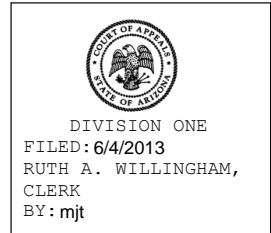


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

WELLS FARGO BANK, N.A., ) No. 1 CA-CV 12-0430  
)  
Plaintiff/Appellee, ) DEPARTMENT E  
)  
v. ) **MEMORANDUM DECISION**  
) Not for Publication  
DIANA RIGGIO and TINO RIGGIO, ) (Rule 28, Arizona Rules  
) of Civil Appellate Procedure)  
Defendants/Appellants. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-011057

The Honorable Katherine M. Cooper, Judge

**AFFIRMED**

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Ryan Rapp & Underwood, PLC Phoenix  
By Michael B. Brewer  
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G E M M I L L, Judge

¶1 Defendants/Appellants Diana Riggio and Tino Riggio ("Riggios") appeal the superior court's judgment in favor of Plaintiff/Appellee Wells Fargo Bank, N.A. For the reasons that

follow, we affirm.

#### **FACTS AND PROCEDURAL HISTORY**

¶12 In December 2005, Wells Fargo extended a \$410,000 loan ("Senior Loan") to the Riggios. Wells Fargo extended an additional loan to the Riggios in April 2006 with a principal sum of \$350,000 ("Junior Loan"), as a home equity line of credit. The loan agreements were secured by a first and a second deed of trust, respectively, which were both recorded against the Riggios' residence at 8106 North 11<sup>th</sup> Street ("Property").

¶13 After asserting the Riggios were in default on the Senior Loan, Wells Fargo initiated a trustee's sale of the Property. The sale was held in October 2009, and the record on appeal indicates that the Property was bought by U.S. Bank National Association, as a trustee for CLMTI 2006-WF1, for a bid of \$416,474.57. On appeal, however, Wells Fargo acknowledges that it (Wells Fargo) was the purchaser.

¶14 In July 2011, following the Riggios' default on the Junior Loan and the trustee's sale of the Property, Wells Fargo filed suit against the Riggios to recover the principal balance of the Junior Loan, \$350,000, plus interest. Wells Fargo moved for summary judgment as a matter of law because there was no dispute that the Riggios breached the Junior Loan agreement by failing to make payments, nor was there a dispute as to the

amount owed.

¶15 The Riggios filed a cross-motion for summary judgment, claiming Wells Fargo's attempt to collect on the Junior Loan obligation was a deficiency action because the "merger of rights" doctrine applied to the Senior Loan and Junior Loan obligations. The Riggios contended, therefore, that Wells Fargo's claim was barred because of its failure to satisfy the 90-day limitations period applicable to this deficiency claim under Arizona Revised Statutes ("A.R.S.") § 33-814(A) (Supp. 2012). The Riggios additionally argued, assuming the limitations period was satisfied, that the amount owed to Wells Fargo must be reduced by the fair market value of the Property at the time of the sale. In support of the fair market value argument, the Riggios presented a statement from Tino Riggio explaining the Property's value exceeded the amount received at the trustee sale and "was worth \$700,000 or more."

¶16 In April 2012, the superior court granted Wells Fargo's motion for summary judgment and denied the Riggios' cross-motion, awarding Wells Fargo \$350,000 plus interest, fees, and costs. The Riggios timely appeal, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) (2003), -2101(A)(1) (Supp. 2012).

#### **ANALYSIS**

¶17 Summary judgment is appropriate when there are no

genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a). "Summary judgment should be granted 'if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense.'" *Armenta v. City of Casa Grande*, 205 Ariz. 367, 369, ¶ 5, 71 P.3d 359, 361 (App. 2003) (quoting *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990)). In reviewing a summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court incorrectly applied the law. *L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co.*, 189 Ariz. 178, 180, 939 P.2d 811, 813 (App. 1997). We view the facts in the light most favorable to the party against whom summary judgment was entered and give that party the benefit of all favorable inferences fairly arising from the evidence. *Id.*

¶8 The issue in this case is whether the Riggios' obligations to pay the Senior Loan and Junior Loan merged, as provided in *Mid Kansas Federal Savings & Loan Association of Wichita v. Dynamic Development Corp.*, 167 Ariz. 122, 804 P.2d 1310 (1991), when Wells Fargo, as the holder of both loans, foreclosed on the Senior Loan. The Riggios contend that because Wells Fargo was the holder of both the Senior Loan and the

Junior Loan, Wells Fargo is unjustly enriched if allowed to separately bring an action on the Junior Loan after the foreclosure of the Senior Loan. The Riggios explain, therefore, that Wells Fargo's right to collect on the Junior Loan is a deficiency action related to the foreclosure of the Senior Loan, and the Riggios are entitled to the protections of A.R.S. § 33-814(A).

¶19 Under A.R.S. § 33-814(A), a debtor is provided with the following protection:

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. In any such action against such a person, the deficiency judgment shall be for an amount equal to the sum of the total amount owed the beneficiary as of the date of the sale, as determined by the court less the fair market value of the trust property on the date of the sale as determined by the court or the sale price at the trustee's sale, whichever is higher.*

(Emphasis added.) The Riggios contend that Wells Fargo's deficiency claim based on the Junior Loan requires the fair market value of the Property to be determined. Also, the Riggios argue that even if Wells Fargo is allowed to bring a

"deficiency claim" by attempting to collect on the Junior Loan obligation, this claim is barred by the statute's 90-day limitation for deficiency action. We conclude, however, that Wells Fargo's action on the Junior Loan does not constitute a deficiency action and A.R.S. § 33-814(A) does not apply.

¶10 The deficiency action contemplated under A.R.S. § 33-814(A) is limited to a "contract for which the trust deed was given as security." Here, the trustee sale was conducted as a foreclosure on the Senior Loan only. In order to apply the statutory protections of § 33-814(A) to the Junior Loan obligation, the Junior Loan must have been foreclosed upon or an exception must be provided. The Riggios rely on the reasoning in *Mid Kansas* as applicable authority.

¶11 In *Mid Kansas*, the holder of two deeds of trust on the same parcel of property purchased the secured property at a trustee's sale on a junior deed of trust. 167 Ariz. at 124-25, 804 P.2d at 1312-13. Afterward, the same holder waived the security interest in the property and sued directly on the note for the balance due on a senior loan obligation. *Id.* The Court found, based on the doctrine of merger, that the foreclosure of the junior lien extinguished the debtor's obligation on the senior debt. *Id.* at 132, 804 P.2d at 1320.

¶12 The Riggios contend that *Mid Kansas* provides that a primary and a secondary loan obligation held by the same party

merges when enforcing the debts would unjustly enrich the lender. In support, the Riggios cite the following paragraph:

Where the same mortgagee holds both a first and second mortgage on the mortgagor's land, and becomes the purchaser at the foreclosure sale of one of the mortgages, the question of merger of rights—often called extinguishment—arises. The merger of rights doctrine addresses the narrow question of whether the mortgagor's personal liability on the senior debt has been discharged. *Wright v. Anderson*, 62 S.D. 444, 253 N.W. 484, 487 (1934). The primary issue in the doctrine of merger of rights is whether the lender would be unjustly enriched if he were permitted to enforce the debt. See generally Burkhardt, *Freeing Mortgages of Merger*, 40 VAND.L.REV. 283, 382 (1987).

*Id.* at 130, 804 P.2d at 1318.

¶13 Comparing the facts of the instant case with the facts of *Mid Kansas*, it is the differences that are most important. Similar to the facts in *Mid Kansas*, Wells Fargo held both the Senior Loan and Junior Loan deeds of trust on the Property, and Wells Fargo agrees that it purchased the Property at the trustee's sale. Unlike the facts in *Mid Kansas*, however, Wells Fargo initiated the trustee's sale on the Senior Loan — not the Junior Loan. The foreclosure of the Senior Loan allowed the purchaser to take the Property free of junior encumbrances, including Wells Fargo's security interest in the Property based upon the Junior Loan. The Arizona Supreme Court specifically noted this distinction in the application of the merger of

rights doctrine when stating, “[a]lthough the mortgagee’s purchase of the property at the foreclosure of the senior mortgage will not extinguish the debt secured by a junior mortgage, the reverse is true where the junior mortgage is foreclosed.” *Id.* at 130, 804 P.2d at 1318. We therefore agree with the superior court that the application of the merger doctrine in *Mid Kansas* does not apply to these facts.

¶14 Further, in *Southwest Savings v. Ludi*, the Arizona Supreme Court rejected an analogous merger argument arising in the context of potential application of Arizona’s other anti-deficiency statute, A.R.S. § 33-729(A) (2007). 122 Ariz. 226, 228, 594 P.2d 92, 94 (1979). In *Ludi*, the holder of two promissory notes secured by mortgages on the same property foreclosed on the senior loan and then sued to collect on the junior loan. *Id.* at 227, 594 P.2d at 93. The Court held that the claim arising from the junior loan, although secured by the same property, was not a deficiency of the foreclosed senior loan; a separate action was appropriate. *Id.* at 94, 594 P.2d at 228. The Court explained that the lender could foreclose on the first mortgage and still sue at law on the second note without violating the statute. The second action would not be an action seeking a deficiency judgment based on the first mortgage but rather an “independent action” on the second note. *Id.*

¶15 Because the merger doctrine does not apply to the



Senior and Junior Loan obligations at issue, the protections specified for a deficiency proceeding under A.R.S. § 33-814(A) are inapplicable. Therefore, we need not decide the Riggios' additional arguments on appeal based upon a deficiency claim. The Riggios' obligation under the Junior Loan is a separate obligation from the Senior Loan, and Wells Fargo, by law, may sue directly on the note. See *Baker v. Gardner*, 160 Ariz. 98, 106, 770 P.2d 766, 774 (1988) (recognizing a deed of trust creditor may elect to forego foreclosure and sue directly on the note).

¶16 Finally, at oral argument before this court, the Riggios proposed that *Mid Kansas* established the doctrine of unjust enrichment, apart from merger, as a stand-alone bar to Wells Fargo's action to collect on the Junior Loan. We have reviewed the Arizona Supreme Court's reasoning and analysis in *Mid Kansas*, and we are not persuaded that such a sweeping application of unjust enrichment is within the spirit and holding of the opinion. See *Mid Kansas*, 167 Ariz. at 129 n.7, 804 P.2d at 1317 n.7 (explaining the issue before the Court was more properly characterized as merger and extinguishment rather than unjust enrichment and election of remedies).

#### CONCLUSION

¶17 For the foregoing reasons, we affirm the trial court's grant of summary judgment. The Riggios request costs and

attorneys' fees on appeal. We deny this request because they are not the successful parties.

/s/

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JOHN C. GEMMILL, Judge

CONCURRING:

/s/

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PATRICIA K. NORRIS, Presiding Judge

/s/

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MICHAEL J. BROWN, Judge