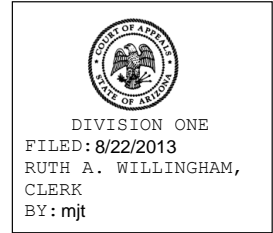


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

BARBARA J. HUFF and CHRISS L. ) 1 CA-CV 12-0399  
FEDER, )  
) DEPARTMENT E  
Plaintiffs/Appellants/ )  
Cross-Appellees, ) **MEMORANDUM DECISION**  
) (Not for Publication -  
v. ) Rule 28, Arizona Rules of  
) Civil Appellate Procedure)  
MATTHEW H. MASON, as Successor )  
Trustee; FLAGSTAR BANK, F.S.B.; )  
MORTGAGE ELECTRONIC REGISTRATION )  
SYSTEMS, INC.; and MERSCORP, )  
INC., )  
)  
Defendants/Appellees/ )  
Cross-Appellants. )

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Appeal from the Superior Court in Maricopa County

Cause No. CV2011-052504

The Honorable Linda H. Miles

**AFFIRMED IN PART, REVERSED IN PART AND REMANDED**

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P O R T L E Y, Judge

¶1 Barbara Huff and Chriss Feder appeal the dismissal of their first amended complaint. Mortgage Electronic Registration Systems and Merscorp, Inc. (collectively "MERS"), Mason, and Flagstar Bank, F.S.B., cross-appeal the denial of an award of attorneys' fees to Flagstar and MERS. For the following reasons, we affirm in part, reverse in part and remand.

**FACTUAL AND PROCEDURAL BACKGROUND**

¶2 Huff purchased a house in Surprise in 2008.<sup>1</sup> She borrowed money from Primary Lending, Inc., to buy the house, signed a promissory note ("Note") and a Deed of Trust ("DOT") securing the Note with the Property. She acknowledges that the recorded DOT is valid and enforceable.

¶3 In her original complaint, Huff alleged, among other things, that in an attempt to foreclose on the house, Flagstar and MERS recorded several documents purporting to claim an interest in the house, which contained false claims and misstatements in violation of Arizona Revised Statutes ("A.R.S.") section 33-420 (West 2013). The Defendants filed a motion to dismiss under Arizona Rules of Civil Procedure ("Rule") 12(b)(6) or, alternatively, a motion for summary

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<sup>1</sup>Huff later quitclaimed the property to herself and her daughter, Chriss Feder.

judgment. Huff then amended her complaint, eliminated several causes of action, and added clarifying details to support her claim for false recording under A.R.S. § 33-420 and her quiet title claim.

¶4 The trial court denied Defendants' motion to dismiss the original complaint because they presented items outside the pleadings and the alternative motion for summary judgment failed to comply with Rule 56. The Defendants then filed a similar motion to dismiss the first amended complaint, but subsequently withdrew their alternative motion for summary judgment. The court granted Defendants' motion to dismiss and awarded them attorneys' fees pursuant to A.R.S. §§ 12-341.01 and 33-807(E) (West 2013). The court reconsidered the award of attorneys' fees and ruled that the Defendants were not entitled to fees, but Defendant Mason was entitled to fees pursuant to A.R.S. § 33-807(E). After judgment was entered, Huff filed her appeal and Defendants filed their cross-appeal.

#### **DISCUSSION**

¶5 Huff maintains that her first amended complaint was well-pled and should not have been dismissed. We review a dismissal of a complaint under Rule 12(b)(6) de novo, *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7, 284 P.3d 863, 866 (2012); *Stauffer v. US Bank National Ass'n*, 1 CA-CV 12-0073, 1 CA-CV 12-

0123, slip op. at \*6, ¶ 7 (Ariz. App. Aug. 20, 2013), accepting as true the facts alleged in the complaint and affirming the dismissal only if the plaintiff would not be entitled to relief under any interpretation of the facts susceptible of proof. *Fidelity Sec. Life Ins. Co. v. State*, 191 Ariz. 222, 224, ¶ 4, 954 P.2d 580, 582 (1998); *Stauffer*, 1 CA-CV 12-0073, 1 CA-CV 12-0123, slip op. at \*6, ¶ 7.

**A. False Recordings Under A.R.S. § 33-420(A)**

¶16 Huff alleges that documents were falsely recorded. She contends that the DOT identifies Primary Lending, Inc., as the Lender; Flagstar, as the Trustee; and, MERS as the nominee for the Lender (and Lender's successors and assigns) and as the Beneficiary. MERS, as the Lender's nominee, has the right to appoint a successor trustee under paragraph twenty-four of the DOT.<sup>2</sup> MERS, purporting to act on Flagstar's behalf, however, recorded a Notice of Substitution of Trustee ("Notice"), which appointed Mason as the successor trustee. Huff contends that the recorded document is a false representation because MERS

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<sup>2</sup> Although Huff asserts that the use of the word Lender in paragraph twenty-four means that the right to appoint a successor trustee is reserved *only* to the Lender and cannot be exercised by the Lender's nominee, successor or assign, we need not resolve her argument in light of the plain language of the paragraph.

only has the authority to act on behalf of the Lender, Primary Lending, and not Flagstar, the Trustee.

¶7 Defendants, however, argue that Flagstar is the successor Lender because the Note was endorsed over to Flagstar. Huff counters by arguing that the person who purported to endorse the note over to Flagstar was an employee of Flagstar, not of Primary Lending. We assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7, 189 P.3d 344, 346 (2008).

¶8 We note that the endorsement is undated. It identifies Rosalyn Pippen as a Loan Operations Associate, but does not identify her employer. Under the endorsement is another stamped endorsement which provides:

PAY TO THE ORDER OF  
FLAGSTAR BANK, FSB  
WITHOUT RECOURSE

PRIMARY LENDING INC

BY: \_\_\_\_\_

PRINTED NAME: \_\_\_\_\_

ITS: \_\_\_\_\_

Stamped over the top of the latter endorsement is a stamp that reads: "NOTE ENDORSEMENT VOID" and appears to be initialed "RP," presumably Rosalyn Pippen. If Pippen was an employee of Primary Lending, Inc., when she signed the endorsement, it seems reasonable that she would have only completed the second endorsement on behalf of Primary Lending.

¶19 Both endorsements are stamped on the Note's signature page bearing Huff's signature. There is a fourth page<sup>3</sup> with yet another endorsement to Flagstar Bank FSB, executed by Jean R. Garrick, Senior Vice President and John P. Mareckl – the spelling of which is unclear – First Vice President. Again, the endorsement does not identify the employer of the two named individuals. Defendants attached the Note and the endorsements as an exhibit to their original motion to dismiss/motion for summary judgment. They do not identify whether Pippen, Garrick or Mareckl were employees of Primary Lending. Nor do they represent that the three individuals are not Flagstar employees. Because there is a question about whether Primary Lending or Flagstar endorsed the note, we accept Huff's allegations, as we must at this stage, that Primary Lending did not endorse the Note over to Flagstar.

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<sup>3</sup> According to Defendants, this fourth page is the back of page three, the signature page, of the Note.

¶10 Similarly, if a Flagstar employee signed the endorsement without authority, Flagstar would have known the endorsement was invalid. Thus, as Huff argues, recording the Notice with the knowledge that MERS had no authority to appoint a successor trustee on behalf of Flagstar would be a violation of A.R.S. § 33-420. Moreover, the subsequent documents recorded by Mason providing notice of the trustee's sale of the Property would be invalid or contain material misrepresentations because Flagstar and MERS knew that Mason had no right or authority to foreclose on the house because he was not a properly appointed successor trustee.

¶11 Because the court was required to accept as true all of Huff's well-pled facts, and given the questions surrounding the endorsements, the court must have concluded that the Notice of Substitution of Trustee, and the several Notices of Trustee's Sale do not fall within A.R.S § 33-420. Huff argues that one may be liable under the false recording statute for filing a notice of substitution of trustee, or a notice of trustee sale which is forged, groundless, contains a material misstatement or false claim or is otherwise invalid. We agree.

¶12 Section 33-420(A) provides that:

A person **purporting to claim an interest in, or a lien or encumbrance against, real property,** who causes a document asserting such claim to be recorded in the office of the county recorder, **knowing or having reason to know that the document** is forged, groundless, **contains a material misstatement or false claim or is otherwise invalid is liable to the owner** or beneficial title holder of the real property for the sum of not less than five thousand dollars, or for treble the actual damages caused by the recording, whichever is greater, and reasonable attorney fees and costs of the action.

(Emphasis added.)

¶13 When interpreting statutes, our objective is to "give effect to the intent of the legislature." *In re Estate of Winn*, 214 Ariz. 149, 151, ¶ 8, 150 P.3d 236, 238 (2007); *Stauffer*, 1 CA-CV 12-0073, 1 CA-CV 12-0123, slip op. at \*6-7, ¶ 9. "When the plain text of a statute is clear and unambiguous there is no need to resort to other methods of statutory interpretation to determine the legislature's intent because its intent is readily discernible from the face of the statute." *Estate of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323, 325, ¶ 8, 266 P.3d 349, 351 (2011) (quoting *State v. Christian*, 205 Ariz. 64, 66, ¶ 6, 66 P.3d 1241, 1243 (2003)).



¶14 Defendants argue that liability under the statute exists only for recorded documents that purport to create an interest in real property. They cite *Schayes v. Orion Financial Group, Inc.*, CV-10-02658-PHX-NVW, 2011 WL 3156303 (D. Ariz. July 27, 2011), which held that a notice of trustee's sale is not covered by the false recording statute because "Arizona courts interpret subsection A's 'document assert[ing] an . . . interest' as the same sort of 'document which purports to create an interest' described in subsection C." *Id.* at \*6.

¶15 The District Court's analysis of A.R.S. § 33-420(A), however, ignores the statute's plain and unambiguous language. Had the legislature intended to limit the application of A.R.S. § 33-420(A) to recorded instruments that "create" an interest in real property, it could easily have said so in subsection A, just as it did in subsection C. See *Padilla v. Indus. Comm'n*, 113 Ariz. 104, 106, 546 P.2d 1135, 1137 (1976) (a fundamental rule of statutory construction is the presumption that what the legislature means, it will say). Consequently, the Defendants' reliance on *Schayes* is misplaced, and we are not bound by it given the plain language of the statute. See *Dube v. Likins*, 216 Ariz. 406, 417, ¶ 37, 167 P.3d 93, 104 (App. 2007) (stating that we are not bound by federal decisions deciding state law issues).

¶16 Even if the statute only applied to documents creating an interest in real property, a notice of substitution of trustee arguably creates such an interest. *Stauffer*, 1 CA-CV 12-0073, 1 CA-CV 12-0123, slip op. at \*8-9, ¶ 12. Without a notice of substitution of trustee, the successor trustee has no power of sale under A.R.S. § 33-807(A), has no authority to notice the trustee's sale under A.R.S. § 33-808, has no right to conduct the sale under A.R.S. § 33-810, or to collect the funds and issue a trustee's deed under A.R.S. § 33-811. The notice of substitution of trustee and notice of trustee's sale must create an interest in real property or those identified therein could not non-judicially foreclose on a borrower's property. *Id.* Because a successor trustee has such sweeping power over such an important interest as one's ownership interest in a home, A.R.S. § 33-420 necessarily applies to notices of substitution of trustee and notices of trustee's sale to provide a remedy for the recording of false instruments.

¶17 Because A.R.S. § 33-420 applies to the recorded notice of successive trustee as alleged in the amended complaint, Huff stated a claim upon which relief might be granted. Consequently, her false recording claims should not have dismissed pursuant to Rule 12(b)(6). See *Stauffer*, 1 CA-CV 12-0073, 1 CA-CV 12-0123, slip op. at \*8-9, \*11, ¶¶ 12, 15.

## B. Quiet Title

¶18 Huff also argues that the court improperly dismissed her quiet title cause of action because she did not tender payment in full of the outstanding amount owed under the Note, secured by the DOT. We must affirm the ruling if it can be sustained on any theory framed by the pleadings and supported by the evidence. *Coronado Co., Inc. v. Jacome's Dept. Store, Inc.*, 129 Ariz. 137, 139, 629 P.2d 553, 555 (App. 1981).

¶19 Dismissal was appropriate here because Huff failed to properly plead a quiet title claim pursuant to A.R.S. § 12-1102. The statute provides that the complaint shall: (1) be under oath; (2) generally set forth the nature and extent of plaintiff's estate; (3) describe the property; (4) state that the plaintiff is credibly informed and believes defendant makes some claim adverse to plaintiff; and (5) request that the court establish plaintiff's estate and that it bar and forever estop defendant from having or claiming any right or title to the premises adverse to plaintiff. A.R.S. § 12-1102.

¶20 Huff only sought to invalidate the interest the Defendants claim as a result of the falsely recorded documents. Her quiet title claim is directed at "parties claiming rights to title under challenged documents containing material misstatements under A.R.S. § 33-420." In her request for

relief, she sought "an order quieting title in favor of Plaintiffs as to each Defendant claiming under each false document." In other words, she did not ask the court to bar and forever estop each Defendant from claiming any right or title to her house, just as to any right that Defendants claim arising out of the challenged false recordings.

¶21 Alternatively, if we construe Huff's first amended complaint as requesting that the court bar and forever estop each Defendant from having or claiming any right or title to Huff's Property, her suit would still be subject to dismissal. Huff concedes the validity of the DOT. Assuming the truth of Huff's allegation that Primary Lending did not endorse the Note over to Flagstar, then MERS is a valid beneficiary and the Lender's nominee under the DOT, and Flagstar is the trustee under the DOT. As the trustee, Flagstar has the power of sale (on behalf of Primary Lending) if Huff is in default under the Note. As a result, Huff has failed to state a claim that she is entitled to quiet title as to MERS or Flagstar.

#### **C. Attorneys' Fees Award to the Successor Trustee**

¶22 Huff argues that Mason was not entitled to an award of attorneys' fees. We disagree.

¶123 Section 33-807(E) provides that a plaintiff need only join a trustee as a party in legal actions pertaining to a breach of the trustee's obligation under this chapter or under the DOT. "If the trustee is joined as a party in any other action, the trustee is entitled to be immediately dismissed and to recover costs and reasonable attorney fees from the person joining the trustee." A.R.S. § 33-807(E).

¶124 Section 33-807(E) applies as to any particular claim if a trustee establishes three elements: (1) that the trustee has been named as a defendant in the claim; (2) that the claim relates to the authority of the trustee to act under the deed of trust or Arizona's statutes regulating trust deeds; and (3) that the claims do not allege that the trustee breached any of his obligations arising under either the trust deed or Arizona's statutes regulating deeds of trust. *Puzz v. Chase Home Fin., LLC*, 763 F. Supp. 2d 1116, 1125 (D. Ariz. 2011).

¶125 Here, because the trustee was named as a defendant in the first amended complaint, the first element is satisfied. The second element is also satisfied because Huff states in her first amended complaint that "Mason is not sued as a trustee or for damages but to quiet title to him as an individual recording documents claiming to create a bare legal title interest in Plaintiffs' real property." She also alleges that Mason is not

a valid trustee because he was not substituted "by a true beneficiary via legally compliant documents pursuant to A.R.S. § 33-804."

¶126 For the first time on appeal, Huff argues that Mason "breach[ed] the deed of trust by taking orders from a false beneficiary despite notice, and by actively misrepresenting the beneficiary's status." We will not, however, consider arguments raised for the first time on appeal. *Scottsdale Princess P'ship v. Maricopa Cnty.*, 185 Ariz. 368, 378, 916 P.2d 1084, 1094 (App. 1995). Moreover, we note that, under Arizona law, a trustee has the "absolute right to rely upon any written direction or information furnished to him by the beneficiary." A.R.S. § 33-820(A). Accordingly, we affirm the court's award of attorneys' fees to Mason under A.R.S. § 33-807(E).

#### **D. Cross-appeal**

¶127 Because we are reversing and remanding the dismissal of Huff's false recording claim, it is premature to consider the cross-appeal on the attorneys' fee issue as to all other Defendants, except for Mason.

#### **CONCLUSION**

¶128 For the foregoing reasons, including the analysis in *Stauffer*, we reverse the ruling on Huff's false recording claim, affirm the dismissal of Huff's quiet title claim, affirm the

dismissal of Mason and his award of attorneys' fees, and remand this case for further proceedings. We do not address the cross-appeal issue because of our remand.

/s/

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MAURICE PORTLEY, Judge

CONCURRING:

/s/

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MARGARET H. DOWNIE, Presiding Judge

/s/

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PHILIP HALL, Judge<sup>4</sup>

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<sup>4</sup> Judge Philip Hall was a sitting member of this court when the matter was assigned to this panel of the court. He retired effective May 31, 2013. In accordance with the authority granted by Article 6, Section 3, of the Arizona Constitution and pursuant to A.R.S. § 12-145, the Chief Justice of the Arizona Supreme Court has designated Judge Hall as a judge pro tempore in the Court of Appeals, Division One, for the purpose of participating in the resolution of cases assigned to this panel during his term in office.