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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT
PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MARIA CARMEN ZUBIA, individually, and in her capacity as the
Trustee on behalf of THE MARIA C. PENA REVOCABLE LIVING
TRUST, *Plaintiff/Appellant*,

v.

DAVID SHAPIRO, individually, and as Trustee of THE SHAPIRO TRUST
DATED FEBRUARY 14, 2006; ILANA SHAPIRO aka ILLANA SHAPIRO,
individually, and as Trustee of THE SHAPIRO TRUST DATED
FEBRUARY 14, 2006, *Defendants/Appellees*.

No. 1 CA-CV 15-0404
FILED 9-29-2016

Appeal from the Superior Court in Maricopa County
No. CV2015-002563
The Honorable Robert H. Oberbillig, Judge

AFFIRMED

COUNSEL

Law Offices of Kyle A. Kinney PLLC, Scottsdale
By Kyle A. Kinney
Counsel for Plaintiff/Appellant

Fidelity National Law Group, Phoenix
By Patrick J. Davis, Nathaniel B. Rose
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Donn Kessler joined.

H O W E, Judge:

¶1 Appellant Maria Carmen Zubia appeals the trial court’s dismissal of her claims against David Shapiro, Ilana Shapiro, and The Shapiro Trust Dated February 14, 2006 (collectively “Shapiro”). Zubia sued to obtain damages from and void a trustee’s sale that already had taken place, alleging that someone forged her signatures on the note and deed of trust. She did not seek to enjoin the sale before it occurred. We thus find her claims against Shapiro are barred by A.R.S. § 33-811(C) and affirm.

FACTS AND PROCEDURAL HISTORY

¶2 According to Zubia’s complaint, she and her husband, Jose Juan Pena, held title to certain property as joint tenants with right of survivorship. Zubia and Pena separated in 2006. In 2008, Pena executed a \$150,000 promissory note in favor of Shapiro and Advanced Capital Group, LLC (“Advanced”). Pena also executed a deed of trust on the property to secure the loans.

¶3 The loans went into default, and a Notice of Trustee’s Sale was recorded in November 2013. Shortly thereafter, Pena quitclaimed his joint tenancy interest to Zubia. In a separate action, Zubia sued Pena, Shapiro, Advanced, and others, alleging that someone had forged her signatures on the note and deed of trust. She asked the trial court to convey the property to her, but never sought to enjoin the trustee’s sale. The trial court eventually dismissed Zubia’s complaint without prejudice for lack of prosecution.

¶4 The trustee’s sale took place on January 12, 2015. Shapiro purchased the property on a credit bid. Zubia responded with the present lawsuit against Shapiro, Advanced, and others reasserting her forgery allegations. She again sought to quiet title in her favor and asserted damages claims under A.R.S. § 33-420(A), alleging that Pena improperly recorded the deed of trust and that either Shapiro or Pena improperly recorded the trustee’s deed. Zubia also added a “wrongful foreclosure”

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claim, asked the trial court to declare the January 2015 sale invalid, and sought to enjoin any future trustee's sales. However, Zubia only served Shapiro.

¶5 The trial court dismissed Zubia's complaint under A.R.S. § 33-811(C), finding that she waived her claims by not obtaining injunctive relief before the January 2015 sale took place. The trial court entered final judgment pursuant to Arizona Rule of Civil Procedure 54(b). Zubia timely appealed.

DISCUSSION

¶6 We review the dismissal of a complaint under Arizona Rule of Civil Procedure 12(b)(6) de novo. *Coleman v. City of Mesa*, 230 Ariz. 352, 355 ¶ 7, 284 P.3d 863, 866 (2012). We accept all well-pleaded facts as true and give Zubia the benefit of all inferences arising therefrom. *Botma v. Huser*, 202 Ariz. 14, 15 ¶ 2, 39 P.3d 538, 539 (App. 2002). In our review, we consider the allegations of the complaint, documents attached to or referenced in the complaint, and public records relating to the trustee's sale. *Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 63-64 ¶¶ 10, 13, 226 P.3d 1046, 1049-50 (App. 2010). We will affirm the dismissal if Zubia would not have been entitled to relief under any facts susceptible of proof in her complaint. *Coleman*, 230 Ariz. at 356 ¶ 8, 284 P.3d at 867.

¶7 As noted above, the trial court based its dismissal on A.R.S. § 33-811(C). Under that statute, a trustor, its successors and assigns, and all persons to whom the trustee mails a notice of sale waive any title claims and any claims that are dependent on the trustee's sale unless they obtain an injunction halting the sale. *Morgan AZ Fin., LLC v. Gotses*, 235 Ariz. 21, 23-24 ¶ 7, 326 P.3d 288, 290-91 (App. 2014). The statute is strictly construed in favor of trustors. *Id.* at 24 ¶ 8, 326 P.3d at 291.

¶8 Zubia's first lawsuit did not seek injunctive relief. This lawsuit, Zubia's second, was not filed until after the trustee's sale, thereby making injunctive relief unavailable. Section 33-811(C) therefore facially applies. Zubia contends, however, that her specific claims are not waived.

1. Quiet Title

¶9 Zubia first contends her quiet title claim is subject to A.R.S. § 33-811(B), not (C). Subsection (B), which pertains to the presumption of compliance accorded to a trustee's deed, states, in relevant part:

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The trustee's deed shall raise the presumption of compliance with the requirements of the deed of trust and this chapter relating to the exercise of the power of sale and the sale of the trust property, including recording, mailing, publishing and posting of notice of sale and the conduct of the sale. A trustee's deed shall constitute conclusive evidence of the meeting of those requirements in favor of purchasers or encumbrancers for value and without actual notice. Knowledge of the trustee shall not be imputed to the beneficiary.

A.R.S. § 33-811(B). Subsection (C) provides that “[t]he trustor . . . shall waive all defenses and objections to the sale not raised in an action that results in the issuance of a court order granting [injunctive relief] . . .” Zubia argues that the subsection (C) waiver only applies if “there is no issue of actual notice” under subsection (B). Zubia does not argue that Shapiro had actual notice of any failure of the trustee to comply with the trustee's sale statutes as subsection (B) requires, but instead argues that Shapiro had actual notice of the alleged forgeries contained in the deed of trust.¹

¶10 However, Zubia's reliance on subsection (B) is misplaced. Subsection (B) does not apply because Zubia did not allege that Shapiro failed to comply with the deed of trust requirements or the non-judicial foreclosure statutes. Her claim instead hinged on Shapiro's knowledge of the alleged forgeries. If Zubia's forgery allegations are true, the trustee's sale may have been invalid. Thus, the forgery allegations stated a defense to the sale that only could have been preserved by enjoining the sale before it took place. See *BT Capital, LLC v. TD Serv. Co. of Ariz.*, 229 Ariz. 299, 301 ¶ 10, 275 P.3d 598, 600 (2012) (“Under [§ 33-811(C)], a person who has defenses or objections to a properly noticed trustee's sale has one avenue for challenging the sale: filing for injunctive relief.”); *Madison v. Groseth*, 230 Ariz. 8, 13 ¶ 15, 279 P.3d 633, 638 (App. 2012) (finding that A.R.S. § 33-811(C) extinguished a trustor's “purported rights of possession due to acts of . . . fraud/deceit”).

¹ Zubia also alleged below that the notice of sale was defective under A.R.S. § 33-809 because it was not posted at or mailed to the property address. However, Zubia did not raise this issue in her opening brief. Therefore, Zubia has waived the argument. See *Dawson v. Withycombe*, 216 Ariz. 84, 100 ¶ 40 n.11, 163 P.3d 1034, 1050 n.11 (App. 2007) (issues not raised in the opening brief are waived).

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¶11 Additionally, Zubia contends that the trustee’s sale should be set aside for “gross irregularities” under *In re Krohn*, 203 Ariz. 205, 52 P.3d 774 (2002). In *Krohn*, our supreme court set aside a trustee’s sale based on gross inadequacy of the sale price, not irregularities in the sale process. *Id.* at 212 ¶ 29, 52 P.3d at 781. Zubia did not allege that the sale price was grossly inadequate, and the trustee’s deed reflects a sale price at or approximating the property’s alleged market value.

¶12 Zubia’s claims are subject to subsection (C) regardless whether Shapiro knew of the alleged forgeries. Although Zubia argues that A.R.S. § 33-811(C) does not apply because Shapiro was not a bona fide purchaser, the statute has no such requirement. See *Madison*, 230 Ariz. at 13 ¶ 14, 279 P.3d at 638. Further, because Zubia was a named trustor, subsection (C) applies. Therefore, the trial court properly dismissed Zubia’s quiet title claim under A.R.S. § 33-811(C).

2. Wrongful Foreclosure

¶13 Zubia next argues the trial court erred in dismissing her wrongful foreclosure claim. Arizona has not recognized a cause of action for wrongful foreclosure. *In re Mortg. Elec. Registration Sys., Inc.*, 754 F.3d 772, 784 (9th Cir. 2014) (“Arizona . . . has not expressly recognized the tort of wrongful foreclosure.”). Further, we need not address whether the cause of action exists because Zubia’s specific “wrongful foreclosure” allegations would remain subject to the statutory requisites of A.R.S. § 33-811(C) and thus barred for failing to seek the required injunctive relief. Assuming *arguendo* that Arizona law does recognize a wrongful foreclosure claim, however, Zubia fails to show how her claim is not waived under subsection (C).

¶14 Zubia first alleged that she owed no money on the note “[a]s a result of the forgery” and because a forged “Deed of Trust . . . cannot serve as the basis for a non-judicial foreclosure.” Zubia also argues on appeal that the notice of trustee’s sale, substitution of trustee, and trustee’s deed “contained misrepresentations that a valid deed of trust existed” as a result of the alleged forgeries. As discussed above, Zubia’s forgery allegations may state a defense to the sale to which A.R.S. § 33-811(C) applies. *Morgan AZ*, 235 Ariz. at 23-24 ¶ 7, 326 P.3d at 290-91; see also *Steinberger v. McVey*, 234 Ariz. 125, 136 ¶ 42, 318 P.3d 419, 430 (App. 2014) (“Pursuant to A.R.S. § 33-811(C), once a non-judicial foreclosure sale has taken place, the only defense that may be raised is lack of notice of the sale.”).

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¶15 Zubia next alleged the trustee’s sale was a sham because (1) Shapiro should not have won the bidding at the sale, and (2) Shapiro’s bid was a credit bid that prevented Zubia from receiving excess sale proceeds under A.R.S. § 33-812(A)(5). Both contentions are objections to the validity of the sale and are waived. *Madison*, 230 Ariz. at 13 ¶ 15, 279 P.3d at 638.

¶16 Finally, Zubia argues on appeal that A.R.S. § 33-811(C) “only applies to the sale itself and does not preclude a trustor from asserting post-sale damages claims.” However, in *Madison*, the court applied A.R.S. § 33-811(C) to preclude claims for compensatory and punitive damages. 230 Ariz. at 11-12 ¶¶ 7-11, 279 P.3d at 636-37. The logical dilemma arising from Zubia’s contention is that while she has waived “all defenses and objections to the sale” pursuant to A.R.S. § 33-811(C) through her failure to obtain an injunction, she continues to assert her right to seek damages arising from those same waived defenses and objections. That Zubia sought to recover damages does not place her claim outside the statutory waiver. Thus, even to the extent Zubia might have stated a wrongful foreclosure claim, it was waived.

3. A.R.S. § 33-420(A)

¶17 Zubia also challenges the dismissal of her A.R.S. § 33-420(A) damages claim against Shapiro. Section 33-420(A) authorizes an owner of real property to recover damages from a person claiming an interest in real property, “who causes a document purporting such claim [to be filed] knowing or having reason to know that the document is forged, groundless, contains a material misstatement or false claim or is otherwise invalid” We determined in *Sitton v. Deutsche Bank Nat. Trust Co.* that trustors can assert monetary damages claims under A.R.S. § 33-420(A). 233 Ariz. 215, 219 ¶ 16, 311 P.3d 237, 241 (App. 2013). *Sitton*, however, involved misrepresentations in documents that would have existed regardless whether the trustee’s sale took place, including note assignments, notices of substitution of trustee, and the notice of trustee’s sale. *Id.* at 217 ¶ 8, 311 P.3d at 239. Here, Zubia alleged that Shapiro improperly recorded *the trustee’s deed*, a claim that cannot succeed without first determining whether the trustee’s sale was improper. Therefore, Zubia’s A.R.S. § 33-420(A) claim against Shapiro is dependent on the sale and is waived under A.R.S. § 33-811(C).

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4. Attorneys' Fees and Costs on Appeal

¶18 Shapiro requests an award of attorneys' fees under A.R.S. §§ 12-341.01(A) and 12-1103(B). Section 12-1103 is the sole basis for recovering attorneys' fees in a quiet title action. *Lewis v. Pleasant Country, Ltd.*, 173 Ariz. 186, 195, 840 P.2d 1051, 1060 (App. 1992); *Lange v. Lotzer*, 151 Ariz. 260, 261, 727 P.2d 38, 39 (App. 1986). Shapiro does not show that it met the statutory requirements to recover fees under A.R.S. § 12-1103(B).

¶19 We also decline to award attorneys' fees under A.R.S. § 12-341.01(A). Taking Zubia's allegations to be true, Zubia did not enter into a contract with Shapiro. Assuming *arguendo* that Arizona law would recognize her wrongful foreclosure claim, the claim would have arisen out of tort, not contract. See *In re Mortg. Elec. Registration Sys.*, 754 F.3d at 784 (discussing possible parameters of the "tort of wrongful foreclosure" under Arizona law). Additionally, Zubia's A.R.S. § 33-420(A) claim is a purely statutory cause of action that does not support a fee award under A.R.S. § 12-341.01(A). *Keystone Floor & More, LLC v. Ariz. Registrar of Contractors*, 223 Ariz. 27, 30 ¶ 11, 219 P.3d 237, 240 (App. 2009).

¶20 Shapiro also requests costs incurred on appeal pursuant to A.R.S. §§ 12-341 and 12-1840. We will award Shapiro its taxable costs incurred on appeal contingent upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶21 We affirm the trial court's ruling dismissing Zubia's claims against Shapiro.²



AMY M. WOOD • Clerk of the Court
FILED: AA

² The trial court dismissed the complaint when the only other parties to the suit had not been served. As such, the judgment was final under Arizona Rule of Civil Procedure 54(c), not 54(b). We do not opine whether the dismissal will preclude Zubia from filing a new action against the unserved defendants or preclude her from raising defenses in a possible deficiency action.