DIVISION ONE
FILED: 6/25/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DESERT GARDENS HOLDINGS, L.L.C., an Arizona limited liability company,	)	1 CA-CV 12-0591
	)	DEPARTMENT B
Plaintiff/Appellee,	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
v.	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure)
HARJIT SINGH and MANJIT KAUR, husband and wife,	)	
	)	
Defendants/Appellants.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-010513

The Honorable Robert H. Oberbillig, Judge
The Honorable Arthur T. Anderson, Judge

AFFIRMED

The Law Office of D. John Djordjevich — Phoenix
By D. John Djordjevich
Attorneys for Appellants

Frank L. Ross, Attorney At Law — Goodyear
Attorney for Appellee

K E S S L E R, Judge

¶1 Harjit Singh and Manjit Kaur (collectively "Defendants") appeal the superior court's grant of partial

summary judgment, award of damages, and denial of their motion for new trial. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Desert Garden Holdings, L.L.C. ("Desert Garden"), executed a Promissory Note for $207,982 (the "Loan") secured by a Deed of Trust in favor of The Money Source, L.L.C. ("The Money Source"). The Money Source then executed an Assignment of Deed of Trust to Defendants which was recorded in La Paz County. Both before and after the assignment, Desert Garden made all payments on the note to The Money Source without any complaint by Defendants or any directions from Defendants to pay them directly.

¶3 In May 2009, Desert Garden paid off the balance of the note to The Money Source. When Desert Garden later attempted to borrow money to refinance the property described in the Deed of Trust, Singh told Desert Garden that The Money Source still owed Defendants $39,167.51 and Defendants would not sign a release of the Deed of Trust until the amount was paid. Desert Garden paid Defendants the remaining amount and demanded Defendants execute a Deed of Release and Full Reconveyance of the Deed of Trust. Defendants allegedly did not comply with the demand.

¶4 Desert Garden filed a two-count complaint against Defendants, The Money Source, and Issam Habbo.[1] In the first count, they alleged Defendants had wrongfully refused to release the Deed of Trust, and they requested statutory damages under Arizona Revised Statutes ("A.R.S.") section 33-712 (2007) and general and compensatory damages. The second count sought punitive damages.

¶5 Desert Garden filed a motion for partial summary judgment against Defendants on the issue of liability. Desert Garden argued that neither the recording of the Assignment of Beneficial Interest in the Deed of Trust nor the issuance of a partial release were sufficient to give Desert Garden notice of the assignment under A.R.S. § 33-818 (2007). Rather, to have required Desert Garden to have made payments on the note directly to Defendants, Defendants had to have given Desert Garden actual notice to make such payments to Defendants, rather than to The Money Source. Desert Garden also argued that The Money Source had been acting as Defendants' agent for purposes of payments.

¶6 Defendants argued that Desert Garden had: (1) actual knowledge that Defendants were the lender/mortgagee and The Money Source was merely a mortgage broker/agent; and (2) notice

[1] The Money Source never answered, and Issam Habbo, a principal of The Money Source, filed a notice of bankruptcy.

of the assignment and made payments to The Money Source as assignor at its peril. Defendants also argued that The Money Source was Defendants' express agent, but the agency relationship terminated upon the recording of the Assignment of Deed of Trust.

¶7 The superior court granted Desert Garden's motion. The court concluded that Defendants had created a course of dealing in which The Money Source acted as their agent in collecting payments on the note, and when Desert Garden made the final payment on the note to The Money Source, Defendants' had in effect received payment so Defendants' remedy was only against The Money Source:

> [I]n my view, The Money Source was an agent in this entire context and -- and the principal through course of dealing fully accepted -- this is a finding of fact; it's not disputed -- fully accepted payments being made through The Money Source through the entirety of the transaction. And that to the extent that The Money Source failed to make a payment that it should have made or transferred the payment on to the principal, [Defendants], the remedy of [Defendants] is back against The Money Source.

¶8 Having resolved the issue of liability, the superior court held a bench trial on damages. At trial, Desert Garden argued that actual damages include damages flowing from or incurred as a direct result of the wrongdoing. Defendants countered by arguing that A.R.S. § 33-712 provides only for

actual damages, and excluding consequential and incidental damages, the allowable award was limited to the $39,167.51 Desert Garden paid Defendants in satisfaction of the Loan.

¶9 Hamid Kazi ("Kazi"), manager of Desert Garden, testified that once he thought he had paid off the Loan to The Money Source, he attempted to refinance the property through another company. That other company required Desert Garden to prepare a business plan using a consultant, do an accounting, obtain an appraisal, and pay a nonrefundable fee. Once Kazi realized there was still a lien on the property as a result of the Loan, he alerted Defendants to the problem that lien was causing. Ultimately, the refinancing failed because Defendants did not release the lien. In addition, Desert Garden still had a loan outstanding on the property from the seller of the property that was coming due and could not be paid without the refinancing. Desert Garden obtained an extension on that loan, but at a much higher interest rate and with a penalty. Thus, the total of Desert Garden's alleged damages included a $10,000 nonrefundable fee, a $750 appraisal fee, a $2,000 consulting fee, and a $3,741 accounting fee. In addition, Desert Garden had to borrow $39,167.51 to pay off the Loan directly to Defendants, incurring interest of $22,031.72 on a five-year note. Finally, the extension on the note owed to the seller of

the property amounted to $12,676 plus a refinancing fee of $6,445.

¶10 The superior court denied punitive damages, awarded Desert Garden the undisputed $39,167.51, and ordered supplemental briefing on the issue of "actual damages." The court ultimately held that the statutory reference to "actual damages" in A.R.S. § 33-712 is a broader concept than consequential damages under contract law, found that all of the items Desert Garden requested were, in fact, actual damages, and granted Desert Garden judgment for $95,895.10.

¶11 Defendants unsuccessfully sought a new trial, arguing that during the damages trial, Desert Garden admitted that The Money Source was its own agent and mortgage broker, which belied the court's prior finding of liability against Defendants.

¶12 Defendants filed a timely appeal. This Court has jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (Supp. 2012).

ISSUES AND STANDARD OF REVIEW

¶13 Defendants argue the superior court erred in: (1) finding there was no question of material fact regarding liability, (2) ruling that all damages Desert Garden claimed to have incurred were "actual damages," and (3) denying Defendants' motion for new trial.

¶14 "Our standard of review of a summary judgment ruling is de novo; that is, we determine independently whether there

are any genuine issues of material fact and whether the [superior] court erred in its application of the law." *Valder Law Offices v. Keenan Law Firm*, 212 Ariz. 244, 249, ¶ 14, 129 P.3d 966, 971 (App. 2006). "[W]e view the evidence in a light most favorable to the party against whom judgment was granted," *Desilva v. Baker*, 208 Ariz. 597, 600, ¶ 10, 96 P.3d 1084, 1087 (App. 2004), but we will affirm the entry of summary judgment if it is correct for any reason, *Hawkins v. Ariz. Dep't of Econ. Sec.*, 183 Ariz. 100, 103, 900 P.2d 1236, 1239 (App. 1995). We review issues of statutory interpretation de novo. *Haag v. Steinle*, 227 Ariz. 212, 214, ¶ 9, 255 P.3d 1016, 1018 (App. 2011). We review the denial of a motion for new trial for an abuse of discretion. *Matos v. City of Phoenix*, 176 Ariz. 125, 130, 859 P.2d 748, 753 (App. 1993).

DISCUSSION

A. The superior court did not err by finding there was no question of material fact regarding liability.

¶15 The court found that there was an undisputed course of dealing between Defendants and The Money Source, and Defendants fully accepted payments being made through The Money Source as their agent during the entirety of the transaction. Based on that finding, the court granted Desert Garden summary judgment on liability under A.R.S. § 33-712. On appeal, Defendants challenge those rulings on several grounds. In addressing those

arguments, we start by delineating the arguments Defendants failed to properly preserve on appeal.

¶16 Defendants argue that if the court was correct in finding the parties were borrower, lender, and agent, Desert Garden should have been required to amend its complaint to allege Defendants were the true lender and assert a breach of contract and agency liability claim. Defendants, however, failed to raise this argument with the superior court, thus waiving it on appeal. *See Cont'l Lighting & Contracting, Inc. v. Premier Grading & Utils., LLC*, 227 Ariz. 382, 386, ¶ 12, 258 P.3d 200, 204 (App. 2011); *Schurgin v. Amfac Elec. Distrib. Corp.*, 182 Ariz. 187, 190, 894 P.2d 730, 733 (App. 1995).

¶17 Defendants do not argue on appeal that the court erred in finding that Defendants were the lender and The Money Source their agent. Accordingly, albeit for different reasons, that argument is also waived. *See State v. Lopez*, 223 Ariz. 238, 240, ¶ 6, 221 P.3d 1052, 1054 (App. 2009) ("The rule that issues not clearly raised in the opening brief are waived serves to avoid surprising the parties by deciding their case on an issue they did not present and to prevent the court from deciding cases with no research assistance or analytical input from both parties." (citation and internal punctuation omitted)); *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989).

¶18 Defendants state without further elaboration that agency and course of dealing are questions of fact. "Merely mentioning an argument in an appellate opening brief is insufficient." *MacMillan v. Schwartz*, 226 Ariz. 584, 591, ¶ 33, 250 P.3d 1213, 1220 (App. 2011). Defendants' failure to meaningfully argue this point constitutes abandonment and waiver of it. *See id.; see also Ace Auto. Prods., Inc. v. Van Duyne*, 156 Ariz. 140, 143, 750 P.2d 898, 901 (App. 1987) ("It is not incumbent upon the court to develop an argument for a party.").

¶19 Turning to arguments Defendants have not waived, the record supports the superior court's summary judgment ruling on agency. "Although agency generally is a question of fact, the issue of agency may be decided as a matter of law where no competent evidence legally sufficient to prove it has been introduced and the material facts from which it is to be inferred are undisputed and only one conclusion can be reasonably drawn therefrom." *Goodman v. Physical Res. Eng'g, Inc.*, 229 Ariz. 25, 30, ¶ 15, 270 P.3d 852, 857 (App. 2011) (citation and internal quotation marks omitted).

> If by express appointment, or by long acquiescence, recognition, or course of dealing, one man has conferred upon another the character of one possessing the requisite authority to represent him in a general way during some more or less continuous period in the transaction of all of his business of a certain kind, or at a particular place, or to perform all acts of

> a certain kind or class, he must be held to have conferred upon him the attributes and powers inherent in the character so bestowed.

Brutinel v. Nygren, 17 Ariz. 491, 498, 154 P. 1042, 1045 (1916).

¶20 In their response to the motion for summary judgment, Defendants stated that The Money Source was Defendants' express agent, but the agency relationship terminated upon the recording of the Assignment of Deed of Trust. At the oral argument on liability, Defendants admitted that there was an undisputed course of dealing between all of the parties regarding to whom payments should be made. Based on Defendants' interaction with The Money Source, there was no dispute the agency relationship continued to exist throughout the parties' involvement and long beyond the date of assignment. Thus, based on the filings and admissions, there was no issue of material fact regarding agency or the parties' course of dealing.

¶21 Defendants also argue that even if they are considered assignees on the note, Desert Garden had actual notice of the assignment of the Deed of Trust and cannot be considered an "innocent mortgager." Defendants' liability, however, is controlled by A.R.S. § 33-818, which provides in relevant part that:

> The recording of an assignment of the beneficial interest in a trust deed shall not be deemed notice of such assignment to the trustor, his heirs or personal

> representatives, so as to invalidate any payment made by them, or any of them, to the person previously holding the note, bond, or other instrument evidencing the contract or contracts secured by the trust deed.

"It is well settled that when an account debtor receives notice of a valid assignment *and* directions to pay to the assignee, the account debtor becomes liable to pay the assignee." *Indep. Nat. Bank v. Westmoore Elec., Inc.*, 164 Ariz. 567, 571, 795 P.2d 210, 214 (App. 1990) (emphasis added). When the debtor disregards the directions to pay the assignee and continues paying the assignor, then the debtor remains liable to the assignee. *Id.* At the oral argument on liability, Defendants admitted they did not request that the payments be made to them at any time. Although Desert Garden allegedly knew that Defendants were the true lender and had notice of the Assignment of the Deed of Trust, it is undisputed that Desert Garden never received specific directions to make any subsequent payments to Defendants. Thus, under the statute, all of the payments made to The Money Source are effective against Defendants. As a result, the superior court correctly held that Defendants were liable for failing to release the note when Desert Garden paid the final balance to The Money Source.

B. The superior court did not err by ruling that the damages Desert Garden claimed to have incurred were "actual damages."

¶22 Defendants argue the superior court erred in ruling that all of the damages Desert Garden claimed to have incurred were "actual damages" under A.R.S. § 33-712, and that the only amount of damages awardable was $39,167.51, the final payment made by Desert Garden to Defendants. We disagree.

¶23 Section 33-712(A) provides that:

> If any person receiving satisfaction of a mortgage or deed of trust shall, within thirty days, fail to record or cause to be recorded . . . a sufficient release, satisfaction of mortgage or deed of release or acknowledge satisfaction as provided in § 33-707, subsection C, he shall be liable to the mortgagor, trustor or current property owner for *actual damages* occasioned by the neglect or refusal.

(Emphasis added.) Section 33-712(B) provides that if the same failure continues for an additional thirty days, the person failing to record the release will be liable for $1,000 in addition to "any actual damage."

¶24 Because the term "actual damages" is not explicitly defined in the statute, Defendants rely on A.R.S. § 33-968(B) (2007), the judicial lien statute, which provides that "[i]f the judgment creditor improperly fails to deliver a recordable document within that time, the judgment creditor is liable to the property owner for *all damages* incurred by reason of the

failure and is presumed liable for at least five hundred dollars." (Emphasis added.) In comparing these two statutes, Defendants claim the obvious implication is that the legislature intended a violation of A.R.S. § 33-712 to be based in contract while a violation of A.R.S. § 33-968(B) is not. Defendants further argue that because liability is based on contract theory, actual damages should only include those which arise naturally from the breach or those which may reasonably have been within contemplation of the parties at the time they entered the contract. As a result, Defendants argue the court erred in awarding Desert Garden additional damages beyond $39,167.51 because there had been no showing that either party knew or reasonably contemplated these damages upon formation of the underlying contract.

¶25 "If a statute's language is clear and unambiguous, we apply it without resorting to other methods of statutory interpretation. However, if more than one plausible interpretation of a statute exists . . . [w]e consider the statute's context, its language, subject matter and historical background, its effects and consequences, and its spirit and purpose." *Haag*, 227 Ariz. at 214, ¶ 9, 255 P.3d at 1018 (internal quotation marks and citations omitted). The legislature provided that if a deed of trust is satisfied and the deed's beneficiary or assignee fails to release the deed,

the beneficiary or assignee will be liable for "actual damages." This language is clear and means exactly what is says——all damages caused by the refusal to release the deed. *See U.S. Fid. & Guar. Co. v. Davis*, 3 Ariz. App. 259, 263, 413 P.2d 590, 594 (1966) (stating that actual damages are "those damages in satisfaction of, or in recompense for, loss or injury sustained; such compensation or damages for an injury as follow from the nature and character of the act, and will put the injured party in the position in which he was before he was injured" (citation and internal quotation marks omitted)).

¶26 Even if the statutory language was not clear, we would come to the same conclusion. Full payment of a mortgage loan legally extinguishes the mortgage lien. R. Wilson Freyermuth, *Why Mortgagors Can't Get No Satisfaction*, 72 Mo. L. Rev. 1159, 1159 (2007). This extinguished status, however, does not automatically appear in the public records and may lead to problems in a subsequent sale or refinance. *Id.; see also* Wanda Ellen Wakefield, Annotation, *Damages Recoverable for Real-Estate Mortgagee's Refusal to Discharge Mortgage or Give Partial Release Therefrom*, 8 A.L.R.4th 853, § 2 (West 2011) ("[T]he consequences to the mortgagor in such situation——such as being unable to obtain additional financing or unable to consummate a sale of the property upon which the mortgage is of record——can clearly be both financially and emotionally devastating. In

recognition of the difficulty of the mortgagor's position, and in order to provide a way for the mortgagor to obtain satisfaction from the mortgagee, the legislatures in a number of jurisdictions have enacted laws setting penalties for the mortgagee's unlawful refusal to correct the record and clear the mortgagor's title.").

¶27 As a result, each state has at least one statute that obligates mortgagees to timely deliver and record a satisfaction after receiving full payment. Freyermuth, 72 Mo. L. Rev. at 1160. If the mortgagee fails to provide the required satisfaction pursuant to the state's statute, the mortgagee may be liable for the damages suffered as a result of its failure. *See* 55 Am. Jur. 2d Mortgages § 382 (West 2013) ("In a number of jurisdictions, statutes have been enacted which, although varying somewhat in their specific provisions, provide that a mortgagee who has received payment of the mortgage debt must enter a satisfaction thereof on the mortgage record, or execute a release of the mortgage, within a specified period after being requested to do so by the mortgagor; and that on his or her failure to do so, the mortgagee may be held liable by the mortgagor for a definite sum, *and for additional damages which the mortgagor may have sustained as a result of the mortgagee's refusal*, including [attorneys'] fees and costs." (emphasis added) (footnote omitted).

¶28 Cases from other jurisdictions that permit actual damages for violation of lien release statutes support the view for Arizona law allowing all damages caused by the failure to release the deed, including other costs the trustor or mortgagor has incurred because of the violation. *See, e.g.*, *Mathews v. Union Cent. Life Ins. Co.*, 213 P. 157, 158 (Kan. 1923) ("Plaintiff was entitled to the additional damages which resulted from the wrongful conduct of the defendant in preventing the consummation of the sale. . . . To keep his tender good plaintiff was required to borrow money, and he was deprived of the use of the purchase money during the default of the defendant. This loss, including some minor items, was traceable to and the probable and natural result of the defendant's misconduct, and was recoverable even under a general allegation of damages."). This interpretation is in keeping with the purpose of the lien release statutes——not to simply require a refund of any amounts paid to the beneficiary or mortgagee to which they were not entitled, but to deter such misconduct and make the trustor or mortgagor whole for any resulting damage. "A statute is not to be read in an atmosphere of sterility, but in the context of what actually happens when human beings go about the fulfillment of its purposes. Clearly, the legislative intent in enacting these statutes was to provide an incentive for the mortgagee, once it no longer has a monetary

interest in the mortgage loan, to promptly record the extinguishment of the lien." *Kinard v. Fleet Real Estate Funding Corp.*, 461 S.E.2d 833, 835 (S.C. Ct. App. 1995). This ultimately eliminates any practical problems the mortgagor would encounter in a subsequent refinancing or sale.

¶29 Based on the purpose of the statute and the generally understood consequences that might arise from a violation, we disagree with Defendants that Desert Garden's "actual damages" are limited to $39,167.51. The damages suffered by Desert Garden were not speculative but were the direct result of Defendants' refusal to release the deed of trust after Desert Garden had made the final payment, including other borrowing and interest Desert Garden had to pay to pay Defendants directly, penalties on another loan, a lost deposit on a proposed refinancing of the property, and costs related to the property. *See supra* ¶ 9; *see also Kissell Co. v. Gressley*, 591 F.2d 47, 49-50 (9th Cir. 1979) (applying Arizona law, court held that defendant mortgage broker's failure to release lien resulted in non-speculative lost profit damages to the developer and that once the fact of loss is proven, courts use a lenient approach in measurement of such damages); *Satine v. Koier*, 164 A.2d 913, 915-16 (Md. 1960) (affirming award of increased costs of labor and materials occasioned by delay in obtaining construction loans caused by failure to release lien); *cf. Marley v.*

McLaughlin, 32 Ariz. 552, 559, 261 P. 33, 35 (1927) (stating that a mortgagor's claim for damages was based on the mortgagee preventing them from farming on the land, and stating in dicta that awarding damages based on the farm's lost profits when the land was never prepared and crops were never planted, was too speculative, but that the award should be the rental value of the farm).

¶30 In addition, Defendants are incorrect in arguing the superior court found liability based on breach of contract, and as a result, the actual damages awarded were based on contract damages. The superior court made the award based on an agency theory. *See supra* ¶ 7. There is nothing in the record to suggest that Defendants and Desert Garden entered into a contract, or that the court implied such a contract was created.

¶31 Finally, we reject Defendants' argument that there was no evidence the parties contemplated these refinancing costs. Since there was no contract between Defendants and Desert Garden when the Loan was made, the contemplation of the parties as to possible damages is irrelevant. Moreover, Kazi testified that once he realized that Defendants had not removed the lien from the note Desert Garden had paid off to The Money Source, he alerted Defendants of the damages he was going to incur if the refinancing did not occur because of the lien. Defendants could have avoided those damages if they had released the lien.

C. The superior court did not abuse its discretion by denying Defendants' motion for new trial.

¶32 Defendants argue that the superior court abused its discretion in denying Defendants' motion for new trial because Desert Garden testified that it hired The Money Source as its mortgage broker. According to Defendants, this evidence contradicts the superior court's decision on liability and thus entitles them to a new trial under Arizona Rule of Civil Procedure ("Rule") 59(a)(8).

¶33 We disagree. Although Desert Garden testified that it hired The Money Source as a mortgage broker, there was evidence in the record to justify the superior court's judgment finding Defendants liable. First, in their response to the motion for summary judgment, Defendants stated that The Money Source was Defendants' express agent and the agency relationship terminated upon the recording of the Assignment of Deed of Trust. Furthermore, at the oral argument on liability, despite the alleged termination of their agency relationship with The Money Source, Defendants admitted that there was an undisputed course of dealing between all of the parties regarding to whom payments should be made. Finally, we construe the evidence in the light most favorable to supporting the court's decision on the motion for new trial. *Hibbitts v. Walter Jacoby & Sons*, 9 Ariz. App. 486, 487, 453 P.2d 997, 998 (1969) ("In reviewing a judgment and

order denying a motion for a new trial, we consider all conflicting evidence in the light most favorable to the appellee, and all competent evidence supporting the judgment will be taken as true."); *Lashinsky v. Hoffman*, 3 Ariz. App. 44, 46, 411 P.2d 467, 469 (1966). Desert Garden's evidence was merely that it hired The Money Source to find it a loan, not that it was Desert Garden's agent for payment of amounts due under the note. Since the judgment was justified by the evidence presented and was not contrary to the clear weight of the evidence, the superior court did not abuse its discretion in denying Defendants' motion for new trial.

D. Defendants and Desert Garden are not entitled to their attorneys' fees on appeal.

¶34 Both Defendants and Desert Garden request their attorneys' fees and costs on appeal. Defendants have not prevailed on appeal and are not entitled to attorneys' fees. As Desert Garden does not provide a substantive basis for a fee award, we deny its request. *See Roubos v. Miller*, 214 Ariz. 416, 420, ¶ 21, 153 P.3d 1045, 1049 (2007) (stating that when a party requests fees it must state the statutory or contractual basis for the award). However, we will award Desert Garden its taxable costs on appeal upon timely compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶35 For the foregoing reasons, we affirm the superior court's judgment.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
SAMUEL A. THUMMA, Judge