not included in the \$73,395.79 amount. Fidelity appears to have relied on the Payoff Quote despite language at the bottom of the page:

These figures are subject to change [upon] interest accruals, subsequent advances, intraday advances, payments, insurance or fees on the Account.

IF YOU WILL BE TERMINATING AND PAYING OFF AN EQUITY OR TAXSMART CREDITLINE, THE "CUSTOMER REQUEST FOR PAYOFF AND TERMINATION OF EQUITY OR TAXSMART CREDITLINE ACCOUNT" FORM MUST BE COMPLETED AND ACCOMPANY THE PAYOFF. IF NOT, THE CREDITLINE ACCOUNT MAY NOT BE CLOSED.

Kodatt's line of credit was an equity creditline, and the third page of the bank's fax to Fidelity was a form for Kodatt to sign "[t]o ensure proper closing and guarantee satisfaction of mortgage." There is no evidence Kodatt received this form, or Fidelity followed up with either the bank or Kodatt regarding the proper payoff amount or the expected reconveyance.

Kodatt continued to draw on his line of credit until he died on December 25, 2005.

¶14 After his death, the credit line went into default, and in May 2007, Regional Trustee Services Corporation, on behalf of the bank, noticed a trustee's sale for the property. To avoid foreclosure of the property, in August 2007, Fidelity paid the bank the \$80,136.52 balance owed on the credit line, pursuant to a policy of title insurance it had issued to the buyer. Subsequently, it sued the Trust for reimbursement.

¶15 Fidelity moved for summary judgment arguing (1) the Trust breached its obligations to the bank under the Deed of Trust, which entitled Fidelity, as equitable subrogee, to collect the sum it had paid the bank; and (2) the Trust's failure to reimburse Fidelity constituted a breach of the terms of the escrow documents. The court agreed with both arguments and granted Fidelity's motion.

DISCUSSION²

I. Subrogation

¶16 In moving for summary judgment, Fidelity argued it was "entitled to recover its damages as the equitable subrogee to Bank of America," because in the Deed of Trust, the Trust had agreed to pay the bank all indebtedness owed on the line of credit.³ The Trust argues on appeal, as it did in the superior court, the Deed of Trust did not authorize the bank to collect against the Trust for Kodatt's personal indebtedness. We agree.

²We review de novo the superior court's grant of summary judgment. *Patterson v. Thunder Pass, Inc.*, 214 Ariz. 435, 437, ¶ 8, 153 P.3d 1064, 1066 (App. 2007). "Summary judgment is proper only if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Accordingly, we will affirm only 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." *Id.* (citing *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990)).

³"Equitable subrogation is the 'substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt.'" *Sun Valley Fin. Serv. of Phoenix, L.L.C. v. Guzman*, 212 Ariz. 495, 499, ¶ 18, 134 P.3d 400, 404 (App. 2006) (quoting *Mosher v. Conway*, 45 Ariz. 463, 468, 46 P.2d 110, 112 (1935)). "[F]or equitable subrogation to apply, there must be an agreement, either express or implied, that the subsequent lender will be substituted for the holder of the prior encumbrance." *Lamb Excavation, Inc. v. Chase Manhattan Mortgage Corp.*, 208 Ariz. 478, ¶ 12, 95 P.3d 542 (App. 2004) (quoting *Herberman v. Bergstrom*, 168 Ariz. 587, 590, 816 P.2d 244, 247 (App. 1991)). In addition to the reasoning that follows, there is no evidence of an express or implied agreement to substitute Fidelity for the bank in this case.

On its face, the Trust's liability was limited to its interest in the property. The relevant provisions of the Deed of Trust provided:

PAYMENT AND PERFORMANCE. Except as otherwise provided in this Deed of Trust, Borrower shall pay to Lender all indebtedness secured by this Deed of Trust as it becomes due, and Borrower and Trustor shall strictly perform all their respective obligations under the Credit Agreement, this Deed of Trust, and the Related Documents.

. . .

NONTITLED SPOUSES AND NON-BORROWER GRANTORS. Any Grantor or Trustor who signs this Deed of Trust, Mortgage or Modification ("Security Instrument") but does not execute the Note or Credit Agreement ("Non-borrower Grantor or Trustor"): (a) is signing only to grant, bargain, sell and convey such Non-borrower Grantor's or Trustor's interest in the Property under the terms of this Security Instrument; (b) is not by signing becoming personally obligated to pay the Note or Credit Agreement⁴

. . .

Borrower. The word "Borrower" means TERRY LEE KODATT and includes all co-signers and co-makers signing the Credit Agreement.

⁴Contrary to Fidelity's argument that the Trust waived its right to rely on this provision in the Deed of Trust, the Trust relied on this provision at oral argument on Fidelity's motion and in its written response. Specifically, the Trust stated "the Borrower [on the line of credit] is Terry Lee Kodatt only" and "[t]here is no language contained within any of the contract documents that identifies the Trust as the Borrower, nor anything that requires the Trust to repay or guarantee the Credit Line obligation of Terry Lee Kodatt."

¶17 As can be seen, Kodatt was "Borrower" in his personal capacity, and the Trust (which signed the Deed of Trust but did not execute the Credit Agreement with the bank) was only liable to the extent of its interest in the property. Similarly, the "Borrower" in the Credit Agreement was "Terry Lee Kodatt," not the Trust. Thus, only Kodatt, not the Trust, was "obligated to pay the Note or Credit Agreement." Fidelity could not recover against the Trust "as the equitable subrogee to Bank of America," because the bank itself was never entitled to collect against the Trust; it was only granted a lien on the property. Accordingly, the superior court should not have granted summary judgment on Fidelity's subrogation claim.

II. Escrow Documents

¶18 In its motion for summary judgment, Fidelity also argued the Trust was expressly obligated under the "Payoff Disbursement Instructions" and the "Terms and Conditions of Escrow" (collectively, "escrow documents"), to reimburse Fidelity for the money it paid to prevent the foreclosure. The Trust responded in part, as it also argues in part on appeal, that the terms of the escrow documents were "ambiguous" and thus Fidelity was not entitled to judgment as a matter of law. We agree with the Trust.

¶9 Contract language is ambiguous "when it can reasonably be construed to have more than one meaning." *In re Estate of Lamparella*, 210 Ariz. 246, 250, ¶ 21, 109 P.3d 959, 963 (App. 2005). When contract language is susceptible to more than one interpretation, summary judgment is inappropriate and the matter should be submitted to the jury. *State v. Mabery Ranch, Co.*, 216 Ariz. 233, 241, ¶ 28, 165 P.3d 211, 219 (2007).

¶10 In support of its position that the Trust was liable for Kodatt's personal indebtedness, Fidelity points out that before escrow closed, the Trust executed "Payoff Disbursement Instructions" and agreed "[i]n the event the lender demands additional funds after the close of escrow," the Trust would "deposit any additional funds necessary to comply with the lenders [sic] instructions."⁵ Fidelity also notes the Trust

⁵The Payoff Disbursement Instructions, addressed to Fidelity, read in pertinent part:

The undersigned **The Terry Lee Kodatt Trust**
Dated June 4, 1993 acknowledge[s] and understand[s] that disbursement of any payoffs for encumbrances being paid off at close of this escrow must be received by the lender by a specific date to avoid further accrual of interest either daily or monthly.

You are instructed to forward payoff funds to the lender by express service of your choice and charge my/our account any fees for overnight delivery at close of escrow.

signed the "Terms and Conditions of Escrow," which authorized Fidelity to "reimburse itself for its charges and for all damages or expenses it may incur in connection with the escrow and the performance of Escrow Agent's duties."⁶

¶11 Viewed in isolation, these provisions of the escrow documents support Fidelity's position. Fidelity's construction is not the only reasonable interpretation of the escrow

In the event the lender demands additional funds after the close of escrow, **The Terry Lee Kodatt Trust Dated June 4, 1993** agree[s] to deposit any additional funds necessary to comply with lenders [sic] instructions immediately upon notice of same.

⁶The pertinent provisions of the Terms and Conditions of Escrow are as follows:

2. Seller and Buyer shall deposit into escrow all documents and funds necessary to complete the transaction as established by the terms of the parties' contract/agreement. . . .

3. Escrow Agent is hereby authorized to act upon any statement furnished to Escrow Agent by a lien holder or his agent, without liability or responsibility for the accuracy of such statement.

. . . .

6. . . . Seller and Buyer hereby authorize Escrow Agent to reimburse itself for its charges and for all damages or expenses it may incur in connection with the escrow and the performance of Escrow Agent's duties, including costs, damages and attorneys' fees.

documents, however. The escrow documents "must be reviewed in [their] entirety and construed as a whole, and the intention of the parties must be collected from the entire agreement and not from detached portions." *Newmont Exploration Ltd. v. Siskon Corp.*, 125 Ariz. 267, 269, 609 P.2d 82, 84 (App. 1980).

¶12 Taken as a whole, the escrow documents are also susceptible to the construction advanced by the Trust: as escrow agent, Fidelity was entitled to reimbursement for sums it advanced to close the transaction with the buyer -- and those sums were limited to the amount Kodatt owed the bank on the credit line as of the date escrow was to close so that the bank would release its lien on the property; but Fidelity, as buyer's title insurer, was not entitled to recoup monies it paid on draws made by Kodatt after the transaction closed.⁷

¶13 Through the Payoff Disbursement Instructions, the Trust "instructed" Fidelity "to forward payoff funds" to the

⁷"'Escrow' means any transaction in which any escrow property is delivered . . . to a person not otherwise having any right, title or interest therein in connection with the sale, transfer, encumbrance or lease of real or personal property, to be delivered or redelivered by that person upon the contingent happening or nonhappening of a specified event or performance or nonperformance of a prescribed act, when it is then to be delivered by such person to a grantee, grantor, promisee, promisor, obligee, obligor, bailee or bailor, or any designated agent or employee of any of them." Ariz. Rev. Stat. ("A.R.S.") § 6-801(4) (1999). Escrow would be complete, then, when the transaction or delivery of escrow property in exchange for real property had occurred.

bank for the encumbrance to be "paid off" at the close of escrow. The Trust acknowledged further interest might accrue if the bank did not receive the payoff "by a specific date" and agreed it would deposit "additional funds" if demanded by the bank.⁸ These provisions must be read together, so every part is given effect. *MT Builders, L.L.C. v. Fisher Roofing, Inc.*, 219 Ariz. 297, 305 n.9, ¶ 20, 197 P.3d 758, 766 n.9 (App. 2008) ("a cardinal rule of contract construction requires us to look at the agreement as a whole, reading each part in light of all other parts"). When read together, a reasonable construction is that the Trust's obligation to pay "additional funds" to Fidelity was limited to amounts needed to pay off the lien as of the close of escrow (which would include any draws on the credit line made before the close of escrow) and any interest accruing if the bank did not receive the payoff by the "specific date."

¶14 The Terms and Conditions of Escrow are subject to a similar construction; they authorized Fidelity to "reimburse itself" for expenses incurred "in connection with the escrow." Further, as the Trust points out, the Trust had agreed to

⁸The Trust "does not dispute that, had Fidelity demanded payment of additional amounts in connection with Fidelity's escrow services during, or within a reasonable time following, the Trust Property's closure in January 2005, the [] Trust would have been liable for any additional amounts 'necessary to complete the transaction.'"

reimburse Fidelity for its "performance of Escrow Agent's duties," and not for its role as buyer's title insurer. Thus, the escrow documents can reasonably be read to mean the Trust would reimburse Fidelity for accruals incurred on the credit line as of the close of escrow so the lien could be paid off -- not to reimburse Fidelity for draws on the line of credit well after "the close of escrow."

¶15 The language of the escrow documents concerning the Trust's obligation to reimburse Fidelity is thus "'reasonably susceptible' to the" interpretations advocated by the parties. *Taylor v. State Farm Mut. Auto Ins. Co.*, 175 Ariz. 148, 154, 854 P.2d 1134, 1140 (1993). Accordingly, the superior court should not have granted Fidelity's motion for summary judgment on the Trust's breach of the escrow documents.

¶16 Finally, the Trust argues this court should enter summary judgment in its favor based on its interpretation of the escrow documents. Because we find the terms of the escrow documents ambiguous, we disagree.

CONCLUSION

¶17 For the foregoing reasons, we reverse the superior court's grant of summary judgment and remand for proceedings

consistent with this decision.⁹

¶18 The Trust has also requested an award of attorneys' fees on appeal pursuant to the Terms and Conditions of Escrow and A.R.S. § 12-341.01 (2003). Because there is not yet a "prevailing" or "successful party" under either the Terms and Conditions or the statute, we deny the Trust's request for attorneys' fees. On remand, the court may consider a request from the successful party for fees incurred in this appeal. The Trust is, however, entitled to costs on appeal under A.R.S. § 12-341 (2003), subject to its compliance with ARCAP 21.

/s/

PATRICIA K. NORRIS, Judge

CONCURRING:

/s/

JOHN C. GEMMILL, Presiding Judge

/s/

MAURICE PORTLEY, Judge

⁹The Trust also argues Fidelity was negligent and mishandled the escrow so that it cannot now attempt to collect from the Trust for reimbursement of Kodatt's personal debt. We decline to address this argument.