DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MICHAEL MILLER and KIM MILLER, as successors in interest to Plymouth Park Tax Services, Defendants-Appellees, v. WILLIAM M. RUSSELL and KIMBERLY JEAN RUSSELL, husband and wife, Intervenors-Defendants-Appellants.	1 CA-CV 09-0077 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-014291

The Honorable Robert Oberbillig, Judge

AFFIRMED

Fidelity National Law Group — Phoenix
By Kimberly A. Lane
Patrick J. Davis
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By Mark L. Manoil
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K E S S L E R, Judge

¶1 Intervenors-Defendants-Appellants William M. and Kimberly Jean Russell (the "Russells") appeal the superior court's order denying their motion to set aside a default judgment to allow them to redeem tax liens purchased by Plymouth Park Tax Services ("Plymouth"). For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Maria L. Barreto was the record fee title owner of the real property at issue (the "Property"). Ms. Barreto died in 1994, and through an un-probated will, passed her interest in the Property to her daughters Genevieve Marquez and Lucia Zevallos in equal shares.

¶3 Marquez filed a bankruptcy petition in 1999. Her one-half undivided interest in the Property was included in the bankruptcy estate. In 2002, the bankruptcy trustee sold that interest to Mr. Russell. Neither the bankruptcy trustee nor the Russells recorded the deed until July 7, 2008.

¶4 After they purchased the Property in 2002, the Russells did not notify the Maricopa County Assessor of their interest in the Property and did not pay the 2002 and 2003 property taxes. In 2004, Plymouth purchased a Maricopa County tax lien against the Property (the "Tax Lien"). Later liens for unpaid taxes were apparently purchased by other persons.

¶5 In March 2007, pursuant to Arizona Revised Statutes ("A.R.S.") section 42-18202 (2006), Plymouth mailed notice of intent to foreclose the Tax Lien to: (1) The record owner of the Property according to the records of the Maricopa County Recorder (Ms. Barreto); (2) The situs address of the Property; (3) The tax bill mailing address according to the records of the Maricopa County Treasurer; and (4) The Maricopa County Treasurer. The notice to Ms. Barreto was returned as undeliverable. As the Russells did not fall under any of these categories, they did not receive that notice.

¶6 In August 2007, Plymouth filed a complaint to foreclose the Tax Lien. Plymouth personally served Ms. Barreto's known heirs Genevieve Marquez and Kim Miller, Ms. Barreto's son Pete L. Barreto, and the occupants of the Property. Plymouth served any unknown heirs and devisees of Ms. Barreto by publication. No responsive pleading was filed and Plymouth applied for entry of default. In February 2008, the superior court entered a default judgment foreclosing the right to redeem the Tax Lien against the defendants and any unknown heirs and devisees of the defendants.

¶7 In March 2008, the Maricopa County Treasurer issued a Treasurer's Deed for the Property to Plymouth. In May 2008, Plymouth sold the Property to Defendants-Appellees Michael and Kim Miller (the "Millers") for $10,000. Plymouth gave the

Millers a Special Warranty Deed, which the Millers recorded on June 3, 2008. As noted *supra*, ¶ 3, the Russells recorded their deed from the bankruptcy trustee in July 2008.

¶8 On July 31, 2008, the Russells moved to intervene in this matter and in September 2008 moved the superior court to set aside the judgment, reinstate the tax lien, and permit the Russells to redeem the lien.[1] The Millers opposed the motion to set aside the judgment and to permit redemption, arguing that Plymouth had followed all the procedures to foreclose on the right to redeem the tax lien and pursuant to A.R.S. § 33-411 (2007), the Russells' failure to record their deed until after the Millers recorded their deed resulted in the extinguishment of the Russells' interest in the Property. Without addressing the recordation issue, the court denied the Russells' motion as untimely under A.R.S. § 42-18152 (2006) because a valid treasurer's deed had been issued prior to the Russells' motion.

¶9 The Russells timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(C) (2003).

ISSUES

¶10 The Russells argue the superior court abused its discretion by refusing to set aside the default judgment both

[1] We found no order in the record granting the Russells' motion to intervene. However, the trial court impliedly granted the motion as it considered the Russells' motion to set aside the judgment.

because: (1) They had the right to vacate the default judgment until one year after the entry of the judgment pursuant to Arizona Rule of Civil Procedure 59(j) and A.R.S. § 12-1560(A) (2003); and (2) Only the foreclosure order and not the treasurer's deed precluded a right to redeem and as an owner of an "off-record" interest in the Property, the foreclosure judgment did not preclude their right to redeem.

DISCUSSION

¶11 We review a trial court's denial of a motion to set aside a default judgment for an abuse of discretion. *Hilgeman v. Am. Mortgage Sec. Inc.*, 196 Ariz. 215, 218, ¶ 7, 994 P.2d 1030, 1033 (App. 2000).[2] We may affirm the superior court on any basis supported by the record. *State v. Childress*, 222 Ariz. 334, 338, ¶ 9, 214 P.3d 422, 426 (App. 2009).

¶12 We begin by noting that there currently is an unresolved tension in Arizona on the time in which a property claimant may seek to redeem when they are served by publication in a tax lien foreclosure action. This Court has held that

[2] Although the Russells moved to set aside the default judgment, they invoked the authority of Arizona Rule of Civil Procedure 59(j), which authorizes the trial court to grant a new trial. Arizona cases do not make a distinction between a motion to set aside or a Rule 59(j) motion. *See Southwest Metals Co. v. Snedaker*, 59 Ariz. 374, 389, 129 P.2d 314, 321 (1942). The same standard of review applies to orders on both types of motions. *See Clark v. Clark*, 71 Ariz. 194, 196, 225 P.2d 486, 487 (1950) (appellate court reviewed trial court's decision regarding whether to grant a new trial pursuant to a statute identical to Rule 59(j) for an abuse of discretion).

pursuant to A.R.S. §§ 42-18204(B) (Supp. 2010) and 42-18206 (Supp. 2010), the entry of a judgment against the defendant in a tax lien foreclosure action forecloses his right to redeem. *Friedeman v. Kirk*, 197 Ariz. 616, 618-9, ¶ 19, 5 P.3d 950, 952-53 (App. 2000).[3] In contrast, in *Leveraged Land Company v. Hodges*, 2 CA-CV 2006-0210, 2007 WL 5556356 at *5 ¶¶ 17-18 (Ariz. App., Aug. 8, 2007) (mem. dec.) (*Hodges I*)[4], a panel of

[3] Pursuant to A.R.S. § 42-18204(B), after a judgment is entered foreclosing the right to redeem, "the parties whose rights to redeem the tax lien are thereby foreclosed have no further legal or equitable right, title or interest in the property subject to the right of appeal and stay of execution as in other civil actions." Pursuant to A.R.S. § 42-18206, any person who is entitled to redeem "may redeem at any time before judgment [of foreclosure] is entered." Pursuant to A.R.S. § 42-18152, a real property tax lien may be redeemed within three years after the date of sale and thereafter only "before the delivery of a treasurer's deed to the purchaser or the purchaser's heirs or assigns." In *Friedeman*, the claimant sought to redeem after the foreclosure judgment had been entered but before the treasurer's deed had been delivered. We held that section 42-18206, as the more specific statute, controlled and that once the foreclosure judgment was entered, the owner could no longer redeem the tax lien. *Id*. at 618-19, ¶ 9, 5 P.3d at 952-53.

[4] No petition for review was filed in *Hodges I.* We are not permitted to cite to unpublished decisions except, *inter alia*, to inform the appellate court of other memorandum decisions so that the court can decide whether to grant a petition for review. Ariz. R. Civ. App. P. 28.c. We are not relying on *Hodges I* as precedent, but merely to note a tension in the Arizona cases which our supreme court may desire to resolve. Indeed, we note that the Arizona Supreme Court has itself cited to *Hodges I* in a later decision it rendered dealing with attorneys fees in that same redemption action. *Leveraged Land Co. v. Hodges,* 226 Ariz. 382, 383, ¶ 3, 249 P.3d 341, 342 (2010) (*Hodges III)*. In part, we waited to resolve this appeal to see whether the supreme court in *Hodges III* would comment on this tension. It did not and we address the tension without attempting to resolve it.

this Court refused to follow *Friedeman* because *Southwest Metals Company v. Snedaker*, 59 Ariz. 374, 391-92, 129 P.2d 314, 321-22 (1942) had held that a trial court abused its discretion in refusing to set aside a judgment foreclosing a right to redeem when a claimant served by publication files a motion within one year of the judgment to vacate the judgment and is ready, willing and able to redeem the tax lien.[5] *Hodges I* noted, in passing, that there was a tension between *Friedeman* and *Snedaker* and also noted that *Friedeman* did not involve a Rule 59(j) issue.

¶13 While the trial court concluded the Russells' time to seek to redeem had expired, we need not address that issue or seek to resolve the above tension in cases because we can affirm on any ground supported by the record. We conclude the Russells lacked any interest in the Property pursuant to Arizona's recording statutes and thus could not seek to redeem that interest as against the Millers.

¶14 A real property tax lien that has been sold by the county treasurer may be redeemed by: (1) The owner; (2) The

[5] In *Snedaker*, the defendant sought to vacate the judgment pursuant to A.R.S. § 21-1309. That statute is now incorporated into A.R.S. § 12-1560(A) and Rule 59(j)(1): "When judgment has been rendered on service by publication, and the defendant has not appeared, a new trial may be granted upon application of the defendant for good cause shown by affidavit, made within one year after rendition of the judgment."

owner's agent; or (3) Any person who has a legal or equitable claim in the property. A.R.S. § 42-18151(A) (2006). However, A.R.S. section 33-411(A) provides that no "instrument affecting real property gives notice of its contents to subsequent purchasers . . . for valuable consideration without notice, unless recorded as provided by law." *See also* A.R.S. § 33-412(A) (2007) ("All . . . conveyances whatever of lands . . . shall be void as to creditors and subsequent purchasers for valuable consideration without notice, unless they are acknowledged and recorded . . . as required by law."). A person with an interest in real property who fails to so record that interest risks having the interest declared invalid as against a subsequent purchaser for value without notice. *Eardley v. Greenberg*, 164 Ariz. 261, 265, 792 P.2d 724, 728 (1990). As our supreme court has held, we are to "construe recording acts so as to afford the greatest possible protection to the person who in good faith endeavored to comply with them." *Neal v. Hunt*, 112 Ariz. 307, 311, 541 P.2d 559, 563 (1975) (defendants who failed to record a right to use water could not prevail against subsequent purchaser of land who searched record for such right and could not find it). *See also W.W. Planning, Inc. v. Clark,* 10 Ariz. App. 86, 89, 456 P.2d 406, 409 (1969) (holding that a bona fide purchaser can transmit good title to a person who has notice of prior adverse right).

¶15 It is undisputed that the Russells did not record their interest in the Property until after the Millers purchased the Property. It is also undisputed that they did not pay the relevant taxes on the Property. Nor do the Russells contend in their opening brief that Plymouth or the Millers had notice of the Russells' interest or failed to pay valuable consideration for the Property. In contrast, the Russells took no action to protect their rights under the recording statutes. As such, the Russells lacked any legal or equitable interest in the Property to redeem the tax liens under A.R.S. § 42-18151(A).

¶16 To avoid this result, the Russells point to three cases in which they claim persons whose interests were not verifiable in public records were permitted to redeem the tax liens after a foreclosure judgment had been entered. We find such reliance misplaced.

¶17 In *Snedaker*, the defendant who sought to redeem the tax liens was a corporation whose interest in the property was recorded, but the ultimate assignee of the tax liens simply could not locate the successor to the corporation. 59 Ariz. at 377-79, 129 P.2d at 316-17. Thus, while the court permitted the successor to vacate the default judgment, 59 Ariz. at 389-92, 129 P.2d at 321-22, the issue was not one of the prior owner failing to have recorded its interest in the property prior to a

good faith purchaser for value and without notice purchasing the tax liens.

¶18 In *Blalak v. Mid Valley Transportation, Inc.*, 175 Ariz. 538, 858 P.2d 683 (App. 1993), Blalak, a prior owner of the property in question, had a straw man repurchase the property for substantially less than Blalak had sold it for. The straw man then quitclaimed the property to Blalak, who failed to record the deed. Prior to any such recordation, a judgment creditor of the straw man had recorded a judgment against him and thus acquired a judgment lien on the property. Blalak sought to quiet title to the property and declare the judgment lien invalid. 175 Ariz. at 539-40, 858 P.2d at 684-85. We held that Blalak's unrecorded equitable interest in the property was not void as against the judgment creditor because a creditor is entitled to execute only on the interest its debtor holds in the property. 175 Ariz. at 541-42, 858 P.2d at 686-87. In doing so, we relied on the principle that the recording statutes making unrecorded conveyances void as to both creditors and subsequent purchasers for value do not cover equitable liens, "which need not be recorded to prevail over *judgment creditors* of the actual titleholder." *Id.* at 541, 858 P.2d at 686 (citation omitted, emphasis supplied). Such a rule makes sense as to judgment creditors who do not rely on record notice in seeking to secure their judgment against a debtor. Here,

however, neither Plymouth nor the Millers were judgment creditors of the Russells; they were persons who purchased tax liens on the Property and then sought to foreclose on the right to redeem those liens relying on record notice. *See Hunnicutt Const., Inc., v. Stewart Title & Trust of Tucson,* 187 Ariz. 301, 304-05, 928 P.2d 725, 728-29 (App. 1996), in which we held that a bona fide purchaser without notice takes title superior to an unrecorded equitable interest in the property and that *Blalak* is limited to judgment creditors because judgment creditors do not rely on recorded title in purchasing or extending credit on property. In applying our recording statutes, we interpret them to protect "the person who in good faith endeavored to comply with them." *Neal*, 112 Ariz. at 311, 541 P.2d at 563.[6]

¶19 Finally, the Russells rely on *Roberts v. Robert*, 215 Ariz. 176, 158 P.3d 899 (App. 2007). In *Roberts*, we held that an heir to a deceased owner of property had a right to redeem tax liens. 215 Ariz. at 179, ¶ 14, 158 P.2d at 902. We further held that the heir could vacate the default judgment obtained by the purchasers of the tax liens because the purchasers had conceded in the trial court they had not served the heir and had not shown what steps they had taken to find the heir, especially

[6] Of course, this does not leave the Russells without a possible remedy. *See* A.R.S. § 33-411.01 (2007) (providing that in lieu of recording of a transfer of real property, the transferor shall "indemnify the transferee in any action in which the transferee's interest in such property is at issue.").

in light of the fact they had talked to the heir's brother and had not asked him if there were any other heirs. 215 Ariz. at 180-81, ¶¶ 19-24, 158 P.3d at 903-04. Here, in contrast, Plymouth detailed what steps it took in giving notice of the foreclosure action and the Russells conceded in the trial court that they had been properly served by publication.

CONCLUSION

¶20 For the foregoing reasons, we affirm the order of the superior court denying the motion to set aside the default judgment.

/s/_____
DONN KESSLER, Judge

CONCURRING:

/s/_____
PHILIP HALL, Presiding Judge

/s/_____
PATRICIA A. OROZCO, Judge