

**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*

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**APR 17 2012**  
COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

TERRI L. FETTERS,	)	
	)	2 CA-CV 2011-0126
Third-Party Plaintiff/Appellant	)	DEPARTMENT A
	)	
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
STEWART TITLE & TRUST OF	)	Rule 28, Rules of Civil
PHOENIX, INC., a Delaware	)	Appellate Procedure
corporation,	)	
	)	
Third-Party Defendant/Appellee	)	
	)	

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APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV201000573

Honorable Bradley M. Soos, Judge

AFFIRMED IN PART; REMANDED IN PART

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B R A M M E R, Judge.

¶1 Appellant Terri Fetters appeals from the judgment the trial court entered in favor of Stewart Title & Trust of Phoenix, Inc. (Stewart) on Fetters's third-party negligence claim after the court granted Stewart's motion for summary judgment and denied Fetters's cross-motion for partial summary judgment. She argues the trustee's sale of the subject property was void because Stewart failed to comply with the statutory requirements for noticing a trustee's foreclosure sale. She also contends there was no basis for the award of attorney fees to Stewart. We affirm in part and remand for the court to reconsider the attorney fee award.

### **Factual and Procedural Background**

¶2 We view the facts and all justifiable inferences in the light most favorable to the party against whom summary judgment was entered. *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, ¶ 2, 212 P.3d 853, 855 (App. 2009). Fetters purchased a parcel of property in the City of Maricopa from Claudio Nava Tapia. Fetters executed a promissory note for the balance of the purchase price, secured by a deed of trust with Nava as beneficiary and Stewart as trustee. On October 15, 2009, Stewart recorded a notice of trustee's sale of the property based on Fetters's alleged default in payment on the promissory note. On January 20, 2010, Stewart conducted a trustee's sale of the property and sold the property to Nava. Fetters alleges she did not learn the sale was to be held until after it had occurred.

¶3 Nava filed a complaint demanding payment from Fetters of the promissory note balance. Fetters filed a third-party complaint against Stewart, alleging it had been

negligent by failing to provide her notice of the sale as required by law. Stewart filed a motion for summary judgment on the third-party complaint. Fetters filed a cross-motion for partial summary judgment.

¶4 After granting Stewart’s motion and denying Fetters’s cross-motion for summary judgment in December 2010, on January 28, 2011, the trial court entered judgment in favor of Stewart on the third-party complaint pursuant to Rule 54(b), Ariz. R. Civ. P., and awarded it attorney fees and costs. On March 18, the court found neither party had notice that it had signed the January judgment until that date. On March 29, Fetters filed a motion to vacate the January judgment or, in the alternative, to extend the time for appeal pursuant to Rule 9(a), Ariz. R. Civ. App. P. On May 25, the court granted the motion to extend the time for appeal until June 8. This appeal followed.

### **Discussion**

#### **Jurisdiction**

¶5 Stewart argues this court lacks jurisdiction over the appeal because the notice of appeal was not filed timely. Rule 9(a), Ariz. R. Civ. App. P., states that a notice of appeal “shall be filed with the clerk of the superior court not later than 30 days after the entry of the judgment from which the appeal is taken.” However, the rule also provides:

If the court finds that (1) a party entitled to notice of entry of judgment did not receive such notice from the clerk or any party within 21 days of its entry and (2) no party would be prejudiced, the court may upon motion filed not later than 30 days after the expiration of the time for appeal, or within 7 days of receipt of such notice, whichever is earlier, extend the

time for appeal for a period not to exceed 14 days from the date of the order granting the motion.

*Id.*

¶6 Because the trial court found that neither party had notice the court had signed the January 28 ruling until March 18, 2011, to extend the time for appeal Fetters was required to file a motion to extend within the earlier of seven days after that date or sixty days after January 28. In this case, both time periods ended on March 29, the day Fetters filed her motion. *See* Ariz. R. Civ. P. 6(a) (period of time less than eleven days excludes intermediate weekends); *see also* Ariz. R. Civ. App. P. 5(a) (Rule 6(a) applies to civil appellate rules). The court granted the motion and extended the time for appeal for fourteen days beyond the date of its order, and Fetters filed her notice of appeal timely. Therefore, we have jurisdiction over the appeal.

¶7 We note that both parties refer to a stipulation between the parties ostensibly extending the time for appeal. At the March 18 hearing, the trial court found “the parties concede that the first day of the thirty day[s] in which to appeal will begin on Monday, March 21, 2011.” It is not, however, a proper exercise of the court’s power to accept the parties’ stipulation beginning the statutory time for appeal from any date other than that provided by the applicable rules. *See* Ariz. R. Civ. App. P. 5(b) (court may not extend time for filing notice of appeal upon stipulation). Therefore, the parties were not entitled to rely on any approval of their stipulation implied by the court’s finding. But, because Fetters filed a motion to extend the time for appeal within the appropriate time

period from the original appealable judgment pursuant to Rule 9, her notice was timely without regard to the parties' stipulation.

### **Notice of Trustee's Sale**

¶8 Feters argues the court erred by entering summary judgment against her on her third-party complaint against Stewart. She argues Stewart had failed to comply with the statutory requirements for noticing the trustee's sale because Stewart had hired an independent contractor to mail the required notices.<sup>1</sup> "On appeal from a summary judgment, we must determine de novo whether there are any genuine issues of material fact and whether the trial court erred in applying the law." *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 8, 965 P.2d 47, 50 (App. 1998).

¶9 As a preliminary matter, Stewart argues Feters has waived any objection to the sale pursuant to A.R.S. § 33-811(C), which states in pertinent part:

The trustor, its successors or assigns, and all persons to whom the trustee mails a notice of a sale under a trust deed pursuant to [A.R.S.] § 33-809 shall waive all defenses and objections to the sale not raised in an action that results in the issuance of a court order granting relief pursuant to rule 65, Arizona rules of civil procedure, entered before 5:00 p.m. mountain standard time on the last business day before the scheduled date of the sale.

The parties do not dispute that Feters failed to seek injunctive relief pursuant to Rule 65 before the sale occurred.

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<sup>1</sup>Feters also alleges Stewart admitted it had failed to provide notice as required by A.R.S. § 33-809(B). However, she fails to cite to any portion of the record supporting that allegation, citing instead only a document filed by Nava.

¶10 The requirements of § 33-809, cited in the waiver statute as a condition of its enforceability, obligate a trustee to “mail by certified or registered mail . . . a copy of the notice of sale that reflects the recording date” to each person who “appears on the records of the county recorder . . . to have an interest in any of the trust property.” § 33-809(B)(2). The trustee also must mail the notice of sale and a statement of breach or nonperformance of the trust deed “to each of the persons who were parties to the trust deed except the trustee” within five business days after recording the notice of sale. § 33-809(C).

¶11 Stewart retained MK Consultants, Inc. (MK) to mail Fetters the required notice. In her affidavit, which was attached to Stewart’s reply to Fetters’s response to its motion for summary judgment, an MK employee stated that “the Statement of Breach or Non-Performance [and] Notice of Trustee’s Sale . . . were sent by certified mail return receipt on October 19, 2009 to Terri L. Fetters.” Attached to the affidavit was a certified mail receipt containing the address Fetters had provided on the deed of trust document. Therefore, the record supports the trial court’s finding that the required notice documents had been sent to Fetters.<sup>2</sup> For that reason, pursuant to § 33-811(C), Fetters waived any

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<sup>2</sup>To prove notice was mailed, Stewart attempts to rely on the affidavit of its employee, Chris Goudy. The trial court also relied on Goudy’s affidavit. We agree with Fetters that Goudy “had no foundation to state what affiant [MK] had put in the envelopes [MK] sent by certified mail.” There is nothing in the record to suggest Goudy had personal knowledge of the mailings. *See* Ariz. R. Civ. P. 56(e) (affidavits supporting summary judgment “shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein”). Stewart alleges Goudy had supervised the mailing of the documents, but nothing in the record supports that

objection to the sale by failing to seek injunctive relief before the sale, and we cannot reach the merits of her argument that it was improper for Stewart to have delegated to MK the task of mailing the notice.<sup>3</sup>

### **Attorney Fees**

¶12 Stewart requested attorney fees below pursuant to A.R.S. § 12-341.01 and provisions in the deed of trust. The trial court granted Stewart its reasonable attorney fees without specifying a basis for the award and without addressing Fetters’s objections to the award. Fetters argues the award of attorney fees to Stewart should be vacated because attorney fees are not recoverable pursuant to § 12-341.01 for a tort claim and because the deed of trust terms did not provide authority for an attorney fee award.

¶13 The application of § 12-341.01 is a question of law we review de novo. *Ariz. Tile, L.L.C. v. Berger*, 223 Ariz. 491, ¶ 35, 224 P.3d 988, 995-96 (App. 2010). Section 12-341.01(A) states in relevant part as follows: “In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees.” A trust is not a contract; the trustee’s duties arise from the trust

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allegation. Goudy stated he “supervise[d] Trustee’s Sales such as the one which is the subject of this litigation,” but never stated he was involved with the mailing to Fetters. However, we may uphold the court’s decision if it is correct for any reason. *Jones v. Cochise Cnty.*, 218 Ariz. 372, ¶ 16, 187 P.3d 97, 102 (App. 2008).

<sup>3</sup>Moreover, Fetters has failed to explain adequately how the “preparation and execution” of a notice of sale includes its mailing, *see* A.R.S. § 33-803.01(A), or how such mailing is a delegation of “the trustee’s name or corporate capacity,” *see* A.R.S. § 33-803(C). *See Polanco v. Indus. Comm’n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393-94 n.2 (App. 2007) (undeveloped argument waived on appeal).

relationship and are not contractual. *Berger*, 223 Ariz. 491, ¶ 38, 224 P.3d at 996. For the purposes of § 12-341.01(A), breach of a “statutorily imposed trust relationship d[oes] not arise out of contract.” *Id.* ¶ 39.

¶14 Fetters’s third-party complaint and cross-motion for partial summary judgment alleged Stewart was negligent for failing to have provided notice to Fetters as required by § 33-809 and by breaching its duty of care to Fetters. The trial court granted summary judgment in favor of Stewart on that claim. Therefore, Stewart was successful in defeating Fetters’s claim that it had breached a statutorily imposed duty as trustee; but, that claim did not arise out of a contract and attorney fees were not recoverable under § 12-341.01(A). *See Berger*, 223 Ariz. 491, ¶ 39, 224 P.3d at 996; *In re Naarden Trust*, 195 Ariz. 526, ¶ 2, 990 P.2d 1085, 1086 (App. 1999) (because trust not contract, trustee not entitled to attorney fees as successful party).

¶15 Stewart also requested attorney fees pursuant to paragraphs three and eleven of the deed of trust. In paragraph three the trustor agrees to appear and defend any action purporting to affect the security of the deed of trust or the rights or powers of the beneficiary or trustee. Paragraph eleven authorizes the trustee to deduct attorney fees before applying the proceeds of sale upon default by the trustor.

¶16 It is unclear whether the trial court erroneously relied on § 12-341.01(A) in awarding Stewart attorney fees. If so, it may not have determined whether attorney fees were authorized under paragraphs three or eleven of the deed of trust. We decline to



make that determination for the first time on appeal. Therefore, we remand this matter to the trial court, which is directed to reconsider the award of attorney fees.<sup>4</sup>

### Disposition

¶17 For the foregoing reasons, we affirm the grant of summary judgment in favor of Stewart, but remand for the trial court to reconsider the award of attorney fees. Stewart also requests an award of attorney fees on appeal pursuant to § 12-341.01(A) and paragraphs three and eleven of the deed of trust. For the reasons stated above, § 12-341.01(A) does not authorize an award of attorney fees in this case. And Stewart has failed to explain adequately on appeal how the deed of trust authorizes attorney fees for the claim at issue here. *See Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393-94 n.2 (App. 2007) (failure to develop and support argument waives issue on appeal). Therefore, we deny its request for attorney fees.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

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<sup>4</sup>We note that on appeal Stewart merely asserts, without explanation, that attorney fees were awardable pursuant to paragraphs three and eleven of the deed of trust. Its written request below similarly failed to explain how paragraphs three and eleven were implicated by Fetters's claim.