DIVISION ONE
FILED: 04/10/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ROOFING WHOLESALE CO., INC., a Delaware corporation, Plaintiff/Appellee, v. SCOTTY D. NEIL and CAROLYN NEIL, husband and wife, and individually, Defendants/Appellants.	)	1 CA-CV 11-0316 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)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. CV2009-027564

The Honorable Eileen S. Willett, Judge

AFFIRMED

Collins & Collins, LLP — Phoenix
by C. Robert Collins
Joseph E. Collins
Attorneys for Defendants/Appellants

Shannon & Fleming, P.C. — Phoenix
by Thomas W. McLellan
L. Timothy Fleming
Attorneys for Plaintiff/Appellee

P O R T L E Y, Judge

¶1 This is a deficiency judgment case. We are asked to decide whether the superior court erred when it determined the

fair market value of property in Prescott Valley that was owned by Scotty D. Neil ("Scott Neil") and Carolyn Neil (collectively "the Neils") and subsequently sold at a trustee's sale. For the reasons that follow, we affirm the judgment.

BACKGROUND

¶2 ENSCO Properties, LLC ("ENSCO") and the Neils executed a $750,000 promissory note in March 2008 in favor of Roofing Wholesale Company ("Roofing Wholesale").[1] On the same day, Scott Neil, as ENSCO's manager, executed a deed of trust naming Roofing Wholesale as the beneficiary. The note was due on January 14, 2009.

¶3 Following default, Roofing Wholesale initiated a deed of trust sale that was held on August 5, 2009. Roofing Wholesale had an appraisal conducted on the property and, as a result, entered a credit bid of $200,000, which was the highest bid. As of the sale date, ENSCO and the Neils owed Roofing Wholesale $874,210.20 on the note.

¶4 Roofing Wholesale then instituted this deficiency action pursuant to Arizona Revised Statutes ("A.R.S.") section

[1] Scott Neil signed the note in his personal capacity, as well as in his capacity as ENSCO's manager. Carolyn Neil executed the note in her personal capacity, as did J. Fraser Smith and Joanne R. Smith (the "Smiths"). The Smiths are not parties to this appeal.

33-814(A) (West 2012).[2] During the hearing to determine the property's fair market value, the parties introduced appraisal reports and expert witness testimony. The superior court learned that the property consisted of approximately 6.94 acres, was zoned for multi-family usage, and sat on a hillside slope above an apartment complex and near a car dealership. The court found that the fair market value was $190,000, as asserted by Roofing Wholesale, and not $685,000 as the Neils had claimed. The remaining issues were resolved by summary judgment.

¶5 The court entered judgment against ENSCO and the Neils pursuant to Arizona Rule of Civil Procedure 54(b) for $674,210.20, plus accrued and accruing interest, attorneys' fees, and costs.[3] The judgment recognized that the fair market value of the property was less than the sales price and credited the sales price against the total indebtedness pursuant to § 33-814(A).

DISCUSSION

I. The Court Correctly Applied A.R.S. § 33-814(A) in Determining the Fair Market Value.

¶6 The principal issue on appeal is whether the superior court erred when it determined that the fair market value of the

[2] Unless otherwise noted, we cite the current version of the statute if no revisions material to this decision have since occurred.

[3] Roofing Wholesale obtained a default judgment against the Smiths.

property pursuant to A.R.S. § 33-814(A) was $190,000. The statute, in relevant part, provides that:

> an action may be maintained to recover a deficiency judgment against any person directly, indirectly or contingently liable on the contract for which the trust deed was given as security including any guarantor of or surety for the contract and any partner of a trustor or other obligor which is a partnership. In any such action against such a person, *the deficiency judgment shall be for an amount equal to the sum of the total amount owed the beneficiary as of the date of the sale, as determined by the court less the fair market value of the trust property on the date of the sale as determined by the court or the sale price at the trustee's sale, whichever is higher*. . . . The fair market value shall be determined by the court at a priority hearing upon such evidence as the court may allow. The court shall issue an order crediting the amount due on the judgment with the greater of the sales price or the fair market value of the real property. *For the purposes of this subsection, "fair market value" means the most probable price, as of the date of the execution sale, in cash, or in terms equivalent to cash, or in other precisely revealed terms, after deduction of prior liens and encumbrances with interest to the date of sale, for which the real property or interest therein would sell after reasonable exposure in the market under conditions requisite to fair sale, with the buyer and seller each acting prudently, knowledgeably and for self-interest, and assuming that neither is under duress*. . . .

(Emphasis added.)

¶7 The Neils contend that the court erred by adopting a valuation that was not based upon the highest and best use of the property. Roofing Wholesale, however, contends that the statute contains no such requirement.

¶8 We review statutory interpretation issues de novo. *Ariz. Dep't of Econ. Sec. v. Superior Court (Lee)*, 228 Ariz. 150, 152, ¶ 6, 264 P.3d 34, 36 (App. 2011) (citation omitted). Our goal when interpreting a statute is to give effect to the legislature's intent. *See Tanque Verde Unified Sch. Dist. No. 13 of Pima Cnty. v. Bernini*, 206 Ariz. 200, 205, ¶ 14, 76 P.3d 874, 879 (App. 2003) (citation omitted). We primarily rely on the language of the statute to determine its meaning, and interpret the terms according to their common meaning unless the legislature has supplied a specific definition or a context indicating that a term carries a special meaning. *Mid Kansas Fed. Sav. & Loan Ass'n of Wichita v. Dynamic Dev. Corp.*, 167 Ariz. 122, 128, 804 P.2d 1310, 1316 (1991) (citations omitted).

¶9 Our review of A.R.S. § 33-814(A) reveals no requirement that the fair market value must be established by proof of the highest and best use of the property. Rather, the statute provides for "the most probable price, as of the date of the execution sale, . . . for which the real property or interest therein would sell after reasonable exposure in the market under conditions requisite to fair sale . . . ." *Id.*

¶10 The Neils cite *Koepnick v. Arizona State Land Department* for the proposition that the court must value the property according to its highest and best use. 221 Ariz. 370, 380-81, ¶ 35, 212 P.3d 62, 72-73 (App. 2009) (citations omitted). *Koepnick*, however, addressed the reclassification of state trust land from agricultural to commercial by the Arizona Land Department. *Id*. at 373, ¶ 4, 212 P.3d at 65. The case did not address the fair market value determination of property sold at a deed of trust sale.

¶11 The Neils also rely on *Salt River Project Agricultural Improvement & Power District v. Miller Park, LLC*, 218 Ariz. 246, 183 P.3d 497 (2008). In *Salt River*, our supreme court held that a trial court presiding over an eminent domain case did not abuse its discretion by excluding statements made in connection with the landowner's tax protest. *Id.* at 251, ¶¶ 22-25, 183 P.3d at 502. The tax protest evidence had little probative value in determining the land's highest and best use for eminent domain purposes. *Id.* at 250-51, ¶ 21, 183 P.3d at 501-02. This, however, is not an eminent domain case, and we decline to bootstrap eminent domain principles into this area of deed of trust law because § 33-814(A) is clear and does not demonstrate a legislative intent to apply the highest and best use standard. *See Life Investors Ins. Co. v. Horizon Resources Bethany, Ltd.*, 182 Ariz. 529, 532-33, 898 P.2d 478, 481-82 (App. 1995)

(upholding jury instructions on fair market value that used the plain language of A.R.S. § 33-814(A)).

¶12 Even though there was no statutory authority for the highest and best use standard, the experts for both parties claimed to have valued the property according to its highest and best use. In reaching its conclusion, the superior court did not mention "highest and best use." Accordingly, we presume that the court followed the statute, and have no reason to conclude that the statute was misapplied.

II. The Evidence Supports the Court's Fair Market Value Determination.

A. Standard of Review

¶13 The Neils also challenge the fair market value determination and make what is essentially a sufficiency of the evidence argument. In determining a property's fair market value, a trial court may adopt portions of evidence from different witnesses, and "a result anywhere between the highest and the lowest estimates which may be arrived at by using the various factors appearing in the testimony in any combination which is reasonable will be sustained by an appellate court." *State Tax Comm'n v. United Verde Extension Mining Co.*, 39 Ariz. 136, 140, 4 P.2d 395, 396 (1931) (citations omitted). When a ruling is based upon conflicting testimony, the court's findings will not be disturbed. *Flood Control Dist. of Maricopa Cnty. v.*

Hing, 147 Ariz. 292, 299, 709 P.2d 1351, 1358 (App. 1985) (citations omitted), *abrogated on other grounds by Calmat of Ariz. v. State ex rel. Miller*, 176 Ariz. 190, 195, 859 P.2d 1323, 1328 (1993), *as recognized in City of Scottsdale v. CGP-Aberdeen, LLC*, 217 Ariz. 626, 629 n.8, ¶ 10, 177 P.3d 1198, 1201 n.8 (App. 2008).

B. The Court Reached a Reasonable Result Based on the Evidence.

¶14 The Neils contend that the court erred by adopting the valuation evidence presented by Roofing Wholesale. They argue that the discrepancy between the experts is mainly attributable to their differing testimony on the amount of usable land. Roofing Wholesale's expert found that only four acres were usable, and the Neils' expert testified that four and one-half acres were usable. Scott Neil also testified that neither calculation was accurate because both had failed to account for two more usable acres on top of the hill.

¶15 As Roofing Wholesale points out, Lance Mills testified that he had spoken with Mike Fann, an owner of Fann Contracting, who had prepared a quote for a prior client interested in developing a multi-family residence on the property. In that capacity, Fann had marked up a plat map — which he replicated for Mills — to show where a contractor would need to "cut in." Fann also provided details on the costs to cure.

¶16 Mills adopted Fann's conclusion that "the site would not be usable as is." Moreover, only four acres could feasibly be developed, because "it would cost you more money to develop anything over four acres than the land would be worth when it's flat." Mills further testified that "the topographical conditions of the subject property are so steep and elevated that no building would realistically be able to sit there without sliding." Using the sales approach to appraisal, Mills determined that the property could have sold for $190,000 on the sale date after one year of market exposure.

¶17 According to Robert C. Huck, however, four and one-half acres of the property were usable. Huck attributes his conclusion to Nick Malouff, a developer of the subdivision:

> However, according to Mr. Nick Malouff, the developer of the subject subdivision, this parcel has only around four to five acres of effectively usable land area. An effective land area of 4.5 acres or 196,020 square feet is concluded for use in this appraisal. It is assumed that this effectively usable land area is substantially accurate.

¶18 Huck's report does not explain why four and one-half acres was appropriate, nor does it include any input from Fann. In the section of his report titled "Extraordinary Assumptions, Hypothetical & Limiting Conditions," Huck states: "The opinion of value concluded in this appraisal is based, in part, on the observation that the subject property contains approximately 4.5

acres of effectively usable land area. It is noted that no survey, engineering study or other relevant data has been supplied which validates this observation."

¶19 In light of the testimony and the fact that the court had an opportunity to assess the witnesses' persuasiveness, there was reasonable evidence to support the court's finding that only four acres of the property were usable. We will not second-guess the court's determination or re-weigh the evidence. *See Magna Inv. & Dev. Corp. v. Pima County*, 128 Ariz. 291, 294, 625 P.2d 354, 357 (App. 1981). Consequently, the court did not abuse its discretion in determining the usable acreage.

¶20 The Neils also suggest a math discrepancy in Mills's value calculations for one of his comparable properties. The issue was brought to the court's attention at the hearing, and other comparables from Mills and Huck were available for the court's consideration. We presume that the court considered all of the evidence presented, *Fuentes v. Fuentes*, 209 Ariz. 51, 55-56, ¶ 18, 97 P.3d 876, 880-81 (App. 2004) (citation omitted), and cannot conclude that the court's adoption of Mills's calculation was unreasonable.

¶21 The Neils additionally emphasize what they consider to be Huck's superior credentials, Mills's allegedly inappropriate choice of comparable properties, and the experts' conflicting evidence on value. They omit, however, that Mills testified

that Huck had made adjustments to his comparable sales based upon topographical conditions; without those adjustments, "we're actually very close in value." We will not re-weigh these matters on appeal.[4] *See Magna Inv.*, 128 Ariz. at 294, 625 P.2d at 357. The court reasonably adopted Mills's valuation and the evidence permitted it to do so.

¶22 Roofing Wholesale also requests its fees on appeal pursuant to the promissory note. Because the note provides: "If suit be brought to recover on this note, the Maker (Payor) agrees to pay such sum as the Court may fix as attorney's fees," Roofing Wholesale is entitled to its reasonable attorneys' fees. *See Chase Bank of Ariz. v. Acosta*, 179 Ariz. 563, 575, 880 P.2d 1109, 1121 (App. 1994) (citation omitted) ("court lacks discretion to refuse to award [attorneys'] fees under [a] contractual provision"). We will also grant Roofing Wholesale is costs on appeal upon compliance with Arizona Rules of Civil Appellate Procedure 21(c).

---

[4] We decline to address the Arizona Rule of Evidence 703 objection to Mills's evidence because it was not raised in the opening brief, *see Romero v. Sw. Ambulance*, and find no indication in the transcript that the objection was raised below. 211 Ariz. 200, 204 n.3, ¶ 7, 119 P.3d 467, 471 n.3 (App. 2005) (citations omitted). We also decline to address the Neils' undeveloped argument regarding a credit for the value of dirt that might be removed when the property is developed. *See* ARCAP 13(a)(6); *Polanco v. Indus. Comm'n of Ariz.*, 214 Ariz. 489, 491 n.2, ¶ 6, 154 P.3d 391, 393 n.2 (App. 2007) (citations omitted).

CONCLUSION

¶23 Based on the foregoing, the court's fair market value determination and judgment are affirmed.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
ANN A. SCOTT TIMMER, Judge

/s/
_____
ANDREW W. GOULD, Judge