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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: 10/22/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WELLS FARGO BANK, N.A.,) 1 CA-CV 12-0644
)
Plaintiff/Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ALFRED CASBY and JANE DOE CASBY,) Rule 28, Arizona Rules of
husband and wife; DEBRALEE DON) Civil Appellate Procedure)
CARLOS and JOHN DOE DON CARLOS,)
wife and husband,)
)
Defendants/Appellants.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-005903

The Honorable Katherine M. Cooper, Judge

AFFIRMED

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G O U L D, Judge

¶1 Alfred Casby and Debralee Don Carlos ("Appellants") appeal from the court's grant of summary judgment in favor of Wells Fargo Bank, N.A. ("Wells Fargo"). For the following reasons, we affirm.

Facts and Procedural History

¶2 The facts are not in dispute. On March 29, 2011, Wells Fargo sued Appellants for defaulting on two home equity lines of credit. The loans were secured by deeds of trust on Appellants' home. Wells Fargo's security interest was junior to a purchase money mortgage held by U.S. Bank, which was also secured by a deed of trust. On June 1, 2011, the home was sold by U.S. Bank via a trustee's sale.

¶3 Wells Fargo filed a motion for summary judgment seeking judgment that Appellants were liable for defaulting on the lines of credit. Appellants filed a response and cross-motion for summary judgment arguing that Wells Fargo could not sue directly on the loans because it had not formally waived its security interests in the home before filing the lawsuit. On May 25, 2012, the court granted Wells Fargo's motion, concluding that there was no affirmative obligation requiring Wells Fargo to formally waive its security interests before filing its lawsuit to collect on the loans. The court also concluded that because Wells Fargo's security interests in the home were extinguished by U.S. Bank's trustee's sale, "[t]here [wa]s no security to waive."

Appellants timely appealed and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21, 12-2101.

Discussion

¶4 Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Arizona Rule of Civil Procedure 56(a). When reviewing a trial court's grant of summary judgment, we "determine *de novo* whether any genuine issues of material fact exist and whether the trial court erred in applying the law." *Nelson v. Rice*, 198 Ariz. 563, 566, ¶ 6, 12 P.3d 238, 241 (App. 2000).

¶5 Appellants argue that Wells Fargo was required to expressly waive its security interests in the home before filing its lawsuit to collect on the unpaid loans, *e.g.*, by recording a release of the security interests in the home. Further, Appellants contend that Arizona's anti-deficiency statutes along with language in *Baker v. Gardner*, 160 Ariz. 98, 770 P.2d 766 (1988), compel the conclusion that Wells Fargo's failure to make a formal waiver bars its action to collect on the subject loans. We disagree.

¶6 As a preliminary matter, the anti-deficiency statute applicable to mortgages, A.R.S. § 33-729, does not apply because Wells Fargo's loans were not purchase money loans, *e.g.*, the loans were not used by the Appellants to purchase the home. See

Baker v. Gardner, 160 Ariz. at 106, 770 P.2d at 774 (“The mortgage anti-deficiency statute, A.R.S. § 33-729(A), only applies to purchase money mortgages.”); A.R.S. § 33-729 (barring deficiency judgments in judicial foreclosure actions where mortgage is “given to secure the payment of the balance of the purchase price, or to secure a loan to pay all or part of the purchase price”). Second, the anti-deficiency statute applicable to even non-purchase money loans secured by a deed of trust, A.R.S. § 33-814, does not require a junior lienholder such as Wells Fargo to formally abandon its secured interest before suing on the note because its lien rights would be extinguished by the senior lien holder’s foreclosure or trustee’s sale. *Wells Fargo Credit Corp. v. Tolliver*, 183 Ariz. 343, 348, 903 P.2d 1101, 1106 (App. 1995) (holding that a junior lienholder did not have to record a release of its secured lien on property prior to a senior lienholder’s trustee’s sale because the “senior creditor’s exercise of its non-judicial sale rights did not constitute an election by [the junior lienholder] to exercise [its] non-judicial foreclosure right.”) (internal quotation marks and citations omitted).

¶7 Moreover, assuming Wells Fargo was required to formally waive its security interest before filing its lawsuit, there was no purpose in requiring Wells Fargo to make such a waiver because the trustee’s sale extinguished its security interests by

operation of law.¹ Thus, any security interest Wells Fargo may have had in Appellant's home was terminated at the trustee's sale; as the trial court stated, "[t]here is no security to waive." The fact that Wells Fargo did not formally release its lien prior to a trustee's sale did not prejudice Appellants; as we stated in *Tolliver*, "[N]either the senior foreclosing lienholder nor the debtors are harmed by simply allowing the junior lien to be extinguished by operation of law at the trustee's sale." *Tolliver*, 183 Ariz. at 347, 903 P.2d at 1105. Accordingly, we find no error.

Conclusion

¶8 For the foregoing reasons, we affirm.

/S/
ANDREW W. GOULD, Presiding Judge

CONCURRING:

/S/
MICHAEL J. BROWN, Judge

/S/
DONN KESSLER, Judge

¹ Notice of a trustee's sale must be recorded 90 days before the sale. See A.R.S. § 33-808(C)(1) ("The date [of the trustee's sale] shall be no sooner than the ninety-first day after the date that the notice of sale was recorded."). Here, U.S. Bank conducted a trustee's sale on June 1. This would indicate Wells Fargo had notice of the trustee's sale prior to filing its complaint on March 29.