DIVISION ONE
FILED: 01/31/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DUANE N. VARBEL,	)	No. 1 CA-CV 11-0197
	)	
Plaintiff/Appellant,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
CHASE HOME FINANCE, L.L.C.,	)	Rule 28, Arizona Rules
	)	of Civil Appellate
Defendant/Appellee.	)	Procedure)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-032497

The Honorable Dean M. Fink, Judge

AFFIRMED

Duane Varbel Plaintiff/Appellant	Phoenix
Maynard Cronin Erickson Curran & Sparks PLC By Michael D. Curran Attorneys for Defendant/Appellee	Phoenix

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G O U L D, Judge

¶1 Appellant Duane N. Varbel appeals the trial court's decision granting Appellee Chase Home Finance, L.L.C.'s ("Chase") motion to dismiss Varbel's complaint. For the following reasons,

we affirm the trial court's decision to grant Chase's motion to dismiss.

Facts and Procedural History[1]

¶2 Varbel filed a complaint against Chase, seeking an order that Chase "does not have any ownership interest" in a residence located in Litchfield Park ("the Residence"). In the complaint, Varbel alleged that Chase did not possess either the promissory note or the deed of trust securing the mortgage on the Residence. The mortgage in question was not based on an agreement between Varbel and Chase, but on an agreement between Robert F. Bartz and Claudia L. Bartz ("the Bartzes") and Phoenix Lending Group, according to Varbel. The agreement between the Bartzes and Phoenix Lending Group was signed on July 15, 2008, and the Bartzes subsequently quit-claimed half of their interest in the Residence to Varbel.[2] Varbel also alleged that Phoenix Lending Group did not have the power to transfer its interest in the home unless it transferred "*both* the deed of trust and the

[1] When reviewing a trial court's decision to grant a motion to dismiss, we accept as true all facts alleged in the complaint and draw all reasonable inferences from these facts in plaintiff's favor. *McDonald v. City of Prescott*, 197 Ariz. 566, 567, ¶ 5, 5 P.3d 900, 901 (App. 2000).

[2] Although Varbel did not specify in his complaint when the alleged transfer between the Bartzes and him occurred, his opening brief states that he purchased a fifty percent ownership interest in the property on November 17, 2010 and that the quit claim deed was recorded with the Maricopa County Recorder on November 18, 2010.

promissory note to the same third party." (Emphasis added.) According to Varbel's complaint, Chase has no standing to collect on the promissory note because the Maricopa County Recorder's records do not show a transfer of Phoenix Lending Group's ownership interest. Varbel alleged that Chase "has been wrongfully collecting mortgage payments" on the Residence from the Bartzes for several months. He also alleged a form of reliance on these facts in acquiring his fifty percent interest in the residence: "Plaintiff took possession of fifty percent ownership of the above described home having reason to believe that [Chase] does not have a Maricopa County Recorder record that said [Chase] ever possessed an ownership interest in the promissory note securing the debt owed on the [Residence]."

¶3 Chase moved to dismiss Varbel's complaint pursuant to Arizona Rule of Civil Procedure 12(b)(6), arguing that it failed to state a claim and also that Varbel lacked standing to challenge the agreement between the Bartzes and Phoenix Lending Group. Chase asserted the following: Varbel "concedes that the Bartz[es] are voluntarily making such payments to [Chase,]" Varbel "does *not* allege that [the Bartzes] are in default," Varbel "does *not* allege that [Chase] has threatened to foreclose," and Varbel "does *not* allege that [Chase] has taken any action to threaten the contractual relationship between the Bartz[es] and [Chase]." The trial court granted the motion to

dismiss, reasoning that Varbel did not have standing to challenge a contract between Phoenix Lending Group and the Bartzes. The court explained that Varbel's complaint failed to allege any "distinct and palpable" injury to himself, given that Varbel did not allege that he had been making payments, that he had been solicited to make payments, or that foreclosure was threatened. Varbel's complaint was dismissed without prejudice. Varbel timely appeals. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1).

Discussion

¶4 When reviewing a trial court's decision to grant a motion to dismiss, we accept as true all facts alleged in the complaint and draw all reasonable inferences from these facts in plaintiff's favor. *McDonald*, 197 Ariz. at 567, ¶ 5, 5 P.3d at 901; *Fidelity Sec. Life Ins. Co. v. State*, 191 Ariz. 222, 224, ¶ 4, 954 P.2d 580, 582 (1998). However, we may not "speculate about hypothetical facts that might entitle the plaintiff to relief." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 420, ¶ 14, 189 P.3d 344, 347 (2008). We do not accept as true allegations consisting of conclusions of law, inferences or deductions not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts. *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389, ¶ 4, 121 P.3d 1256, 1259 (App.

2005). We affirm dismissal only if "plaintiff would not be entitled to relief under any interpretation of the facts susceptible of proof." *Hogan v. Wash. Mut. Bank*, 227 Ariz. 561, 564, ¶ 12, 261 P.3d 445, 448 (App. 2011).

¶5 Varbel argues that the trial court erred by dismissing his complaint because (1) Chase is required to produce the original promissory note to require payments from the Bartzes and and (2) Arizona public policy requires a trust beneficiary to possess both the deed of trust and the promissory note in order to foreclose. However, neither of these substantive issues are properly before this court. The trial court dismissed Varbel's complaint because Varbel lacked standing to challenge a contract between Phoenix Lending Group and the Bartzes, having asserted no "distinct and palpable injury" to himself. Thus, the only question properly before us is whether Varbel has standing to assert the claims in question. The substantive legal questions Varbel desires us to address were not relied upon, discussed, or even mentioned by the trial court in dismissing his claims.[3] Also not properly before us are Varbel's arguments that Chase has not complied with his requests for discovery. Once a complaint has been dismissed, a party is no longer entitled to discovery.

[3] While it is true that Chase raised the argument that Arizona does not recognize a "show me the note" cause of action as an alternative basis for dismissal in its motion to dismiss, the trial court never reached this theory and based the dismissal solely on standing.

See Ariz. R. Civ. P. 26(b) (stating that parties may obtain discovery that is "relevant to the subject matter involved in the *pending* action") (emphasis added).

¶6 Because Arizona's Constitution lacks the "case or controversy" requirement found in its federal counterpart, standing is not a doctrine of constitutional significance in Arizona state courts, but a doctrine of judicial restraint. *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs.*, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985). "This judicial restraint has led Arizona courts to impose a 'rigorous' standing requirement" that requires a party to show "a personal, palpable injury" in order to ensure that we do not issue mere advisory opinions, that the case is not moot, and that the issues will be fully developed by true adversaries. *Home Builders Ass'n of Cent. Ariz. v. Kard*, 219 Ariz. 374, 377, ¶¶ 9-10, 199 P.3d 629, 632 (App. 2008) (citing *Armory Park*, 148 Ariz. at 6, 712 P.2d at 919 (1985)). For purposes of analysis, "[s]tanding generally requires an injury in fact, economic or otherwise, caused by the complained-of conduct, and resulting in a distinct and palpable injury giving the plaintiff a personal stake in the controversy's outcome." *Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, 406, ¶ 8, 207 P.3d 654, 659 (App. 2008). On appeal, standing issues are reviewed de novo. *Id.*, 220 Ariz. at 405, ¶ 7, 207 P.3d at 658.

¶7 Varbel has failed to allege in his complaint that he has suffered a distinct and palpable injury. Varbel has alleged hypothetical situations which, if they occurred, might cause him harm. For example, Varbel alleged that "[s]hould the property be lost, [he] will lose his investment in the property." He also alleged that if Chase "is allowed to collect on the [p]romissory [n]ote relating to the above described home, [Varbel] will incur financial loss and mental anguish." However, absent from Varbel's complaint is any allegation that Chase has threatened to foreclose on the property[4] or that Chase ever tried to collect on the promissory note *from him.*

¶8 This Court will not provide an advisory ruling for Varbel based on his alleged hypothetical injuries. As the court stated in *Velasco v. Mallory*, 5 Ariz. App. 406, 410-11, 427 P.2d

[4] Varbel attempts to present evidence to this court suggesting that he has suffered an injury because the property was in fact threatened with foreclosure. Varbel attached as Exhibit 3 to his opening brief a Notice of Trustee's Sale of the Residence, dated August 24, 2009. The Notice advised that the property would be sold on November 20, 2009. Varbel also states in his opening brief that Chase has given notice that the "property will be sold on April 25, 2001" [sic]. However, we cannot consider this evidence because it was not alleged in Varbel's complaint and was never presented to the trial court. *Cullen*, 218 Ariz. at 419, ¶ 7, 189 P.3d at 346 ("When adjudicating a Rule 12(b)(6) motion to dismiss, Arizona courts look only to the pleading itself and consider the well-pled factual allegations contained therein."). For similar reasons, we may not consider Varbel's arguments in his reply brief that his title has been clouded based on the above-mentioned foreclosure proceedings. This alleged injury was not pled in the complaint and was not presented to the trial court.

540, 544-45 (1967), "[we] will not render advisory opinions anticipative of troubles which do not exist; may never exist; and the precise form of which, should they ever arise, we cannot predict."

Conclusion

¶9 For the foregoing reasons, we affirm the dismissal of Varbel's complaint.

/S/
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ANDREW W. GOULD, Judge

CONCURRING:

/S/
_____
MAURICE PORTLEY, Presiding Judge

/S/
_____
ANN A. SCOTT TIMMER, Judge