DIVISION ONE
FILED: 05-18-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DAMIAN J. GRECO, Plaintiff/Appellant, v. FAIRWAY INDEPENDENT MORTGAGE CORPORATION, Defendant/Appellee.	No. 1 CA-CV 09-0536 1 CA-CV 09-0673 (Consolidated) DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2006-053364

The Honorable Robert Budoff, Judge

AFFIRMED

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J O H N S E N, Judge

¶1 Damian J. Greco appeals from the superior court's grant of summary judgment and award of attorney's fees in favor of Fairway Independent Mortgage Company. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Greco entered into a contract to purchase a home on August 13, 2006. The purchase agreement stated that Greco's "obligation to complete this sale is contingent upon an appraisal of the [home] by an appraiser acceptable to lender for at least the sales price." The agreement included a section titled "due diligence," which granted Greco ten days from the date of the contract to "conduct all desired physical, environmental, and other types of inspections and investigations to determine the value and condition" of the home. The purchase agreement also provided, "**BUYER IS AWARE THAT ANY REFERENCE TO THE SQUARE FOOTAGE OF THE PREMISES, BOTH THE REAL PROPERTY (LAND) AND IMPROVEMENTS THEREON, IS APPROXIMATE. IF SQUARE FOOTAGE IS A MATERIAL MATTER TO THE BUYER, IT MUST BE INVESTIGATED DURING THE INSPECTION PERIOD.**" The agreement required Greco to notify the seller before the close of the inspection period if he disapproved of anything revealed by his due diligence. It further stated, "BUYER'S FAILURE TO GIVE NOTICE OF DISAPPROVAL OF ITEMS OR CANCELLATION OF THIS CONTRACT

WITHIN THE SPECIFIED TIME PERIOD SHALL CONCLUSIVELY BE DEEMED BUYER'S ELECTION TO PROCEED WITH THE TRANSACTION WITHOUT CORRECTION OF ANY DISAPPROVED ITEMS." On August 17, 2006, Greco signed the Buyer's Inspection Notice, which stated, *inter alia*, that he had completed all desired "inspections and investigations pertaining to square footage."

¶3 Greco and Fairway entered into a mortgage loan origination agreement on August 18, 2006. As part of that agreement, Greco exercised his right to ask for a copy of the appraisal report that Fairway might obtain. Fairway contracted for an appraisal of the property. Greco was not a party to that contract, which was between Fairway and the appraiser. The appraisal's purpose, according to the appraisal itself, was to provide Fairway "with an accurate, and adequately supported, opinion of the market value of the subject property." The home appraised for $1,300,000; the sale price was $1,265,000. Although the home was listed at 3,279 livable square feet, the appraisal stated the livable square footage was 2,860.

¶4 In connection with the closing, Greco signed an "Acceptance Agreement and Hold Harmless" form, in which he agreed that he understood "that [Fairway] assumes no responsibility for the Property or its condition." The form also stated, "I acknowledge that the determination of the acceptability of the Property is my responsibility," and "I

hereby hold harmless and indemnify [Fairway] from any claims . . . which may arise resulting from the condition of the Property . . . [and] any matters indicated or that may have been revealed on a survey." On September 26, 2006, Greco also executed a form titled "Appraisal Disclosure," which stated, "If you have not already paid an appraisal fee, you may be required to reimburse us for the cost of appraisal and other costs associated with photocopying and postage as a condition to receiving a copy of the appraisal report if not prohibited by state statutes." Greco paid the $400 cost of the appraisal at closing.

¶5 Greco and the seller had agreed the transaction would close on Wednesday, September 28, 2006. On September 27, Greco received a packet of paperwork relating to the transaction, but it did not contain the appraisal. That day, Greco sent an email to Fairway requesting a copy of the appraisal. Fairway responded that he would receive the appraisal as part of a "closing packet" by the end of the week. Greco did not respond to this email. Escrow closed on September 28, 2006. Greco received a copy of the appraisal after escrow closed.

¶6 Greco filed a complaint on November 17, 2006, naming as defendants Fairway, his real estate agents and the sellers. Count five of the complaint alleged breach of contract by Fairway; it alleged Fairway breached "by failing to deliver the appraisal to [Greco] until several days after closing."

¶7 On cross motions for summary judgment, the superior court entered judgment in favor of Fairway. It stated, "The Court concludes that there was no contract or agreement between the parties that the appraisal would be received by Plaintiff in advance of closing and that Plaintiff's closing of the agreement without receipt of the appraisal is clear indication that Plaintiff did not believe that receipt of the appraisal prior to closing was part and parcel of any agreement." The court later granted Fairway's application for attorney's fees. We have jurisdiction of Greco's appeals pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

A. Summary Judgment.

1. Standard of review.

¶8 We review the grant of a motion for summary judgment *de novo* and view the evidence in the light most favorable to the nonmoving party. *Strojnik v. Gen. Ins. Co. of Am.*, 201 Ariz. 430, 433, ¶ 10, 36 P.3d 1200, 1203 (App. 2001). Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c). We consider only the evidence that was before the superior court when it addressed the motion. *Vig v. Nix Project II P'ship*, 221 Ariz. 393, 396, ¶ 10, 212 P.3d 85, 88 (App. 2009). We may,

however, affirm the superior court's grant of summary judgment for any reason. *CDT, Inc. v. Addison, Roberts & Ludwig, C.P.A.*, 198 Ariz. 173, 178, ¶ 19, 7 P.3d 979, 984 (App. 2000).

¶9 "If the party with the burden of proof on the claim or defense cannot respond to the motion by showing that there is evidence creating a genuine issue of fact on the element in question, then the motion for summary judgment should be granted." *Orme School v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990). In addition, when a motion for summary judgment is filed, "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Ariz. R. Civ. P. 56(e); *see also Florez v. Sargeant*, 185 Ariz. 521, 526, 917 P.2d 250, 255 (1996) ("affidavits that only set forth ultimate facts or conclusions of law can neither support nor defeat a motion for summary judgment").

2. Summary judgment was proper.

¶10 Greco argues Fairway promised it would provide him the appraisal before the transaction was to close. In his motion for summary judgment and his response to Fairway's cross motion, however, the only language Greco cited for that purported promise was in the Multiple Disclosure Form, the form in which

Greco requested a copy of the appraisal. That form stated, "You have the right to a copy of the appraisal report used in connection with your application for credit. If you would like to receive a copy, please check the appropriate box below. By signing below you acknowledge receiving a copy of this notice." Greco checked the box stating that he wished "to receive a copy of [the] appraisal."

¶11 Nothing in the Multiple Disclosure Form states when Fairway would provide the appraisal to Greco. The unambiguous language of the parties' written contract, therefore, provides no support for Greco's argument that Fairway promised to give him the appraisal report prior to close. *See, e.g., Hill-Shafer P'ship v. Chilson Family Trust*, 165 Ariz. 469, 473, 799 P.2d 810, 814 (1990) (where there is no meeting of the minds, no contract is formed).

¶12 Greco's deposition testimony that he expected to receive the appraisal "when available" cannot change the meaning of the contract if that is not the agreement the parties reached. Greco's statement is insufficient to create a material issue that Fairway promised to provide him with the appraisal prior to closing. A contract is not ambiguous simply because the parties disagree about its meaning. *In re Estate of Lamparella*, 210 Ariz. 246, 250, ¶ 21, 109 P.3d 959, 963 (App. 2005). Instead, "[l]anguage in a contract is ambiguous only

when it can reasonably be construed to have more than one meaning." *Id.* (citing *State ex rel. Goddard v. R.J. Reynolds Tobacco Co.*, 206 Ariz. 117, 120, ¶ 12, 75 P.3d 1075, 1078 (App. 2003)).

¶13 Greco's deposition testimony, moreover, is contradicted by his acknowledgement in the Appraisal Disclosure Form that he "may be required to reimburse [Fairway] for the cost of the appraisal . . . as a condition to receiving a copy of the appraisal report." Since Greco did not reimburse Fairway for the cost of the appraisal until closing, the Appraisal Disclosure Form disproves any contention that Fairway had contracted to provide him the appraisal prior to closing. Greco argues that the Appraisal Disclosure Form was executed after the Multiple Disclosure Form, was not part of his agreement with Fairway and "cannot be construed together [with his agreement] as a whole." At the very least, however, the Appraisal Disclosure Form supplemented the Multiple Disclosure Form and informs its meaning.

¶14 Greco repeatedly contends Fairway "promised" him that he would receive the appraisal report prior to closing. The record citation he provides for that assertion, however, supports only the proposition that he asked Fairway for the appraisal, not that Fairway promised him that he would receive it prior to the closing.

¶15 Our holding is further supported by the language of the purchase agreement. In his motion for reconsideration, Greco provided an affidavit in which he argued that he would have rescinded the purchase agreement if he had received the appraisal prior to the close of escrow. As noted, however, the purchase agreement imposed on Greco the responsibility to verify the square footage of the home, and he signed the Buyer's Inspection Notice without noting any issue about the square footage.

¶16 The purchase agreement plainly provided that if Greco was concerned about the square footage of the home, he needed to verify the square footage during the 10-day inspection period. *Supra* ¶ 2.[1] Greco signed the Inspection Notice without raising any issue about the square footage; he does not explain how, given the recited language, the agreement would have permitted him to cancel had he discovered after the 10-day inspection period but prior to closing that the home was smaller than represented. Accordingly, the language of the purchase agreement does not support Greco's contention that he contracted for receipt of a copy of the appraisal report from Fairway prior

[1] Greco does not contend that the time allowed to complete such verification was insufficient. The record is silent as to what efforts Greco made, if any, to verify the square footage before signing the Inspection Notice.

to the closing so that he could cancel the transaction if he was not satisfied with the appraisal.[2]

¶17 For all of these reasons, we hold the superior court did not err in granting Fairway's motion for summary judgment.[3]

B. Attorney's Fees.

1. Standard of review.

¶18 We review a superior court's orders regarding attorney's fees for an abuse of discretion and "will uphold the court's award of attorney's fees and costs if it has 'any reasonable basis.'" *Maleki v. Desert Palms Prof'l Props., L.L.C.*, 222 Ariz. 327, 333-34, ¶ 32, 214 P.3d 415, 421-22 (App. 2009) (quoting *State Farm Mut. Auto Ins. Co. v. Arrington*, 192 Ariz. 255, 261, ¶ 27, 963 P.2d 334, 340 (App. 1998)). "[W]e view the record in the light most favorable to sustaining the trial court's decision." *Rowland v. Great States Ins. Co.*, 199 Ariz. 577, 587, ¶ 31, 20 P.3d 1158, 1168 (App. 2001).

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[2] Greco does not assert Fairway promised to provide him a copy of the appraisal prior to the expiration of the 10-day inspection period.

[3] Greco argues the court erred by ruling based on waiver when the parties had not briefed that issue. We need not address this issue because we hold entry of summary judgment was appropriate even apart from any alleged waiver. For the same reason, we need not address Greco's argument concerning anticipatory repudiation or Fairway's cross-issues in support of the judgment.

¶19 The superior court has the discretion to award attorney's fees to the prevailing party in a case arising out of contract. A.R.S. § 12-341.01(A) (2003); *see also Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 569, ¶ 9, 155 P.3d 1090, 1093 (App. 2007). In deciding whether to award fees, the superior court should consider the following factors:

> the merits of the unsuccessful party's claim, whether the claim could have been avoided or settled, whether the successful party's efforts were completely superfluous in achieving the result, whether assessing fees against the unsuccessful party would cause an extreme hardship, whether the successful party did not prevail with respect to all of the relief sought, the novelty of the legal question presented, and whether an award to the prevailing party would discourage other parties with tenable claims from litigating legitimate contract issues for fear of incurring liability for substantial amounts of attorneys' fees.

Id. at ¶ 10 (quoting *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985)). The question "is not whether the judges of this court would have made an original like ruling, but whether a judicial mind, in view of the law and circumstances, could have made the ruling without exceeding the bounds of reason." *Warner*, 143 Ariz. at 571, 694 P.2d at 1185 (quoting *Davis v. Davis*, 78 Ariz. 174, 179, 277 P.2d 261, 265 (1954) (Windes, J., specially concurring)).

2. The superior court did not err in awarding Fairway its attorney's fees.

¶20 The superior court considered several factors in deciding to award Fairway all of the attorney's fees it sought. The court found "that the litigation between these parties arose out of contract (A.R.S. 12-341.01), that Fairway is clearly the prevailing party in this litigation, that Fairway's defense of the case was necessary, that no conclusive evidence has been provided to the Court that an award of fees against Plaintiff would cause extreme hardship, and that the fees of Fairway, although a substantial amount, are reasonable." The court granted Fairway an award of attorney's fees "in the amount of $144,572.55 (the Court took into consideration Fairway's concession to have a deduction of $1052.00 from its original request), judgment for costs in the amount of $3179.05 and Rule 68 costs of $2459.50 . . . ."

¶21 It is clear from the superior court's order that it considered the appropriate factors and reduced the judgment in accordance with the parties' stipulation. We note the trial in the case was continued once on only two days' notice, and then it was continued again. These continuances added substantially to the cost of litigation, and we cannot say on this record that the superior court's order was unreasonable.

CONCLUSION

¶22 For the foregoing reasons, we affirm the superior court's judgments.

/s/_____
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/_____
DANIEL A. BARKER, Presiding Judge

/s/_____
LAWRENCE F. WINTHROP, Judge