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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JANICE ANN MORIN, Plaintiff/Appellant, v. BANK OF AMERICA, N.A. as Trustee, Successor by Merger to LA SALLE BANK, N.A., as Trustee for the Registered Holders of BEAR STEARNS ASSET BACKED SECURITIES I TRUST 2007-HE4 ASSET-BACKED CERTIFICATES; and PERRY & SHAPIRO, LLP., Defendants/Appellees.	2 CA-CV 2011-0125 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CV201000919

Honorable Steven J. Fuller, Judge

AFFIRMED

Janice Ann Morin — Mesa
In Propria Persona

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E S P I N O S A, Judge.

¶1 In this action for declaratory and injunctive relief relating to a home foreclosure and trustee's sale, plaintiff/appellant Janice Morin appeals from the trial court's dismissal of her complaint for failure to state a claim upon which relief can be granted. *See* Ariz. R. Civ. P. 12(b)(6). She argues, *inter alia*, that the court erred in dismissing her complaint because no recorded document established that appellee Bank of America was a beneficiary under the deed of trust with authority to commence foreclosure proceedings. Because Morin admitted default and failed to timely challenge the sale, she cannot state a claim for relief, and we accordingly affirm.

Factual Background and Procedural History

¶2 On appeal from the grant of a motion to dismiss, "we consider the facts alleged in the complaint to be true, and we view them in a light most favorable to the plaintiff to determine whether the complaint states a valid claim for relief." *Mintz v. Bell Atl. Sys. Leasing Int'l, Inc.*, 183 Ariz. 550, 552, 905 P.2d 559, 561 (App. 1995). However, we do not accept as true "conclusions of law or unwarranted deductions of fact." *Folk v. City of Phoenix*, 27 Ariz. App. 146, 150, 551 P.2d 595, 599 (1976). Morin borrowed $160,000 from Bear Stearns Residential Mortgage Corporation to buy a home in Pinal County (referred to here as the "property"), which was used to secure the loan

pursuant to a deed of trust. The trust deed listed Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary and Great American Title as the trustee, but provided that "[t]he Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to [the] Borrower."

¶3 In a "Notice of Substitution of Trustee," dated August 14, 2008, and recorded August 21, "Ocwen Loan Servicing, LLC on behalf of LaSalle Bank National Association, as Trustee for the registered holders of [certain] Bear Stearns Asset Backed Securities," purported to appoint Christopher Perry as successor trustee under the deed of trust. Perry mailed Morin a "Statement of Breach, Notice of Default and Election to Sell Under Deed of Trust" dated August 19—a single document notifying her that she had failed to make her May 2008 payment "and all subsequent payments" and therefore had defaulted under the terms of the deed of trust, requiring her to pay immediately "all sums secured by the Deed of Trust," and "elect[ing] to sell the subject real property." A "Notice of Trustee's Sale" was recorded August 21, and the trustee's sale was held over a year later in November 2009. The trustee's deed stated the purchaser was Bank of America "as Successor by Merger to LaSalle Bank National Association." Morin ultimately was evicted after being found guilty of forcible detainer.

¶4 Morin filed this action in March 2010. In an amended complaint, she requested that the trial court enjoin the defendants from "any further disposition and sale of the subject Property," declare the rights of the respective parties, and determine whether the defendants had standing to conduct the sale and whether Perry had breached

his obligations as trustee. Morin alleged she was the rightful owner of the property because "there is no Assignment of Deed of Trust . . . on file at the office of the Pinal County Recorder to indicate that MERS at any time assigned [its] interest in the [trust deed] to another party." She further maintained that she "does not have signed originals of the Note . . . and cannot determine the terms of 'default' . . . [or] other defined terms contained in the Note without production . . . of the Note," and that the defendants could not have established her default, for purposes of a trustee's sale, without producing the note. She additionally alleged certain procedural irregularities relating to the appointment of Perry as substitute trustee and the manner in which the trustee's sale had been noticed and conducted.

¶5 The complaint named as defendants Bank of America, N.A. as successor to La Salle Bank, N.A.; MERS; Ocwen Loan Servicing, LLC; Bear Stearns Residential Mortgage Corp.; and Perry & Shapiro, LLP.[1] However, Morin later stipulated to the dismissal of all defendants except Bank of America and Perry & Shapiro, which are likewise the only defendants named in this appeal (hereafter referred to as the appellees).[2]

[1]Although Perry & Shapiro is now known as Shapiro, Van Ess & Sherman, LLP, to avoid confusion, we continue to refer to the firm as Perry & Shapiro for purposes of this appeal.

[2]Perry & Shapiro contends it is not a proper party, relying on A.R.S. § 33-807(E), which provides that a trustee need only be joined as a party when the litigation pertains to a breach of the trustee's obligations under the law or the deed of trust. Although we note that Morin's complaint alleged Perry "bre[a]ched his duties and obligations under the [deed of trust] and A.R.S. § 33-801 *et seq.*," we need not address this argument further in view of our resolution of this appeal.

¶6 After hearing oral argument, the trial court dismissed the complaint as to the appellees, finding that Morin could not state a claim for relief because she had admitted she was in default on the loan and she had waived any defense to the trustee's sale by failing to object until after it had taken place. *See* A.R.S. § 33-811(C) (trustor waives objections by failing to obtain preliminary injunction before trustee's sale). We have jurisdiction over Morin's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

¶7 We review the grant of a motion to dismiss for an abuse of discretion and review issues of law de novo. *Dressler v. Morrison*, 212 Ariz. 279, ¶ 11, 130 P.3d 978, 980 (2006). Dismissal for failure to state a claim is not favored in Arizona, *Folk*, 27 Ariz. App. at 151, 551 P.2d at 600, and we will affirm such a dismissal only if "it appears certain that the plaintiff would not be entitled to relief under any state of facts susceptible of proof under the claim stated," *Acker v. CSO Chevira*, 188 Ariz. 252, 255, 934 P.2d 816, 819 (App. 1997).

¶8 Morin's principal argument is that because county records do not reflect an assignment of the beneficial interest by MERS—the beneficiary originally named in the deed of trust—to Bank of America, the latter was not a beneficiary of the trust deed and therefore was not entitled to appoint Perry as a substitute trustee or initiate foreclosure proceedings. Even if this argument had some merit, Morin waived it by failing to raise it until after the trustee's sale had taken place—a consequence she acknowledged in her

complaint. Although a trustee's failure to strictly comply with statutory procedures provides a defense or ground for objection to a trustee's sale, *BT Capital, LLC v. TD Serv. Co. of Ariz.*, 228 Ariz. 188, ¶ 25, 265 P.3d 370, 376 (App. 2011), *rev. granted* (Jan. 10, 2012), a trustor, such as Morin, must object before the sale is held, regardless of whether she was mailed notice:

> The trustor . . . and all persons to whom the trustee mails a notice of a sale under a trust deed . . . shall waive all defenses and objections to the sale not raised in an action that results in the issuance of a [preliminary injunction] entered . . . on the last business day before the scheduled date of the sale.

§ 33-811(C). "To permit an objecting party who did not obtain an injunction prior to the sale to void a sale would render . . . § 33-811(C) meaningless." *BT Capital, LLC*, 228 Ariz. 188, ¶ 25, 265 P.3d at 376. And, once the sale has been effected, the trustee's deed raises a "presumption of compliance with the requirements of the deed of trust and [title 33, chapter 6.1] relating to the exercise of the power of sale and the sale of the trust property." § 33-811(B); *see Sec. Sav. & Loan Ass'n v. Milton*, 171 Ariz. 75, 76, 828 P.2d 1216, 1217 (App. 1991).

¶9 Here, notice of the trustee's sale was recorded in August 2008, and the sale was held in November 2009. In the intervening fourteen months, Morin never sought, much less obtained, an injunction against the sale.[3] Although she seeks a post-sale

[3]Although Morin seems to suggest she had not been provided with notice of the November 2009 trustee's sale, it is clear from her amended complaint that she had received notice of the trustee's sale originally scheduled for November 2008. No further notice of continued sale dates was required. A.R.S. § 33-810(B).

"preliminary" injunction in her amended complaint, the request is far too late, as she was required to obtain the injunction "before 5:00 p.m. Mountain standard time on the last business day before the scheduled date of the sale." § 33-811(C). The trial court thus correctly found, pursuant to § 33-811(C), that Morin has waived "all defenses and objections" to the sale. *Id.*; *see BT Capital, LLC*, 228 Ariz. 188, ¶ 23, 265 P.3d at 375-76.[4]

¶10 But even had Morin not waived her objection to the trustee's sale, we would find her argument to be without merit. An assignment is not invalid simply because it is not recorded. A.R.S. § 33-412(B). As our supreme court recently held,

> [W]hile the failure to record an assignment of a deed of trust might leave an assignee unprotected against claims by some purchasers or creditors, it does not affect a deed's validity as to the obligor. In light of § 33-412(B), it would be anomalous to read [A.R.S.] § 33-808[, governing notice of trustee's sales,] as preventing foreclosure of a valid deed of trust simply because an assignment has not been recorded.

In re Vasquez, 228 Ariz. 357, ¶ 7, 266 P.3d 1053, 1055 (2011).

¶11 Morin relies on A.R.S. §§ 33-706 and 33-818 to argue that, for an assignment to be valid, "[a]n assignee of a beneficial interest under a deed of trust must give actual notice of the assignment to the trustor." But her reliance is misplaced. Section 33-706 is inapplicable here because it governs mortgages, not deeds of trust that are subject to non-judicial foreclosure. *See* A.R.S. § 33-805; *Mid Kan. Fed. Sav. & Loan*

[4]We consequently do not reach the other issues raised by Morin, including the specific procedural defects that she alleges should have invalidated the trustee's sale.

Ass'n of Wichita v. Dynamic Dev. Corp., 167 Ariz. 122, 126 n.2, 804 P.2d 1310, 1314 n.2 (1991).[5] In any event, § 33-706 merely provides that recordation of a mortgage assignment constitutes notice of the assignment "to all persons subsequently deriving title to the mortgage from the assignor"—it does not invalidate unrecorded instruments. And, although § 33-818 applies to deeds of trust, it merely provides that recordation alone does not constitute notice to the trustor of an assignment, a provision that protects the trustor from the invalidation of any payment "to the person previously holding the note . . . secured by the trust deed" if the trustor fails to receive actual notice of the assignment. *Id.* The provision does not, as Morin implies, require actual notice of an assignment or invalidate an assignment of which the trustor does not receive notice. *See Vasquez*, 228 Ariz. 357, ¶ 7, 266 P.3d at 1055.

¶12 Morin's reliance on *Eardley v. Greenberg*, 164 Ariz. 261, 792 P.2d 724 (1990), is similarly unavailing. Although *Eardley* notes that § 33-404(C) requires "any trustee who receives actual knowledge of a change in beneficiary to record a notice of the change in the county in which the property is located," the court went on to state that when an assignment is not recorded, the beneficiary "is in jeopardy of having the assignment declared invalid *as against a subsequent purchaser for value without notice.*" 164 Ariz. at 265, 792 P.2d at 728 (emphasis added). Thus, *Eardley* concluded a trustor has standing "to inquire into and raise objections about the process by which a trustee has

[5]We find inapplicable Morin's citation to *Newman v. Fidelity Savings & Loan Ass'n*, 14 Ariz. 354, 128 P. 53 (1912), for the same reason.

been substituted," but it does not hold that the failure to record an assignment renders it void as to the trustor. *Id.*; *see Vasquez*, 228 Ariz. 357, ¶ 7, 266 P.3d at 1055. For these reasons, Morin's argument that Bank of America lacked authority to foreclose merely because an assignment had not been recorded is without merit. And, to the extent she argues the sale was invalid because no assignment was ever executed, this objection is waived because Morin did not raise it until after the sale had taken place, as discussed above. *See supra* ¶¶ 8-9.

¶13 In any event, the trial court correctly found that Morin cannot claim to own the property because she had defaulted on the note. In *Hogan v. Washington Mutual Bank, N.A.*, 227 Ariz. 561, 261 P.3d 445 (App. 2011), *rev. granted* (Nov. 29, 2011), this court decided a case factually similar to the one before us. There, the borrower sought to prevent the trustee's sale of the subject property, asserting the putative beneficiary under the deed of trust "had not demonstrated it was entitled to enforce the underlying promissory note" because no assignment of the trust deed had been recorded. *Id.* ¶¶ 1, 5. This court affirmed the dismissal of the borrower's complaint, noting he did not dispute "that his own default [had] prompted the trustee's sale." *Id.* ¶¶ 1, 13. The court also concluded "'Arizona's non-judicial foreclosure statute does not require presentation of the original note before commencing foreclosure proceedings'" and held the default empowered the trustee to conduct the sale pursuant to the deed of trust. *Id.* ¶ 13, *quoting Diessner v. Mortg. Elec. Registration Sys.*, 618 F. Supp. 2d 1184, 1187 (D. Ariz. 2009).

¶14 As in *Hogan*, Morin does not dispute her obligation pursuant to the promissory note underlying the deed of trust. 227 Ariz. 561, ¶ 16, 261 P.3d at 448. Although her complaint alleged that the defendants could not prove she was in default, she conceded at oral argument on the motion to dismiss that she had failed to make payments required under the loan. She has not alleged that after receiving the notice of default, she made any payments, nor, as the appellees point out, does she now argue she was willing or able to tender the amount owed on the note.[6] As the deed of trust provides, "If the default is not cured on or before the date specified in the notice [of default], Lender at its option may . . . invoke the power of sale . . . ." Applying *Hogan*, we conclude Morin's default provided "the trustee [with] authority to conduct the sale under the deed of trust." *Id.* ¶ 13; *see also* A.R.S. § 33-807 (granting trustee power of sale "after a breach or default in performance" of contract secured by deed of trust). Perry, as the trustee identified in the recorded Notice of Substitution of Trustee, was therefore authorized to initiate and conduct the sale. *See Hogan*, 227 Ariz. 561, ¶ 13, 261 P.3d at 448; *see also* A.R.S. § 33-804 (providing for appointment of successor trustee). Accordingly, even accepting Morin's allegations of procedural irregularities surrounding

[6]Relying on *Schaeffer v. Chapman*, 176 Ariz. 326, 861 P.2d 611 (1993), Morin further argues Perry breached the deed of trust by simultaneously filing the notice of default and notice of intent to sell, thereby depriving her of the thirty-day grace period to cure default required by the deed of trust. *See id.* at 329, 861 P.2d at 614. But she does not argue on appeal, nor did she allege in her complaint, that, had she received the thirty-day grace period she would have made the required payments. In any event, as already discussed, her failure to raise this defect until after the sale waived the objection. *See* § 33-811(C).

the sale, she cannot claim to be the rightful owner of the property because her admitted default prompted the sale she now challenges. *See Hogan*, 227 Ariz. 561, ¶ 13, 261 P.3d at 448.

Disposition

¶15 For the reasons stated above, we find no abuse of discretion in the trial court's finding that Morin has failed to state a claim for which relief can be granted. Accordingly, the court's ruling on the motion to dismiss is affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge