DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

GULF UNION, INC.; PAHRUMP 161, L.L.C.; JAMES W. SCOTT, Appellants, v. JEWEL INVESTMENT COMPANY, L.P.; PAUL STEPHEN KNOBBE; DAVE R. WEBBER; LOWELL A. SPENCER; D.D.S. PROFIT SHARING; SEGAL FAMILY LIMITED PARTNERSHIP; MURIEL SIEH FAMILY LIMITED PARTNERSHIP and MURIEL SIEH IRREVOCABLE TRUST; and THE 1999 GORDON FAMILY TRUST, Appellees.	No. 1 CA-CV 11-0357 DEPARTMENT D **MEMORANDUM DECISION** Not for Publication (Rule 28, Arizona Rules of Civil Appellate Procedure

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-003487

The Honorable Jeanne M. Garcia, Judge

VACATED AND REMANDED

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G E M M I L L, Judge

¶1 This is an appeal from the superior court's grant of Appellees' motion for judgment on the pleadings and subsequent denial of Appellants' motion for a new trial. Because we conclude that judgment on the pleadings was premature and not warranted, we vacate the judgment and remand for further proceedings and factual development.

BACKGROUND AND PROCEDURAL HISTORY

¶2 This case began as an interpleader action commenced by Fidelity National Title Agency, Inc. ("Fidelity") against Gulf Union, Inc., Pahrump 161, L.L.C., and James W. Scott (unless the context dictates otherwise, collectively "Gulf Union") to determine proper ownership of $120,000 in funds held by Fidelity in escrow ("the interpleaded funds").[1] Gulf Union allegedly deposited the funds into escrow when it entered into a Loan Modification and Forbearance Agreement ("LMFA") with Appellees herein (collectively "Jewel") regarding a property consisting of

[1] Fidelity named additional defendants below, but those defendants either failed to answer or denied entitlement to the interpleaded funds.

11 unfinished condominium units ("the Property"). Through a land exchange, Gulf Union had acquired title to the Property and assumed the obligation to pay the indebtedness then owed to Jewel that was secured by Jewel's first-position lien. Jewel filed a motion to intervene in this action, which the superior court granted. Jewel then filed an answer in intervention, and Gulf Union also filed an answer.

¶3 Jewel alleges that Gulf Union defaulted under the terms of the LMFA, an allegation denied by Gulf Union in its answer. On appeal, however, Gulf Union admits that it defaulted on its obligation to Jewel, and that Jewel completed a trustee's sale of the Property.

¶4 Jewel filed a motion for judgment on the pleadings, arguing that it was entitled to the interpleaded funds because all defendants other than James W. Scott failed to appear or disclaimed interest in the interpleaded funds. Despite Gulf Union's answer reflecting its filing on behalf of all parties named as Appellants here, it was Jewel's contention that Gulf Union, Inc. and Pahrump 161, L.L.C. failed to answer and therefore were in default. Based apparently on a process of elimination, Jewel argued that Mr. Scott had "no right and/or good faith claim" to the interpleaded funds and accordingly that Jewel was entitled to the escrow proceeds.

¶5 Gulf Union filed its own motion for judgment on the

pleadings along with its response to Jewel's motion, arguing that Arizona Revised Statutes ("A.R.S.") section 33-814(D) (Supp. 2012) operated as a complete bar to Jewel's claim to the interpleaded funds because Jewel failed to seek a deficiency judgment within 90 days of the trustee's sale of the Property.[2] In its reply and response to Gulf Union's cross-motion, Jewel argued that § 33-814(D) did not apply because the Property was not anti-deficiency property as described in § 33-814(G). Jewel argued it is entitled to the escrowed funds because the funds were intended to complete construction of the project and were not intended by the parties to be part of the indebtedness secured by the trust property.

¶6 Faced with competing motions for judgment on the pleadings filed by Jewel and Gulf Union in an interpleader action filed by Fidelity, the superior court was required to analyze the allegations of the interpleader complaint and the admissions of the separate answers. In granting Jewel's motion for judgment on the pleadings, the superior court explained in part:

> Gulf Union Defendants assert that Intervenors' claim is untimely because A.R.S. §33-814 requires any deficiency action be filed within 90 days after a trustee's sale. The court agrees with Intervenors that A.R.S. §33-814 has no

[2] We cite the current version of statutes when no material revisions have been enacted since the events in question.

> applicability to the circumstances because the funds were not intended to secure the debt; they were intended to be used to complete construction of the condominium units. In addition, the statute is not applicable because the property did not consist of a single one-family or two-family dwelling; rather, it consisted of 11 condominium units.

The superior court entered judgment in favor of Jewel for the interpleaded funds, less Fidelity's costs and attorneys' fees. Gulf Union later filed a motion for new trial, which the trial court denied.

¶7 Gulf Union filed a notice of appeal from both the judgment and the denial of the motion for new trial. This court issued an order ruling that the notice of appeal was premature because the superior court's denial of the new trial motion was contained in an unsigned minute entry. *See Tripati v. Forwith,* 223 Ariz. 81, 84–85, ¶¶ 14–17, 219 P.3d 291, 294–95 (App. 2009). Gulf Union then provided this court with a signed and entered order from the superior court denying the new trial motion. Based on *Craig v. Craig*, 227 Ariz. 105, 107, ¶ 13, 253 P.3d 624, 626 (2011) and *Barassi v. Matison*, 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981), we conclude that the "*Barassi* exception" is applicable, and Gulf Union's premature notice of appeal became effective to trigger our appellate jurisdiction when the trial court signed and entered the order. Accordingly, we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) (2003) and

12-2101(A)(1) (Supp. 2012).

DISCUSSION

¶8 "A motion for judgment on the pleadings for the purposes thereof admits all material allegations of the opposing party's pleadings, and all allegations of the moving party which have been denied are taken as false so that a motion for judgment on the pleadings is only granted if the moving party is clearly entitled to judgment." *Food for Health Co. v. 3839 Joint Venture*, 129 Ariz. 103, 106, 628 P.2d 986, 989 (App. 1981). Because the trial court granted Jewel's motion for judgment on the pleadings, we construe the facts in the light most favorable to Gulf Union based on its answer to Fidelity's complaint in interpleader. Additionally, we review de novo the trial court's legal conclusions, including those on questions of statutory interpretation. *In re Estate of Olson*, 223 Ariz. 441, 444, ¶ 11, 224 P.3d 938, 941 (App. 2010); *Save Our Valley Ass'n v. Ariz. Corp. Comm'n*, 216 Ariz. 216, 219, ¶ 6, 165 P.3d 194, 197 (App. 2007). We conclude that the pleadings do not establish sufficient facts to entitle Jewel to judgment on the pleadings. We also conclude that the pleadings do not reveal enough undisputed facts to allow determination of whether any portion of A.R.S. § 33-814 is applicable to bar Jewel's claim against Gulf Union.

¶9 In its minute entry granting Jewel's motion for

judgment on the pleadings, the trial court "agree[d] with [Jewel] that . . . the statute [referring to § 33-814] is not applicable because the property did not consist of a single one-family or two-family dwelling; rather, it consisted of 11 condominium units." The trial court's stated conclusion suggests a potential misinterpretation of the statutory scheme.

¶10 The Arizona Supreme Court and this court have taken great care over the years to refer to the relevant subsection of § 33-814 as an "anti-deficiency statute," rather than labeling the entire section as such. *See, e.g.*, *Baker v. Gardner*, 160 Ariz. 98, 99, 770 P.2d 766, 767 (1988) (referring to then - A.R.S. § 33-814(E), now § 33-814(G), as "the so-called 'anti-deficiency' statute"); *Mid Kansas Fed. Sav. & Loan Ass'n of Wichita v. Dynamic Dev. Corp.*, 167 Ariz. 122, 125, 804 P.2d 1310, 1313 (1991) (denoting A.R.S. §§ 33-729(A) and 33-814(G) as "Arizona's consumer anti-deficiency statutes"); *Resolution Trust Corp. v. Segel*, 173 Ariz. 42, 43, 839 P.2d 462, 463 (App. 1992) (stating that A.R.S. § 33-814(G) is "the deed of trust anti-deficiency statute"); *M & I Marshall & Ilsley Bank v. Mueller*, 228 Ariz. 478, 479, ¶ 7, 268 P.3d 1135, 1136 (App. 2011) (recognizing that "anti-deficiency protection" is provided by A.R.S. § 33-814(G)). Jewel characterized the entirety of § 33-814, rather than just § 33-814(G), as "Arizona's anti-deficiency statute." In its minute entry filed October 4, 2010, granting

Jewel's motion for judgment on the pleadings, it appears the trial court may have also considered the entire statute (§ 33-814) as an anti-deficiency statute.

¶11 Rightly understood, § 33-814 as a whole recognizes the general right of a trust beneficiary to seek a deficiency judgment if the trustee's sale proceeds are insufficient to satisfy the balance due on the promissory note, subject only to the specific "anti-deficiency" limitations contained within various subsections of that statute. This is evidenced by the plain language of the first sentence of A.R.S. § 33-814(A):

> *Except as provided in subsections F and G of this section*, within ninety days after the date of sale of trust property under a trust deed pursuant to section 33-807, 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.

(Emphasis added). In turn, subsection G provides that

> [i]f trust property of two and one-half acres or less which is limited to and utilized for either a single one-family or a single two-family dwelling is sold pursuant to the trustee's power of sale, no action may be maintained to recover any difference between the amount obtained by sale and the amount of the indebtedness and any interest, costs and expenses.

It is undisputed that the Property consisted of 11 condominium

units. As such, the Property was not "limited to and utilized for a single one-family or a single two-family dwelling" and therefore Gulf Union could not claim the benefit of anti-deficiency protection under subsection 33-814(G). *See PNL Credit L.P. v. Sw. Pac. Invs., Inc.*, 179 Ariz. 259, 265, 877 P.2d 832, 838 (App. 1994) (holding that subsection G did not bar a deficiency judgment against the trustor of a property consisting of four condominium units because "[i]nterpreting the statute to protect trust property consisting of multiple single-family dwellings would violate the language of the statute"). Insofar as the trial court found the Property not to be included within the reach of § 33-814(G), it was quite correct.

¶12 It does not follow, however, that the entirety of § 33-814 was inapplicable simply because the Property did not qualify for § 33-814(G) anti-deficiency protection. As subsection A clearly specifies, a deficiency judgment can generally be sought "[e]xcept as provided in subsections F and G of this section." We agree that subsection G does not apply in this case. Because the Property was *not* anti-deficiency property as described in subsection G, the other subsections of § 33-814 must be examined to determine if a deficiency action could have been maintained following the trustee's sale of the Property.

¶13 Like subsection G, subsection F is also an exception

to the authorization of a deficiency action under subsections A and D of § 33-814. Subsection F prohibits "the recovery of any balance due after trust property is sold pursuant to the trustee's power of sale" if the deed of trust contains "express language" to that effect. If the deed of trust relied upon by Jewel for the trustee's sale of the Property contains express language prohibiting a deficiency action, the provisions in § 33-814(A) and (D) allowing for a deficiency judgment do not apply. The record before us does not contain the deed of trust, and therefore we cannot determine if the exception provided by § 33-814(F) is applicable. Unless there is language in the deed of trust expressly prohibiting the beneficiary from having a deficiency, the remaining sections of § 33-814 may be applicable here.

¶14 If Jewel's pursuit of the escrowed funds is, in essence, the seeking of a deficiency judgment against Gulf Union, Gulf Union may be entitled to protection under A.R.S. § 33-814(A) and (D). Subsection A provides that "an action . . . to recover a deficiency judgment" may be maintained "within ninety days after the date of sale of trust property."[3]

[3] Subsection A assumes there is only one trust deed securing the obligation and that only one trustee's sale has occurred. Subsection B provides for an extension of the time limitation if there were multiple deeds of trust or multiple trustee's sales. The record before us does not establish how many trust deeds secured the Property or how many trustee's sales of the Property

Subsection D further provides that "[i]f no action is maintained for a deficiency judgment within the time period prescribed in subsections A and B of this section, the proceeds of the sale, regardless of amount, shall be deemed to be in full satisfaction of the obligation and *no right to recover a deficiency in any action shall exist*." (Emphasis added). Subsection D emphasizes that a deficiency action is barred if not sought within 90 days and further provides that the underlying "obligation" is "full[y] satisf[ied]," i.e. extinguished, on the 91st day following the trustee's sale if no deficiency action was timely initiated.

¶15 To summarize, the "anti-deficiency statute," § 33-814(G), is not applicable in this case. It must be determined on remand whether § 33-814(F) is applicable. If § 33-814(F) is not applicable, the remaining subsections of § 33-814 — including subsections A and D — may be indeed applicable if a trustee's sale of the Property was completed and if the escrowed funds are correctly considered part of the obligation covered by the deed of trust.

¶16 Jewel contends that the escrowed funds had nothing to do with the loan or the deed of trust that secured the loan. At the trial court, in response to Gulf Union's motion for a new

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were conducted. In this decision, we therefore assume without deciding that the 90-day limitation of subsection A applies.

trial, the court concluded:

> [T]he funds had nothing to do with the deed of trust. If the funds had nothing to do with the deed of trust, then A.R.S. § 33-814(D) does not apply and [Jewel] w[as] not required to file any deficiency action within 90 days. The "paid in full" language from A.R.S. § 33-814(D) that Gulf [Union] invokes does not apply to these circumstances because the funds in escrow did not relate to the [d]eed of [t]rust.

¶17 A motion for judgment on the pleadings merely "tests the sufficiency of the complaint in stating a claim for relief" prior to development of an evidentiary record. *See Food for Health*, 129 Ariz. at 106, 628 P.2d at 989. Additionally, "[a] motion for judgment on the pleadings for the purposes thereof admits all material allegations of the opposing party's pleadings, and all allegations of the moving party which have been denied are taken as false so that a motion for judgment on the pleadings is only granted if the moving party is clearly entitled to judgment." *Id*. Unlike the more typical motion for judgment on the pleadings, we are here addressing a motion for judgment on the pleadings filed in an interpleader action by an intervenor against a defendant. Jewel's motion should be granted only if Jewel is "clearly entitled to judgment." *Id.*

¶18 The pleadings and the record on appeal do not establish as a matter of law that Jewel is entitled to the escrowed funds. At the trial court, Jewel argued principally

that it was the only party with a legal right to escrowed funds. Jewel explained that Gulf Union had put up the funds for construction of the condos "in connection with the various Loan Modification and Forbearance Agreements." Jewel also argued, however, that the funds were not part of the Gulf Union's indebtedness secured by the deed of trust because Gulf Union had escrowed the money as a separate agreement between the parties. At oral argument, Jewel argued that it became the rightful owner of the funds when Gulf Union defaulted on the LMFA.

¶19 Based on the pleadings, we are not able to conclude at this juncture that Jewel is entitled to the escrowed funds. Jewel points to Exhibit B to the pleadings to show that Gulf Union deposited $120,000 for "construction" funds. Exhibit B, however, is a master statement that simply shows the transfer of funds, and it does not establish the basis of Gulf Union's obligation to place the money into escrow. The master statement does not establish whether the escrowed funds were part of Gulf Union's obligation under the LMFA and therefore secured by the deed of trust. Nor does Exhibit B establish that Jewel assumed the right to the money when it became the owner of the project. Similarly, our review of Exhibit C, the "Exchange Escrow Instructions," fails to reveal the nature of the escrowed funds in dispute. The instructions do not refer to the $120,000 and do not include a provision for disbursing the funds on default.

Furthermore, the pleadings do not include the Loan Modification agreement that Jewel relies on as the basis for Gulf Union's obligation to place the money into escrow to finish construction of the project. On remand, Jewel may succeed in demonstrating its legal right to the escrowed funds, but based on this record, we are unable to conclude that Jewel is entitled to the escrowed funds based solely on the pleadings.

¶20 Gulf Union requests on appeal that we find § 33-814(D) applies to bar Jewel's claim to the escrowed funds. Gulf Union argues that the escrowed funds were part of the indebtedness under the LMFA, and protected by § 33-814(D) when Jewel failed to bring a timely deficiency action. Given the scant factual record before us, however, we are unable to make a definitive statement on the application of § 33-814(D) in this dispute. Conspicuously absent from the record are the promissory note, deed of trust, and the LMFA. Consequently, we are unable to determine whether the escrowed funds were part of Gulf Union's obligation under the LMFA. Without these documents we cannot determine the nature of the escrow proceeds, their disposition upon default of any party, or the existence of any additional contracts between the parties. Further, the record does not prove the amount of Gulf Union's indebtedness, the amount bid at the trustee's sale, or whether a deficiency even existed. Because there are too many unanswered questions, it would be

equally inappropriate for us to rule that Gulf Union is entitled to the escrowed funds.

¶21 For these factual and legal reasons, the judgment on the pleadings in favor of Jewel was premature and must be vacated. Further factual development is required.

ATTORNEYS' FEES AND COSTS

¶22 Gulf Union requests an award of attorneys' fees on appeal, based on A.R.S. § 12-341.01 (Supp. 2012). Jewel also requests its attorneys' fees on appeal, based on § 12-341.01, ARCAP 21(c) and ARCAP 25. There is no basis for an award of fees under ARCAP 25 and we deny that request. Although Gulf Union is the successful party on appeal, it is not yet known which party or parties will ultimately prevail. We therefore decline to award either side an amount of reasonable attorneys' fees under § 12-341.01(A) at this time; but we authorize the trial court, at the completion of this case, to consider awarding the ultimately successful party or parties an amount of reasonable attorneys' fees for this appeal. We award Gulf Union its taxable costs on appeal contingent upon its timely compliance with ARCAP 21.

CONCLUSION

¶23 For the reasons explained in this decision, the judgment of the superior court is vacated and the case is

remanded for further proceedings consistent with this decision.

/s/

JOHN C. GEMMILL, Presiding Judge

CONCURRING:

/s/

PETER B. SWANN, Judge

/s/

ANDREW W. GOULD, Judge