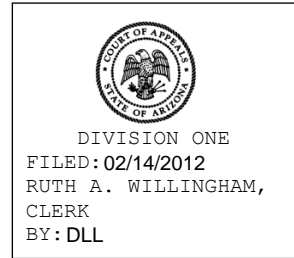


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



ERROL S. STILLMAN and HANNAH) No. 1 CA-CV 10-0842
STILLMAN, husband and wife; and)
RICHARD SAKS,) DEPARTMENT E
)
Plaintiffs/Appellees,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
CAMIE CONLIN and MICHAEL CONLIN,)
wife and husband,)
)
Defendants/Appellants.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-003308

The Honorable Robert H. Oberbillig, Judge
The Honorable J. Richard Gama, Judge

REVERSED AND REMANDED

Law Office of Lawrence K. Lynde Phoenix
By Lawrence K. Lynde
Attorney for Plaintiffs/Appellees

Mack Drucker & Watson PLC Phoenix
By Richard V. Mack and Carlotta L. Turman
Attorneys for Defendants/Appellants

B R O W N, Judge

¶1 Camie and Michael Conlin appeal the trial court's ruling granting summary judgment in favor of Errol and Hannah

Stillman and Richard Saks (collectively "the Stillmans") in the amount of \$172,000. For the following reasons, we reverse and remand for further proceedings.

BACKGROUND

¶12 The Stillmans are the beneficiaries of a deed of trust which was the subject of a trustee's sale, initially conducted on November 7, 2008. The Stillmans had loaned \$250,000 to the trustor in August 2006, evidenced by a promissory note and secured by a deed of trust on a house located in Phoenix (the "property"). Sometime after the trustor became delinquent on his loan payments, Title Trust Deed Service Company of Arizona, L.L.C. (the "trustee"), on behalf of the Stillmans, issued a notice of trustee's sale.

¶13 At the November 7th sale, the Stillmans entered an opening credit bid of \$250,000. The Conlins paid a \$10,000 deposit and entered the bidding. In \$10,000 increments, they and the Stillmans competitively bid the sale price up to \$432,000, with the Conlins ultimately becoming the highest bidder.¹ Pursuant to Arizona Revised Statutes ("A.R.S.") section 33-811(A) (2007), the Conlins were required to pay their bid price to the trustee by 5:00 p.m. the following day. The Conlins did not make the deadline. Indeed, they were unaware of

¹ The Conlins were unaware that the property was subject to a superior lien of nearly \$600,000.

the existence of the deadline, and had planned to pay for the home through a pre-approved home mortgage.

¶14 Because the Conlins did not pay the bid price by the deadline, the trustee continued the sale to December 5, 2008. At the second auction, the Stillmans again entered an opening credit bid of \$250,000. No other bids were submitted and the Stillmans took title to the property based on their credit bid.

¶15 In February 2009, the Stillmans filed a complaint against the Conlins alleging liability under A.R.S. § 33-811(A) for \$172,000—the difference between the Conlins' bid price and the price the property sold for at the continued auction, less the \$10,000 deposit the Conlins forfeited in the first sale.² The Stillmans moved for summary judgment, asserting that the loss they sustained "as a result of [the Conlins'] failure to pay the \$432,000.00 amount [they] bid is the difference between the price paid on re-sale and the amount of [the Conlins'] bid." The Conlins countered that the Stillmans had not shown they had suffered any actual damages so the question of their loss was a disputed issue of fact. The trial court denied the motion in October 2009, stating that "there is a factual dispute presented

² Section 33-811(A) provides in relevant part: "In addition to the forfeit of deposit, a highest bidder who fails to pay the amount bid by that bidder is liable to any person who suffers loss or expenses as a result, including attorney fees."

by the parties as to what 'losses or expenses' Plaintiff incurred in connection with this trustee sale."

¶16 After re-assignment to a different judge, the parties filed pretrial memoranda, essentially repeating the arguments made in the summary judgment proceedings. Upon stipulation of the parties, the court treated the memoranda as a motion for reconsideration and response. The court then granted summary judgment in favor of the Stillmans, finding "A.R.S. 33-811(A) makes the Conlins responsible for the \$182,000 loss less the \$10,000 down payment credit for a total loss of \$172,000." The court also determined that the Stillmans had no "statutory duty" to mitigate their damages. The court subsequently entered judgment against the Conlins for \$172,000 in damages and \$18,000 in attorneys' fees. This timely appeal followed and we have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (Supp. 2011).

DISCUSSION

¶17 Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c). We determine de novo whether any issue of material fact exists and whether the court properly applied the law. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996). Because the burden is on the party requesting summary judgment, we construe the evidence and all reasonable inferences that

follow in favor of the non-moving party. *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 116, ¶ 17, 180 P.3d 977, 981 (App. 2008).

A. Absence of a Binding Contract

¶18 As a defense to liability, the Conlins argue that no binding contract was formed when they submitted their bid. The Conlins contend they were unaware that the property was subject to "a superior lien of approximately \$600,000_[,]" and assert they would not have bid on the property had they known this fact. They rely on *Stone v. Stone*, 176 S.W.2d 464, 468 (Mo. 1944), for the proposition that a "meeting of the minds" is required before a bid at a trustee's sale will be binding on the bidder. In *Stone*, the plaintiff was the high bidder at a trustee's sale and refused to pay the bid price because he misunderstood which deed of trust on the property his bid would be paying. *Id.* at 466-67. Applying common law principles, the Missouri supreme court decided that the plaintiff's misunderstanding was a valid justification for excusing him from liability for the loss the defendant incurred as a result of plaintiff's refusal to pay his bid price. *Id.* at 468.

¶19 *Stone* has no applicability here, however, in light of an Arizona statute governing trustee's sales that does not allow a bid to be revoked once it is made. See A.R.S. §§ 33-810(A) (2007), -811(A). The statute provides that "[e]very bid shall

be deemed an irrevocable offer until the sale is completed" and that "[t]he highest bidder at the sale . . . shall pay the price bid" A.R.S. §§ 33-810(A), -811(A). Thus, a bidder acquires liabilities immediately "after its bid is determined to be the winning bid." *BT Capital, LLC v. TD Serv. Co. of Ariz.*, 228 Ariz. 188, 193, ¶ 21, 265 P.3d 370, 375 (App. 2011) (rejecting argument that no contract is formed until the bid price is paid and accepted by the trustee). Additionally, a purchaser of real property at a trustee's sale takes it "subject to all liens, claims or interests that have a priority senior to the deed of trust." A.R.S. § 33-811(E). The purchaser is therefore "expected and presumed to take into account existing senior liens in calculating an appropriate bid for [a] property." *Hanley v. Pearson*, 204 Ariz. 147, 150, ¶ 13, 61 P.3d 29, 32 (App. 2003). Accordingly, the Conlins' ignorance of the superior lien on the property does not invalidate their irrevocable bid.³

³ The Conlins also argue they should have been given notice by the trustee that a continued sale would be conducted at their risk. When a trustee's sale is continued as a result of a high bidder's failure to pay, "the trustee shall provide notice of the continuation of the sale by registered or certified mail, with postage prepaid, to all bidders[.]" A.R.S. § 33-811(A). It is undisputed the trustee provided the Conlins with notice of the continued sale. We reject the Conlins' suggestion that we read into the statute additional notification requirements. See *Cicoria v. Cole*, 222 Ariz. 428, 431, ¶ 15, 215 P.3d 402, 405 (App. 2009) ("Courts will not read into a statute something that is not within the manifest intent of the legislature as

B. Liability for Loss

¶10 Our legislature has established the consequences of a successful bidder's failure to timely pay the amount bid to the trustee: "In addition to the forfeit of deposit, a highest bidder who fails to pay the amount bid by that bidder is *liable to any person who suffers loss or expenses as a result, including attorney fees.*" A.R.S. § 33-811(A) (emphasis added). The Stillmans argue on appeal, as they did in their motion for summary judgment, that their "loss" under § 33-811(A) is \$172,000—the difference between the Conlins' bid price and the ultimate sale price of the property at the continued sale, less the Conlins' \$10,000 forfeited deposit. The Stillmans assert that this calculation accounts for their "loss of the sale" and that the statute does not require that they prove specific damages.

¶11 However, counsel for the Stillmans conceded at oral argument before this court that the Stillmans are required to establish the amount of their loss by proving the amounts owed under the note secured by the deed of trust. Counsel also acknowledged that the Stillmans are only entitled to the difference between the two sale prices "to the extent of [their]

indicated by the statute itself, nor will the courts inflate, expand, stretch, or extend a statute to matters not falling within its express provisions.").

loss," and that they are not entitled to more damages than what they have actually suffered.⁴

¶12 Requiring the Stillmans to prove their actual losses is consistent with the plain language of the statute. See *Bustos v. W.M. Grace Dev.*, 192 Ariz. 396, 398, 966 P.2d 1000, 1002 (App. 1997) (stating that in determining legislative intent "[w]e look first to the language of the statute on the presumption that the legislature says what it means"). The legislature's use of the phrase "suffers loss or expenses" clearly suggests that a plaintiff is entitled to damages only for the losses he or she actually suffers. "Damages" are "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss." Black's Law Dictionary 416 (8th ed. 2004). Similarly, "actual damages" are defined as "[a]n amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses." *Id.* Further, consistent with the ordinary meaning of the term "suffers loss," the burden is on the Stillmans to prove their damages with "reasonable certainty," and to provide a verifiable basis for calculating their loss. See *Gilmore v. Cohen*, 95 Ariz. 34, 36, 386 P.2d 81, 82 (1963).

⁴ Counsel also agreed, consistent with the trial court's ruling, that the Stillmans' damages are measured as of the time of the second trustee's sale.

¶13 Moreover, nothing in § 33-811(A) indicates that the legislature intended to provide any person a windfall at the expense of a bidder who fails to pay the trustee. Instead, a related statutory provision governing the distribution of the proceeds of a trustee's sale supports the opposite view. See A.R.S. § 33-812 (Supp. 2011); *Sw. Gas Corp. v. Indus. Comm'n*, 200 Ariz. 292, 297, 25 P.3d 1164, 1169 (App. 2001) (stating that courts favor an "interpretation that is most harmonious with the statutory scheme and legislative purpose") (internal quotations and citation omitted). Section 33-812(A) provides in pertinent part as follows:

(A) The trustee shall apply the proceeds of the trustee's sale in the following order of priority:

1. To the costs and expenses of exercising the power of sale and the sale, including the payment of the trustee's fees and reasonable attorney fees actually incurred.
2. To the payment of the contract or contracts secured by the trust deed.
3. To the payment of all other obligations provided in or secured by the trust deed and actually paid by the beneficiary before the trustee's sale.
4. To any condominium association or planned community association . . . that had a subordinate lien as provided by law[.]
5. To the junior lienholders or encumbrancers in order of their priority as they existed at the time of sale. After payment in full of all sums due to all

junior lienholders and encumbrancers as of the date of the sale and excluding any postsale attorney fees, payment shall be made to the trustor[.]

Applying these provisions, if the Conlins had paid the \$432,000 by 5 p.m. the day after the trustee's sale, the Stillmans would have been entitled to keep an amount equal to: (1) their costs, expenses, and attorneys' fees; (2) the amounts due under the promissory note; and (3) "all other obligations provided in or secured by the trust deed and actually paid by the beneficiary before the trustee's sale." See A.R.S. § 33-812(A)(1)-(3). After payment to the Stillmans, any excess funds would be paid to satisfy any junior liens and then the remainder to the trustor. Thus, to establish their right to recover under § 33-811, the Stillmans' claim for "loss and expenses" must, at a minimum, be analyzed within the context of § 33-812(A)(1)-(3) to determine what amount the Stillmans would have been entitled to receive had the Conlins paid the amount they bid at the first auction.

¶14 Notwithstanding the concession at oral argument that proof of actual losses is required, the Stillmans contend that evidence in the record supports the trial court's award of \$172,000. We disagree.

¶15 In their complaint, the Stillmans alleged that "[a]t the time of the trustee's sale on December 5, 2008, the

indebtedness owed on the note secured by the deed of trust was approximately \$439,532.60[,]” and that they would have been entitled to the entire difference between the Conlins’ bid price and the sale price of the property at the second sale. However, the Stillmans have not directed us to, nor have we been able to find, any evidence in the record showing the actual amounts owed under the contract. The Stillmans’ motion for summary judgment and accompanying statement of facts do not provide any basis for determining what losses they actually suffered. Therefore, the trial court erred in granting summary judgment because factual issues exist regarding the amount of loss the Stillmans suffered.

C. Duty to Mitigate

¶16 Finally, the Conlins argue that the Stillmans failed to “mitigate their damages” by refusing to accept the Conlins’ offer to tender their bid price with funds from their home mortgage loan after the statutory deadline. Because this issue is likely to arise on remand, in our discretion we address it insofar as permitted by the record on appeal. See *State v. Abdi*, 226 Ariz. 361, 366, ¶ 18, 248 P.3d 209, 214 (App. 2011). The Conlins’ argument does not appear to be based on a common law duty to mitigate damages because they do not argue that the Stillmans unreasonably increased their losses. See *Life Investors Ins. Co. of Am. v. Horizon Res. Bethany, Ltd.*, 182

Ariz. 529, 534, 898 P.2d 478, 483 (App. 1995) ("A party's failure to mitigate damages may be invoked to negate and reduce damages where the party by its own voluntary activity has unreasonably exposed itself to damage or increased its injury" beyond that caused by the defendant's wrongdoing.). Instead, the Conlins assert they should have been allowed to pay the funds to the trustee at a later date under A.R.S. § 33-811(B).

¶17 We reject the Conlins' argument. First, the argument is misdirected, as the plain language of subsection (B) gives discretion to accept late payment of a bid to the trustee, not the beneficiary. A.R.S. § 33-811(B). Also, consistent with the trial court's ruling, nothing in the statute indicates that the legislature intended to limit the trustee's discretion in deciding whether to accept a late payment from the prevailing bidder. See *id.* ("The payment of the bid price may be made at a later time if agreed upon in writing by the trustee."). Thus, the trial court correctly found that the Stillmans have "no statutory duty to mitigate damages."

¶18 Based on our understanding of the Conlins' argument, we express no opinion regarding whether the Stillmans had a duty under the common law to mitigate their damages. That determination may be made by the trial court in the first instance after the Stillmans produce evidence supporting their

claim for the losses they contend they have suffered as a result of the Conlins' failure to pay the bid price.

CONCLUSION

¶19 For the foregoing reasons, we reverse the trial court's grant of summary judgment and remand for further proceedings consistent with this decision.

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

DIANE M. JOHNSEN, Presiding Judge

/s/

PATRICIA A. OROZCO, Judge