IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

HELVETICA SERVICING INC, *Plaintiff/Appellant*,

v.

MICHAEL S. PASQUAN, *Defendant/Appellee*.

No. 1 CA-CV 21-0612
FILED 7-12-2022

Appeal from the Superior Court in Maricopa County
Nos. CV2008-050966
CV2009-029276
The Honorable Theodore Campagnolo, Judge

AFFIRMED

COUNSEL

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By Daniel L. Kloberdanz
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MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the court, in which Presiding Judge Jennifer B. Campbell and Judge James B. Morse Jr. joined.

H O W E, Judge:

¶1 Helvetica Servicing, Inc. appeals from the trial court's award entitling it to a reduced deficiency judgment of only $444,564.07 against Michael Pasquan. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 We view the evidence in the light most favorable to sustaining the trial court's ruling. *Carey v. Soucy*, 245 Ariz. 547, 552 ¶ 19 (App. 2018). This is the sixth appeal relating to the purchase of Michael Pasquan's 1.01-acre real property in Paradise Valley, Arizona ("Property").[1] In May 2003, Pasquan and his then-wife Kelly[2] purchased the Property for $935,000, paying $335,000 cash and obtaining a loan for $600,000 from Hamilton Mortgage Company ("Hamilton loan"). The Pasquans indicated in their purchase contract that they intended the Property to be their primary residence. As of June 2006, the Property was valued at $5.85 million. The Property was zoned as residential, single-family housing and the lot included an approximately 4,000 square-foot house, which they expanded into an 11,500 square-foot mansion. Pasquan, a licensed contractor, initially retained a general contractor for the project but became dissatisfied and took over as his own general contractor, paying himself for the work.

¶3 To fund the expansion, the Pasquans obtained a loan for $1,600,000 from Desert Hills Bank ("DHB") in December 2004 and used proceeds from that loan to pay off the Hamilton loan. They later obtained

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[1] The factual and procedural history for this case has been largely recounted in the previous opinions, *Helvetica Servicing, Inc. v. Pasquan*, 229 Ariz. 493 (App. 2012) (*Helvetica I*); *Gold v. Helvetica Servicing, Inc.*, 229 Ariz. 328 (App. 2012) (*Helvetica II*); *Helvetica Servicing, Inc. v. Giraudo*, 241 Ariz. 498 (App. 2017) (*Helvetica III*); *Helvetica Servicing, Inc. v. Pasquan*, 248 Ariz. 219 (App. 2019) (*Helvetica IV*), vacated, 249 Ariz. 349 (2020) (*Helvetica V)*.

[2] Kelly Pasquan is not a party to this appeal.

an additional $100,000 under the same deed of trust and another DHB loan for $400,000 under a second deed of trust. Thereafter, they obtained an unsecured $225,000 loan from Pasquan's father and charged about $133,000 on credit cards for the project. In September 2006, they obtained a $3.4 million promissory note from Helvetica secured by a deed of trust against the Property to pay off the existing loans; the Helvetica loan thus refinanced the DHB obligations, and, according to their loan application, sought the refinancing to "convert to construction loan." In this application, the Pasquans marked that the Property was their primary residence but also that they did not intend to occupy the Property as such. In their occupancy and financial-status affidavit, they indicated that the Property was for investment purposes. The Pasquans defaulted on the Helvetica loan, and in March 2008, Helvetica sued to judicially foreclose and purchased the Property for $400,000 at a sheriff's sale.

¶4 In April 2009, the court determined that the Pasquans owed Helvetica $3,657,793.30. In August 2009, Pasquan applied for a fair-market-value ("FMV") determination of the Property under A.R.S. § 12–1566(C) to be credited against the judgment; the court heard evidence and found the FMV was $2,266,666.67. In April 2010, the court found that Helvetica's total judgment against Pasquan, including interest, was $4,203,492.28. The court applied the FMV credit to the judgment to calculate a deficiency of $1,936,825.61.[3] Pasquan appealed the judgment, arguing that the Helvetica loan was a purchase-money mortgage under A.R.S. 33–729(A) not subject to a deficiency judgment. This court ruled in *Helvetica I* that refinancing a loan does not change its purchase-money character, refinance loans for home construction are purchase-money sums, and when a loan includes both purchase and non-purchase-money sums, lenders may pursue a deficiency for the non-purchase-money sums. 229 Ariz. at 499 ¶ 23, 501 ¶ 32, 502 ¶ 37. *Helvetica I* remanded the case to the trial court to determine which amounts of the loan proceeds were used for construction of the Property subject to anti-deficiency protection. *Id.* at 502 ¶ 38.

¶5 In 2017, the court conducted a bench trial and concluded that most of the Helvetica loan were purchase-money sums. However, it did not specify which amounts were for construction or home-improvement purposes but determined that the deficiency judgment was $341,188.35. Helvetica appealed, and this court ruled in *Helvetica IV* that "the bulk of the loan proceeds" were for home improvement because the home was not built from scratch. 248 Ariz. at 222 ¶ 15. Our supreme court vacated and remanded *Helvetica IV* for the trial court to determine whether the loan was

[3] We insert the corrected decimal numbers from the judgment.

for construction or home improvement based on the totality of the circumstances, including five non-exclusive factors. *Helvetica V*, 249 Ariz. at 355 ¶ 23. These factors address (1) whether the Property was substantially demolished, (2) the intent of the parties when completing the loan documents, (3) whether the Property was inhabitable during the expansion, (4) whether the Property was largely preserved or substantially expanded, and (5) whether official documents characterize the expansion as "construction" or "home improvement." *Id.* at 354 ¶ 19.

¶6 On remand, the trial court heard testimony and argument on the issue and found that most of the Helvetica loan was a construction loan. The court made findings under the *Helvetica V* factors:

(1) The Property was "largely demolished, with the final product being at least twice as large as the original structure." All that remained from the original structure were three walls and part of the foundation.

(2) Although the Pasquans signed some loan documents avowing that the Property was their primary residence, they also checked the box avowing that the Property was for investment purposes. The Pasquans' intent was to purchase the Property as a primary residence and sell it after construction. Helvetica knew that the Pasquans wanted to sell the property after the construction and that Mr. Pasquan lived in different rooms of the Property during construction.

(3) Pasquan moved between rooms because the Property was "only habitable on a room-to-room basis" but was not habitable as a home.

(4) The project "was a substantial rebuild." The original house would be unrecognizable after expansion, resulting in a "high-quality luxury mansion, which completely eviscerated any structural memory of the original house."

(5) The DHB loan document showed that it was a construction loan because it was secured by a "Construction Deed of Trust," which designated it a "construction mortgage." Further, none of DHB's or Helvetica's loan documents used the word "home improvement." Although Town of Paradise Valley

documents used "remodel," this term did not indicate construction or home improvement loan.

¶7 The court also considered other factors: that the expenditures for outdoor amenities, which Helvetica argued were akin to yard improvements, were "part and parcel of a construction loan" under a "unified construction project." The court further considered that Helvetica's loan was a 12-month bridge loan, whose first 11 payments were interest-only, and the twelfth payment was a balloon payment of the principal and any unpaid interest. The court took judicial notice that lenders issue short-term bridge loans for construction "where permanent financing, often by a third-party purchaser, will be obtained at the end of the bridge loan." Home improvement loans, on the other hand, have longer terms, require equal monthly payments, and are suitable for homeowners planning to live in the home. Additionally, the court found that the DHB loan required the Pasquans to make draw requests to receive the funds, a provision common in construction loans. Further, the court noted that the Helvetica loan was a construction loan because it assumed the DHB loan, providing more funds for construction than the DHB loan, and was a "continuation of the DHB loan's character as a purchase-money obligation."

¶8 After holding that most of the Helvetica loan was for construction, the court determined that roughly 2% of the loan consisted of non-purchase-money obligations and to that extent, was a non-purchase-money loan subject to recovery under a deficiency judgment. To make this determination, the court analyzed the construction costs, applicable payments, fees, interests, and other costs. It identified $2,010,058.18 in construction costs, which included the $225,000 loan from Pasquan's father and $133,018 credit card expenses for the expansion. The court also found that these $2.1 million construction costs, the $600,000 Hamilton mortgage loan, $500,153.32 settlement costs, and $227,885 interest reserve payments from "Cash to Pasquans" were purchase-money sums totaling $3,338,096.50, roughly 98% of the Helvetica loan. After subtracting the purchase money sums from the entire loan amount ($3,400,000-$3,338,096.50), the court determined that the non-purchase money obligation was $61,903.50, roughly 2% of the loan. The court then deducted a pro-rata amount of the FMV from the non-purchase-money obligation to calculate the deficiency amount. Thus, the court concluded that Helvetica was entitled to $33,427.89 from Pasquan, and $444,564.07 with interest, litigation costs, and attorney fees. Helvetica timely appealed.

DISCUSSION

¶9 Helvetica argues that the court erred in finding that the Helvetica loan is a construction loan and in calculating the deficiency judgment. We defer to the trial court's factual findings unless clearly erroneous, *Sholes v. Fernando*, 228 Ariz. 455, 460 ¶ 15 (App. 2011), viewing the facts in the light most favorable to upholding the trial court's ruling, *Ariz. Biltmore Hotel Villas Condos. Ass'n v. Conlon Grp. Ariz., LLC*, 249 Ariz. 326, 329 ¶ 3 (App. 2020). But we review de novo the trial court's legal conclusions, *Helvetica V*, 249 Ariz. at 352 ¶ 10, and interpretation and application of statutes, *First Fin. Bank, N.A. v. Claassen*, 238 Ariz. 160, 162 ¶ 8 (App. 2015).

I. The trial court did not err in concluding that the Helvetica loan was a construction loan.

¶10 As a threshold matter, Helvetica argues that the loan was not subject to anti-deficiency protection because the Property was for investment. Anti-deficiency statutes protect a borrower from a deficiency judgment, *Helvetica V*, 249 Ariz. at 351 ¶ 1, when the collateral-property is (1) two-and-a-half acres or less and (2) "limited and utilized for either a single one-family or a single two-family dwelling," A.R.S. §§ 33–729(A), –814(G). As *Helvetica V* found, A.R.S. § 33–729(A) is the applicable anti-deficiency statute because Helvetica judicially foreclosed on its lien. 249 Ariz. at 352 ¶ 11. A lender cannot obtain a deficiency judgment for real property bought with a purchase-money loan under A.R.S. § 33–729(A), *Baker v. Gardner*, 160 Ariz. 98, 107 (1988), and this includes property for investment purposes, *see N. Ariz. Props. v. Pinetop Props. Grp.*, 151 Ariz. 9, 12 (App. 1986) (holding that a "dwelling" as referenced in A.R.S. § 33–729(A) is not limited to "someone's permanent residence or normal place of abode" and "does not preclude investment use"). Pasquan's purchase and expansion of the Property for investment purposes falls under the protections of A.R.S. § 33–729(A).

¶11 Turning to the merits, the court's finding that approximately 98% of the Helvetica loan was a construction loan was not clearly erroneous. A construction loan is a purchase-money obligation if "(1) the deed of trust securing the loan covers the land *and* the dwelling constructed thereon; and (2) the loan proceeds were in fact used to construct a residence that meets the size and use requirements set forth in A.R.S. § 33–729(A)." *Helvetica I*, 229 Ariz. at 501 ¶ 32; *Helvetica V*, 249 Ariz. at 352 ¶ 7. Construction loans include building a new residence, but also building or rebuilding a residence that is "largely demolished." *Helvetica V*, 249 Ariz. at 354 ¶ 18. In contrast, "[h]ome improvement loans are not entitled to anti-

deficiency protection" and involve "elective enhancement, such as the expansion of an existing structure, but not reconstruction of a damaged structure." *Id.* at 353 ¶ 13, 354 ¶ 18.

¶12 To properly characterize the loan, the trial court must look at the totality of the circumstances, based on whether (1) an existing structure was demolished completely or substantially and a new building constructed in its place; (2) the parties intended the loan to be for construction in the loan documents; (3) "the structure was inhabitable or inhabited during construction"; (4) "the structure was largely preserved and improved or substantially expanded"; and (5) the loan documents, permits, or other documents characterize the project as "home improvement" or "construction." *Id.* at ¶¶ 17, 19. No one factor is dispositive. And when loan proceeds consist of purchase-money and non-purchase-money sums, the lender may pursue a deficiency judgment for the traced and segregated non-purchase-money amounts. *Helvetica I*, 229 Ariz. at 501 ¶ 37.

¶13 Here, sufficient evidence supports the trial court's conclusion that most of the Helvetica loan is a construction loan. The court found that the Property was "largely demolished," with only three walls and a portion of the original foundation remaining after the expansion. Although Helvetica argues that the "original home at all times existed" over the expansion period, the trial court found that any structural memory of the original home had been "completely eviscerated." The court considered Pasquan's testimony,[4] which Helvetica did not dispute, that the original structure was "ripped apart," every window and door replaced, and the Property expanded to more than 20 rooms and an eight-car garage. Further, the plumbing, electrical, sewer, and gas lines were all replaced, and the ceilings were raised "from eight feet to twelve feet or higher."

¶14 The purpose of the refinance, as evidenced in the uniform residential loan application, was to "convert construction loan." Some documents seemingly created a conflict of intent for the use of the Property. The Pasquans indicated that the Property was their primary residence in their real estate purchase contract. But they avowed that the Property was for investment in their occupancy and financial affidavit. And in their loan application, they marked that the Property was their primary residence but indicated later they did not intend to occupy it as such. Helvetica

[4] Pasquan's testimony is not included in the record on appeal, so we presume the record supports the trial court's findings. *Schultz v. Schultz*, 243 Ariz. 16, 19 ¶ 9 n.2 (App. 2017).

apparently claimed at trial that it would not have made the loan knowing that the Pasquans intended to use the Property as their primary residence. The court reasoned that Helvetica should have raised such a dispute before the foreclosure sale and that Helvetica should have known based on the circumstances—construction and uninhabitability of the Property—that their intent was to sell the Property. The court concluded that no conflicts existed: the Pasquans accurately stated that the Property was their primary residence but intended to sell it after the expansion, and the totality of the circumstances reasonably reconciled any conflicts that those documents posed. Thus, the court did not err in concluding that based on these documents the intent of the parties was to refinance the Helvetica loan as a construction loan.

¶15 Although Pasquan lived from room to room in the Property during the expansion, the court found that the Property was not fully habitable as a home. Because evidence shows that someone did reside in the Property during the expansion, this third factor leans toward home improvement. *See Helvetica V*, 249 Ariz. at 354 ¶ 21. But the supreme court in *Helvetica V* did not find this fact dispositive to the character of the loan, but one of many facts used to determine this "close call," deeming it appropriate to remand for factual findings. *Id.* at ¶¶ 20–21. Additionally, the original structure of the Property "was not significantly preserved," and evidence showed that it was "wholly unrecognizable after the expansion," which "completely eviscerated any structural memory of the house." While Helvetica argues that the original home always existed, evidence shows that after the expansion, the Property became a "high-quality luxury mansion."

¶16 Further, the DHB loan's deed of trust was labeled as a "Construction Deed of Trust" and included a provision stating, "This Deed of Trust is a 'construction mortgage' for the purposes of Sections 9–334 and 2A–309 of the Uniform Commercial Code, as those sections have been adopted by the State of Arizona." Helvetica argues that the use of the term "construction" is limited to its use under the Uniform Commercial Code, codified as A.R.S. § 47–9334(H) and A.R.S. § 47–2A309(A)(4): neither the Helvetica loan nor the DHB loan was used to purchase the Property because the Pasquans owned the Property for two years, and construction loans must purchase the land and construct an improvement on the land. But neither statutory provision requires that the loan be used to purchase property. Rather, a construction mortgage "secures an obligation incurred for the construction of an improvement on land, *including* the acquisition cost of the land, if the recorded writing so indicates." A.R.S. § 47–9334(H) (emphasis added); A.R.S. § 47–2A309(A)(4). The word "including"

indicates that the loan *may* be used to purchase the land but not necessarily. *See State ex rel. Dep't of Econ. Sec. v. Torres*, 245 Ariz. 554, 558 ¶ 14 (App. 2018) (stating that the term "includes" is a "term of enlargement rather than limitation"). Further, construction includes "building or rebuilding qualified properties—even if the project did not begin 'from scratch' with an empty lot." *Helvetica V*, 249 Ariz. at 354 ¶ 17.

¶17 The court even considered other factors, such as that expenditures for outdoor amenities are "part and parcel of a construction loan" when building a house and that the project, while completed "piece-meal," was a "unified construction project." Evidence also showed that Helvetica's loan was a 12-month bridge loan, whose first 11 payments were interest-only, and the twelfth payment was a balloon payment of the principal and any unpaid interest. The court took judicial notice that construction loans have short-term bridge loans while home improvement loans have longer terms and require equal monthly payments. Also, the DHB loan required the Pasquans to make draw requests to receive the funds, which is common in construction loans. And the court recognized that the Helvetica loan assumed the DHB loan, providing more funds for construction than the DHB loan covered and retaining the DHB loan's purchase-money character.

¶18 The court also rejected Helvetica's argument at trial that Pasquan's testimony and certificates of completion from the Town of Paradise Valley demonstrated that the expansion was a "remodel" and thus not purchase money. The court determined that a remodel could occur under either a home improvement or construction loan, and that the documents using this term did not signify one character over another. "Remodel" means "[t]o make over in structure or style; reconstruct." *Remodel*, American Heritage Dictionary, ahdictionary.com (last visited Apr. 22, 2022). Additionally, the documents in evidence did not use the term "home improvement." Based on this definition, a remodel of a home could be elective enhancement or reconstruction of the entire structure. Thus, the court properly determined that this term is ambiguous.

¶19 Based on these findings of fact and conclusions of law, evidence in totality demonstrates that most of the Helvetica loan is a construction loan. Nothing in the record indicates that the court erred.

II. The trial court did not err in calculating the amount of the deficiency judgment.

¶20 Helvetica argues that the court erred in including general contracting fees as construction costs and in deducting the FMV credit twice. We reject both arguments. The court did not abuse its discretion in finding that nearly $925,000 in general contracting fees were purchase-money sums. The court properly traced the purchase-money and non-purchase-money sums, relying in part on exhibits documenting the construction costs. It also relied on Pasquan's testimony that the expenses related to construction of the Property, and the court concluded that these payments were "usual and necessary costs in the expansion." Where substantial evidence supports the trial court's ruling, we will not reweigh the evidence on appeal. *Sholes*, 228 Ariz. at 460 ¶ 15. Thus, the court did not err in its purchase-money determination.

¶21 Further, the court did not deduct the FMV credit twice. After a FMV determination, the court credits "the amount due on the judgment with the greater of the sales price or the fair market value of the real property." A.R.S. § 12–1566(C). Here, the FMV credit ($2,266,666.67) was greater than the sales price ($400,000). After identifying the non-purchase-money portion ($61,903.50) of the Helvetica loan, the court then prorated the FMV credit to reduce that portion from the non-purchase-money sums. The court did not apply the FMV credit until after it traced and segregated the purchase-money and non-purchase-money amounts from the total $3.4 million loan. It properly concluded that Helvetica's deficiency judgment was $33,427.89. Therefore, the court only applied the FMV credit once toward the non-purchase-money amount.

CONCLUSION

¶22 For the foregoing reasons, we affirm. Both parties request attorney fees pursuant to ARCAP 21 and A.R.S. §§ 12–341.01 and –341.[5] In our discretion, we decline to award either party attorney fees. Because Pasquan prevailed on appeal, we award him his appellate costs upon compliance with ARCAP 21.

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

[5] Helvetica inadvertently miscited these statutes.