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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
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

WAYNE GOOD and PAULETTE GOOD,) No. 1 CA-CV 09-0726
)
Plaintiff/Appellant,) DEPARTMENT D
)
) **MEMORANDUM DECISION**
v.)
) (Not for Publication -
) Rule 28, Arizona Rules of
NATIONAL CITY MORTGAGE,) Civil Appellate Procedure)
)
Defendant/Appellee)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-023649

The Honorable Hugh E. Hegyi, Judge

AFFIRMED

Wayne Good and Paulette Good Phoenix
Plaintiffs/Appellants *In Propria Persona*

Ballard Spahr LLP Phoenix
By John G. Kerkorian and Craig C. Hoffman
Attorneys for Defendant/Appellee

B R O W N, Judge

¶1 Wayne and Paulette Good (the "Goods") appeal the dismissal of their complaint against National City Mortgage ("National City") for failure to state a claim upon which relief

could be granted pursuant to Arizona Rule of Civil Procedure 12(b)(6). For the following reasons, we affirm.

BACKGROUND

¶12 The Goods purchased a home in Phoenix, Arizona in October 2007 (the "property"). The property was financed through National City and secured by a Deed of Trust. Sometime after the purchase of the property, National City threatened to initiate a non-judicial foreclosure sale, apparently due to the Goods' inability to pay the mortgage on the property. According to the Goods, the outstanding balance on the mortgage is \$230,000, but the home is now worth only \$100,000.

¶13 In response to the threatened foreclosure, the Goods filed a complaint against National City seeking to compel a renegotiation of the mortgage based on a "public policy to minimize home foreclosures[,]" which they argued was created by the adoption of the Emergency Economic Stabilization Act (the "Act"), 12 U.S.C. §§ 5201 to -5261 (Supp. 2008), and set forth in *White v. Mattox*, 127 Ariz. 181, 619 P.2d 9 (1980); and *Wagenseller v. Scottsdale Mem. Hosp.*, 147 Ariz. 370, 710 P.2d 1025 (1985), *superseded by statute on other grounds*. National City filed a motion to dismiss the complaint for failure to state a claim, arguing that the public policy cited by the Goods was not a proper basis for a cause of action in Arizona. National City also argued the Goods failed to state facts that

could be construed to result in a cause of action against them. The trial court granted National City's motion and the Goods filed this appeal.

DISCUSSION

¶14 We review a trial court's grant of a motion to dismiss for failure to state a claim de novo. *Phelps Dodge Corp. v. El Paso Corp.*, 213 Ariz. 400, 402, ¶ 8, 142 P.3d 708, 710 (App. 2006). We assume the allegations in the complaint are true, and will "uphold dismissal only if the plaintiff[] would not be entitled to relief under any facts susceptible of proof in the statement of the claim." *T.P. Racing, L.L.L.P. v. Ariz. Dep't of Racing*, 223 Ariz. 257, ___, ¶ 8, 222 P.3d 280, 282 (App. 2009) (citation and internal quotation marks omitted).

¶15 The Goods argue that public policy requires lenders like National City to meet with borrowers in a good faith effort to implement a plan to avoid foreclosure. They ask us to find that such a public policy is recognized in Arizona and to apply it here.

¶16 As an initial matter, the Goods make no specific arguments on appeal that the trial court erred in dismissing their complaint for failure to state a cognizable claim, which could constitute abandonment and waiver of their claim on that

basis.¹ See *State v. Moody*, 208 Ariz. 424, 452 n.9, ¶ 101, 94 P.3d 1119, 1147 n.9 (2004) (quoting *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (“[O]pening briefs must present significant arguments, supported by authority, setting forth an appellant’s position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim.”)). In our discretion, however, we decide this appeal on its merits based on our review of the record. See *Adams v. Valley Nat’l Bank of Ariz.*, 139 Ariz. 340, 342, 678 P.2d 525, 527 (App. 1984) (recognizing that courts prefer to decide cases on the merits rather than dismiss on procedural grounds).

¶17 We construe the Goods’ opening brief liberally and take it to be a challenge to the trial court’s dismissal of their complaint pursuant Rule 12(b)(6) based on its finding that neither the “[the Act] nor Arizona law articulate a policy of prohibiting residential foreclosures under the circumstances described” in the Goods’ complaint. A complaint may be properly dismissed for failure to state a claim if it lacks a cognizable

¹ The Goods also fail to cite to the record or provide any authority regarding the issues presented in their opening brief as required. ARCAP 13(a)(6) (“The brief of the appellant shall concisely and clearly set forth . . . [a]n argument which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.”). We therefore rely on our own review of the record for the pertinent facts. *State Farm Mut. Auto. Ins. Co. v. Arrington*, 192 Ariz. 255, 257 n.1, 963 P.2d 334, 336 n.1 (App. 1998).

legal theory or contains insufficient facts to support a claim under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

¶8 Here, the complaint, like the assertions proffered on appeal, rests on the notion that the Act created a public policy that required lenders to renegotiate mortgages when doing so would avoid foreclosure and be "in the best interest of [the] nation or the best interest of their stockholders." But the Act only provides authority for "the Federal Government to purchase and insure certain types of troubled assets for the purposes of providing stability to and preventing disruption in the economy and financial system and protecting taxpayers[.]" Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765, introductory comment (codified at 12 U.S.C. §§ 5201 to -5261). To the extent the Secretary of the Treasury of the United States "acquires mortgages, mortgage backed securities, and other assets secured by residential real estate," the Secretary is required to implement a plan that may accommodate reasonable loan modifications and provide assistance to financially distressed homeowners. See 12 U.S.C. § 5219(a)(1). Nothing in the Act, however, creates a private right of action for financially distressed homeowners or requires private mortgage lenders to renegotiate contract terms with borrowers.

¶9 Nor do the cases cited by the Goods in the trial court support their legal theory. *White* stands for the proposition that not all contracts involving a violation of a statute are void. 127 Ariz. at 184, 619 P.2d at 12. The Goods, however, raise no claims regarding the validity of their agreement with National City; thus their reliance on *White* is misplaced. *Wagenseller*, on the other hand, does recognize that judicial decisions can be a source of public policy. 147 Ariz. at 378-79, 710 P.2d at 1033-34. But it also warns that "courts should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject." *Id.* at 379, 710 P.2d at 1034 (citation omitted). As previously explained, in adopting the Act, the legislature did not create a private right of action or suggest mandatory consultation with borrowers regarding renegotiation of mortgage terms prior to foreclosure, nor has our research revealed any other authority that would do so under the circumstances presented here.

¶10 Moreover, the Goods acknowledge that financial institutions have a duty to foreclose on homes for nonpayment in order to protect their stockholders. Consequently, they admit that they do not seek to preclude National City from foreclosing on their property; rather they seek to have National City meet with them "in a good faith effort to determine if a

renegotiation of the mortgage on the Goods' home would be beneficial to all parties involved." The Goods, however, provide no authority that requires National City to participate in such a meeting, and we are aware of none.

¶11 Because the Goods have failed to state any cognizable claim, we find the trial court properly dismissed their complaint pursuant to Rule 12(b)(6).

CONCLUSION

¶12 For the foregoing reasons, we affirm the dismissal of the Goods' complaint against National City.

/s/

MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/

JON W. THOMPSON, Judge

/s/

SHELDON H. WEISBERG, Judge