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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 09/25/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

HARRIS KHAN, a married man,) No. 1 CA-CV 11-0672
dealing with his sole and)
separate property,) DEPARTMENT D
)
Plaintiff/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
)
M&I MARSHALL AND ILSLEY BANK, a)
Wisconsin corporation; M&I)
MORTGAGE CORP.; LARRY O. FOLKS,)
individually and as successor)
trustee,)
)
Defendants/Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-098425

The Honorable Karen A. Potts, Judge

AFFIRMED

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By Donald O. Loeb
Attorney for Plaintiff/Appellant

Scottsdale

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William F. Begley
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B R O W N, Judge

¶1 Harris Khan appeals the trial court's grant of summary judgment in favor of M&I Marshall & Ilsley Bank and M&I Mortgage (collectively referred to as the "Bank").¹ For the reasons discussed below, we affirm.

BACKGROUND

¶2 Khan borrowed approximately \$1.9 million from the Bank to construct a house (the "property"). To memorialize the loan, the parties executed a residential construction loan agreement and a promissory note secured by a deed of trust on the property. During construction, Khan was obligated to make monthly interest payments on the funds disbursed. Substantial completion of the house occurred in 2010, at which time the construction loan converted to a permanent loan with monthly payments of \$13,371.92.

¶3 When Khan failed to make required payments, the Bank recorded a notice of trustee's sale. Khan filed a forty-eight page complaint, along with an application for temporary restraining order ("TRO"), seeking to enjoin the Bank from conducting the trustee's sale.² The trial court granted the application for TRO. In response, the Bank asked the court to

¹ Larry O. Folks is also a defendant in this action. None of the issues raised on appeal differentiate between the Bank and Folks. Thus, for ease of reference, we refer to the defendants collectively as "the Bank."

² The complaint also alleged claims for breach of contract, negligent misrepresentation, and fraudulent concealment.

dissolve the TRO. Following an evidentiary hearing, the trial court enjoined the Bank from conducting a trustee's sale against the property until the Bank strictly complied with the terms of paragraph 22 of the deed of trust, which required notification to Khan of his right to bring a court action to "assert the non-existence of a default" or "any other defense."

¶14 Notwithstanding the court's ruling, the Bank moved for summary judgment, asserting it was entitled to judgment as a matter of law as to all claims alleged by Khan and that the court had erred in granting the injunction. In response, Khan sought additional time pursuant to Arizona Rule of Civil Procedure 56(f) to obtain affidavits and conduct discovery prior to responding to the Bank's motion.

¶15 The trial court gave Khan sixty days to conduct discovery in five specific areas. Prior to expiration of the sixty-day period, the Bank filed a motion to dissolve the injunction, asserting it had complied with the disclosure requirements of paragraph 22 of the deed of trust as previously directed by the trial court. Sixty-one days after the court's order granting additional time to conduct discovery, Khan sought another sixty-day extension, and simultaneously served the Bank with non-uniform interrogatories and requests for production of documents.

¶16 Following oral argument, the court denied Khan's request for a second extension, finding that the prior order gave Khan adequate time to take depositions, propound discovery, and obtain relevant documents. The court found no good cause to extend the deadline, explaining that it was undisputed Khan "engaged in no discovery during this sixty day period" and that he had offered "no excuse for this failure."

¶17 The court also vacated the preliminary injunction, finding Khan did not dispute that the Bank issued new notices that complied with the statutory and deed of trust requirements. Additionally, the court granted the Bank's motion for summary judgment, concluding that Khan failed to offer any material facts to dispute the facts the Bank presented. The court subsequently entered a final judgment, which included an award of attorneys' fees to the Bank in the amount of \$25,762. Khan timely appealed.

DISCUSSION

¶18 Summary judgment may be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c). In reviewing a motion for summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139

(App. 2000). "If the party with the burden of proof on the claim or defense cannot respond to the motion by showing that there is evidence creating a genuine issue of fact on the element in question, then the motion for summary judgment should be granted." *Orme School v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990).

¶9 Khan argues the Bank failed to prove it had a right to exercise the power of sale because it failed to present the original promissory note to prove the note was never endorsed or transferred by endorsement to a third party. The trial court determined, however, that the Bank never sold, assigned, or otherwise transferred its interest in the note and deed of trust to any other third party. Furthermore, the Bank obtained the original note from its vault in Milwaukee, brought it to counsel's office in Phoenix, and made it available to Khan's counsel to inspect. The Bank even brought the note to a July 2011 hearing for Khan to inspect it. Yet nothing in the record reflects that Khan's counsel attempted to review the note.

¶10 Further, our supreme court has recently rejected the "show me the note" argument, explaining that Arizona Revised Statutes ("A.R.S.") "[§] 33-809(C) requires only that, after recording the notice of the trustee's sale under § 33-808, the trustee must send the trustor notice of the default, signed by the beneficiary or his agent, setting forth the unpaid principal

balance." *Hogan v. Washington Mut. Bank, N.A.*, ____ Ariz. ____, 277 P.3d 781, 782-84 (Ariz. 2012). A trustee is required to give written notice of the time and place of sale including: recording notice, giving notice, posting a copy of notice, and publication. A.R.S. § 33-808(A)(1)-(4). Khan does not dispute that the Bank complied with these statutory requirements. Accordingly, there are no issues of material fact regarding the authenticity of the note.

¶11 Khan also argues an affidavit prepared by real estate appraiser Roy Morris created a genuine issue of material fact. Khan argues Morris' affidavit raised issues regarding whether the Bank was required to provide Khan with an updated appraisal and inspection report so that he could make an informed decision on whether to proceed with the permanent loan or attempt to renegotiate the terms and conditions of his loan. We disagree.

¶12 As the trial court properly determined, the affidavit does not defeat summary judgment because the undisputed plain language of the promissory note provides for a thirty-year loan. Khan's obligation to pay the amounts provided in the promissory note is not contingent on an appraisal. Moreover, the Residential Construction Loan Agreement, signed by Khan, provides:

9. **APPRAISALS & INSPECTIONS.** Lender shall have the right from time to time to inspect the Property to determine whether

construction is substantially in accordance with the plans and specifications and to determine Borrower's compliance with its obligations under Article 3, but is in no way obligated to do so (whether or not Borrower has paid an inspection fee as part of its loan costs). *Any appraisals or inspections of the Property made by or on behalf of the Lender shall be solely for its benefit in determining the adequacy of its security and Borrower shall not, and hereby waives any right to rely upon such appraisals or inspections in any way.*

(emphasis added.) Based on the plain language of the agreement, the Bank had no obligation to disclose any subsequent appraisals that it prepared for its own use, regardless of Morris' general opinion testimony on the matter.

¶13 We also reject Khan's suggestion that the Bank was obligated to renegotiate the loan or to reduce the principal based on a decrease in value caused by poor economic conditions. He is bound by the contracts he signed when he obtained the loan from the Bank. Khan does not dispute that (1) he entered into a loan with the Bank; (2) the loan was one loan for a term of thirty years secured by a deed of trust; (3) and he failed to pay the Bank according to the terms of the note. Thus, Khan failed to establish any material factual dispute as to whether the Bank had an obligation to modify the terms of the loan.

¶14 Finally, Khan argues the court erred in denying his request for additional time to respond to the summary judgment motion pursuant to Ariz. R. Civ. Pro. 56(f), which permits a

party to request additional time to respond to a motion for summary judgment to obtain necessary discovery. Khan argues that because the Bank had not produced the original note, he needed more time to examine it to determine whether the loan was securitized.³ We will not overturn a trial court's decision on a Rule 56(f) motion absent an abuse of discretion. *Lewis v. Oliver*, 178 Ariz. 330, 338, 873 P.2d 668, 676 (App. 1993).

¶15 We find no abuse of discretion. Khan had previously requested an extension pursuant to Rule 56(f) and was granted a sixty-day extension of time to conduct discovery. For the second request, Khan asserted that he needed additional time because the Bank had failed to provide him with the original promissory note to determine whether it was genuine, whether the signatures were proper endorsements, and whether the note had been transferred. However, the trial court had previously determined at the evidentiary hearing that the Bank never sold, assigned, or otherwise transferred its interest in the note and deed of trust. Under these circumstances, the trial court acted within its discretion in determining that Khan failed to

³ Khan also suggests the trial court should have conducted a hearing to determine whether his failure to comply with the discovery deadline was due to willfulness or bad faith. However, Khan waived that argument because nothing in this record shows he made such a request. See *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 503, 733 P.2d 1073, 1086 (1987) (appellate court will generally refrain from considering issues not raised in the trial court).

demonstrate good cause for a further extension of time to conduct discovery.

CONCLUSION

¶16 For the foregoing reasons, we affirm the judgment of the trial court. As the prevailing party, the Bank is entitled to recovery of its costs. Additionally, pursuant to the note and the deed of trust, we grant the Bank's request for attorneys' fees upon its compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/

MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/

ANDREW W. GOULD, Judge

/s/

DONN KESSLER, Judge