IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JAMES M. BURKE, *Plaintiff/Appellee*,

v.

BANK OF AMERICA NA, *Defendant/Appellant*.

No. 1 CA-CV 16-0703
FILED 6-7-2018

Appeal from the Superior Court in Maricopa County
No. CV2015-093769
The Honorable Robert H. Oberbillig, Judge Retired

AFFIRMED

COUNSEL

Lake & Cobb, Tempe
By Joseph J. Glenn, Richard L. Cobb
Counsel for Plaintiff/Appellee

Tiffany & Bosco, PA, Phoenix
By Kevin P. Nelson, Amy D. Sells, James J. Farley
Counsel for Defendant/Appellant

MEMORANDUM DECISION

Judge Kenton D. Jones delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge James B. Morse Jr. joined.

J O N E S, Judge:

¶1 Bank of America, NA (the Bank) appeals the trial court's order granting summary judgment in favor of James Burke. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In April 2007, non-party Darlene Robertson executed a $755,000 promissory note (the Note) in favor of the Bank's predecessor-in-interest, along with a Deed of Trust encumbering Robertson's interest in property located in Scottsdale (the Property).[1] At the time, Robertson was the sublessee under a Residential Sub-Lease dated June 10, 1982 (the Sub-Lease) with another non-party; the Phoenician II Land Trust (Phoenician Trust) was the sublessor. Pursuant to its terms, Robertson was permitted to "charge" the Sub-Lease "by way of mortgages, deeds of trust, or otherwise."

¶3 Robertson eventually defaulted on her Sub-Lease obligations to Phoenician Trust. Thereafter, pursuant to sections 12.1(d) and (f) of the Sub-Lease, Phoenician Trust provided the Bank notice of its opportunity to either: (1) cure Robertson's default, or (2) become a successor sublessee by entering a new sublease upon the termination of Robertson's leasehold interest. The Bank did neither. Thereafter, Burke purchased fee title to the Property.

¶4 Two years later, the Bank noticed a trustee's sale to foreclose the Property. Burke then filed this action to enjoin the sale, arguing the

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[1] We view the facts and the inferences to be reasonably drawn therefrom in the light most favorable to the Bank, the party against whom summary judgment was entered. *Sanders v. Alger*, 242 Ariz. 246, 248, ¶ 2 (2017) (citing *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12 (2003)).

Bank's leasehold mortgage had been extinguished when the Bank failed to act after Phoenician Trust gave it the opportunity to either cure Robertson's breach or replace her as sublessee. The trial court agreed and granted Burke's motion for summary judgment. The Bank timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) § 12-120.21(A)(1) and -2101(A)(1).[2]

DISCUSSION

¶5 A motion for 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." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309 (1990); Ariz. R. Civ. P. 56(a). We review *de novo* whether there are genuine issues of material fact and whether the trial court properly applied the law. *Sign Here Petitions L.L.C. v. Chavez,* 243 Ariz. 99, 104, ¶ 13 (App. 2017) (quoting *L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co.*, 189 Ariz. 178, 180 (App. 1997)). "We will affirm summary judgment if it is correct for any reason supported by the record." *KB Home Tucson, Inc. v. Charter Oak Fire Ins.*, 236 Ariz. 326, 329, ¶ 14 (App. 2014) (citing *Mutschler v. City of Phx.*, 212 Ariz. 160, 162, ¶ 8 (App. 2006)).

¶6 The Bank does not challenge the general rule that, as a leasehold mortgagee, its security interest terminated when the sublessee's leasehold interest terminated.[3] Instead, the Bank argues the rule does not apply because the Sub-Lease expressly provided that the leasehold mortgage continued to encumber the Property, even after termination of Robertson's interest under the Sub-Lease, so long as the debt owed the Bank remained unpaid.

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[2] Absent material changes from the relevant date, we cite a statute's current version.

[3] The parties acknowledge this rule has not been explicitly adopted in Arizona. However, because the Bank does not argue error upon this basis and determination of the issue is unnecessary to resolve the appeal, we do not address it. *See Freeport McMoRan Corp. v. Langley Eden Farms, L.L.C.*, 228 Ariz. 474, 478, ¶ 15 (App. 2011) ("[W]e do not issue advisory opinions or decide unnecessary issues.") (citing *Progressive Specialty Ins. v. Farmers Ins. Co. of Ariz.*, 143 Ariz. 547, 548 (App. 1985)).

¶7 We review questions of contract interpretation *de novo*. *Grubb & Ellis Mgmt. Servs., Inc. v. 407417 B.C., L.L.C.*, 213 Ariz. 83, 86, ¶ 12 (App. 2006) (citing *Thomas v. Liberty Mut. Ins.*, 173 Ariz. 322, 324 (App. 1992)). In interpreting a contract, our purpose is to ascertain and enforce the parties' intent. *ELM Ret. Ctr., L.P. v. Callaway*, 226 Ariz. 287, 290, ¶ 15 (App. 2010) (citing *US W. Commc'ns, Inc. v. Ariz. Corp. Comm'n*, 185 Ariz. 277, 280 (App. 1996)). In doing so, we look to the plain meaning of the particular words used within the context of the contract as a whole. *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 593, ¶ 9 (App. 2009) (citing *United Cal. Bank v. Prudential Ins.*, 140 Ariz. 238, 259 (App. 1983)). "Our law generally presumes, especially in commercial contexts, that private parties are best able to determine if particular contractual terms serve their interests." *1800 Ocotillo, L.L.C. v. WLB Grp., Inc.*, 219 Ariz. 200, 202, ¶ 8 (2008) (citation omitted). Thus, it is "neither the duty nor the right of the superior court to rewrite the contract with terms more favorable to either party than those provided by the instrument." *Coury Bros. Ranches, Inc. v. Ellsworth*, 103 Ariz. 515, 522 (1968) (citing *Goodman v. Newzona Inv. Co.*, 101 Ariz. 470, 472 (1966)).

I. The Bank Waived All Rights Against Phoenician Trust Pursuant to Section 12.1(f) of the Sub-Lease.

¶8 Section 12.1(f) of the Sub-Lease allows a leasehold mortgagee to enter a new sublease in place of the sublessee, upon the same terms the sublessee previously enjoyed, within 30 days after receiving written notice of default. The leasehold mortgagee that does so protects its investment by putting itself into the same position it would be if it chose to foreclose on the sublessee before the sublease. *Cf. Jack Burton Mgmt. Co. v. Am. Nat'l Ins.*, 77 F. Supp. 2d 1102, 1104 (E.D. Mo. 1999) ("A leasehold mortgagee who forecloses and thereby acquires title to the mortgaged lease becomes thereby an assignee of the [underlying] lease and liable thereby through privity of estate for all tenant obligations accruing during his ownership of the lease.") (quoting *Friedman on Leases* § 7.802 (4th ed. 1997)). Pursuant to section 12.1(f)(vii), failure to take advantage of this opportunity may be "conclusively . . . deemed an abandonment and waiver on the part of [the Bank] of all rights to obtain such new sub-lease and of any and all rights against the Sub-Lessor [Phoenician Trust]."

¶9 It is undisputed that Phoenician Trust offered the Bank the opportunity to obtain the protections of the Sub-Lease by entering into a new sublease in Robertson's stead, but the Bank did not take any action to protect its interest. The Sub-Lease is clear that, in failing to do so, the Bank

thus abandoned and waived "any and all rights against the Sub-Lessor" — Phoenician Trust.

¶10 The Bank nevertheless argues that because section 12.1(f) is silent regarding any new sublease's effect upon the leasehold mortgage, the leasehold mortgage remains an encumbrance upon the Property regardless of whether a leasehold mortgagee executes a new sublease. But where the leasehold mortgagee steps into the shoes of a defaulted sublessee, it holds both the mortgage and the sublease. The debt is then extinguished because the lesser interest — the mortgage — merges into the greater interest — the leasehold interest — leaving the parties' rights and responsibilities defined entirely within the new sublease and unhindered by the prior, now-extinguished leasehold mortgage. *See United Ins. Co. of Am. v. Lutz,* 227 Ariz. 411, 413, ¶ 9 (App. 2011) ("Generally, when one person obtains both a greater and a lesser interest in the same property, and no intermediate interest exists in another person, a merger occurs and the lesser interest is extinguished.") (quoting *Mid Kan. Fed. Sav. & Loan Ass'n of Wichita v. Dynamic Dev. Corp.,* 167 Ariz. 122, 129 (1991); *cf. Sourcecorp, Inc. v. Norcutt,* 229 Ariz. 270, 276, ¶ 28 (2012) (stating that, if a fee owner acquires a mortgage on its own property, the lien is extinguished because the lesser interest merges into the greater).

II. Other Provisions of the Sub-Lease Cited by the Bank do not Preserve the Bank's Rights.

A. Section 12.1(h)

¶11 Section 12.1(h) states that the rights of the Bank, as leasehold mortgagee, under Article 12 "shall cease once the Sub-Lessee has discharged all of its obligations under the pertinent Leasehold Mortgage." The Bank argues the converse must also then be true, i.e., that its rights continue until the sublessee has discharged her obligations under the leasehold mortgage. We disagree. Nothing within the plain language of section 12.1(h) supports the Bank's position, and section 12.1(h) is simply inapplicable.

B. Section 12.2

¶12 Section 12.2 provides Phoenician Trust with a thirty-day window following the termination of the Sub-Lease to exercise an option to pay off the leasehold mortgage and obtain a discharge and release of the Bank's rights against the Property. The Bank argues there is no reason to permit a pay-off if termination of the Sub-Lease extinguishes the leasehold mortgage anyway. The Bank is incorrect. This section provides the

sublessor an alternative to the remedies in section 12.1(f), *see supra* ¶¶ 8-9, allowing it to foreclose upon the leasehold mortgagee's right to enter a new sublease and thereby establish for itself clear title to the property. But Phoenician Trust's decision to not exercise its section 12.2 right to redeem the leasehold mortgage does not mean the mortgage continues indefinitely. Nor does it alter the unambiguous directive of section 12.1(f) that the Bank's failure to substitute as sublessee, when provided the opportunity, is "conclusively . . . deemed an abandonment and waiver on the part of [the Bank] . . . of any and all rights against the Sub-Lessor [Phoenician Trust]."

C. Section 12.4

¶13 The Bank cites section 12.4 but does not explain its significance. This section provides: "Subject to the terms of this Residential Sub-Lease the rights and interests of a Leasehold Mortgagee shall remain in full force and effect for such time as the indebtedness to the pertinent Leasehold Mortgagee shall remain outstanding." This provision cannot be read in a vacuum. *See Goodman*, 101 Ariz. at 473 ("It is axiomatic that a contract must be construed as a whole, and each and every part must be read in light of the other parts.") (citing *Hamberlin v. Townsend*, 76 Ariz. 191, 196 (1953)). To the extent the Bank obliquely asserts this section proves the sublessor's ownership interest in the fee is subordinate to a leasehold mortgage while financing is outstanding, it ignores the qualifying language above. Section 12.4 is, by its terms, subject to section 12.1(f), *see supra* ¶¶ 8-9, which expressly address the rights and obligations of the leasehold mortgagee upon default and termination of the Sub-Lease, including the abandonment and waiver of the Bank's rights as a result of inaction.

D. Section 12.8

¶14 Section 12.8 is a non-merger provision that applies if either the sublessee or sublessor "acquires" the other's interest in the Property. In such a case, the leasehold interest will not merge into the ground lease if there is an outstanding leasehold mortgage. While the Bank mentions section 12.8, it offers no persuasive explanation as to how that section applies here; nor can we discern one.

CONCLUSION

¶15 Because the Bank waived its rights under the Sub-Lease by failing to timely enter a new sublease, it no longer holds a security interest in the Property upon which to foreclose. Accordingly, we affirm the trial court's order.

¶16 Both parties request an award of attorneys' fees on appeal pursuant to A.R.S. § 12-341.01 (permitting an award of reasonable attorneys' fees to the successful party "[i]n any contested action arising out of a contract"). As the successful party, Burke is awarded his reasonable attorneys' fees and costs upon compliance with ARCAP 21(b). *See* A.R.S. § 12-341.

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