IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED:12/07/10
RUTH WILLINGHAM,
ACTING CLERK
BY:DLL

CITIBANK, N.A.,	)	1 CA-CV 09-0665
	)	
Plaintiff/Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
TERRY MAJOR,	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure)
Defendant/Appellant.	)	
	)	
	)	
	)	

Appeal from the Superior Court in Yavapai County

Cause No. P1300CV20090302

The Honorable David L. Mackey, Judge

AFFIRMED IN PART; REVERSED IN PART; REMANDED

Terry Major — Cottonwood
Defendant/Appellant *in propria persona*

Greenberg Traurig, LLP — Phoenix
By Robert A. Mandel
Julie R. Barton
Attorneys for Plaintiff/Appellee

S W A N N, Judge

¶1 Defendant/appellant Terry Major appeals the trial court's grant of summary judgment to plaintiff/appellee

Citibank, N.A. on its claim that Major defaulted on his obligation under a line of credit. We find that a relevant question of fact exists as to whether Citibank received insurance proceeds in compensation for its loss arising out of Major's default, an issue on which Major sought but did not obtain discovery. We remand for a determination of this issue.

FACTS AND PROCEDURAL HISTORY

¶2 In January 2006, Major executed a Credit Agreement and Disclosure ("the Note") with GB Home Equity, LLC ("GB"), for a $60,000 non-purchase line of credit for home improvement secured by a junior deed of trust on real property. GB assigned the Note to CitiMortgage, and CitiMortgage subsequently assigned it to Citibank. Until February 2008, Major made withdrawals and payments as permitted and required under the Note, but made no payments after February 19, 2008.

¶3 On March 4, 2009, Citibank filed a complaint against Major[1] seeking a judgment in the amount of $59,381.95. Attached to the complaint were copies of the loan application and the Note, and an affidavit by an officer of Citicorp Credit Services, Inc., avowing that Citibank currently held the Note and was owed the debt.

[1] The complaint also named "Jane Doe," Major's putative wife, but Citibank subsequently dismissed "Jane Doe" from the suit without prejudice.

¶4 Major's answer denied the allegations. He contended that Citibank had not proved that it was the "holder in due course of the actual 'wet-ink' alleged contract" and that therefore he owed no debt to Citibank. As an affirmative defense, Major asserted that the security for the loan was the real property and that Citibank was at fault for not securing its claimed rights in the property when senior creditor Washington Mutual Bank ("WaMu") foreclosed on it in September 2008. He also asserted that Citibank should have included WaMu, the Internal Revenue Service, and the appraiser for GB as necessary parties to the suit.[2]

¶5 Major attached to his answer a letter he had sent to Citibank and WaMu on March 10, 2008. The letter stated that Major could not continue making payments on his debts to Citibank and WaMu. It then proposed that Major quitclaim the real property securing the debts and thereby eliminate his obligations to the banks.

¶6 On June 3, 2009, Citibank moved for summary judgment. The motion asserted that Citibank had waived its security interest in the property and elected to sue on the Note.

[2] Major did not explain why WaMu and the I.R.S. were necessary parties, but alleged that the appraiser might be "culpable for an erroneous appraisal," which would relieve Major of responsibility for the debt. Major contended the house appraised at $198,000 in January 2006, but was only worth $103,679.85 in September 2008.

Attached were copies of Major's loan application, the Note, the deed of trust, the transaction history for the Note, and the assignments of the deed of trust and the Note from GB to CitiMortgage and from CitiMortgage to Citibank. Also attached was an affidavit by an employee of Citibank stating that Citibank's records demonstrated that Major had defaulted under the Note, that he had been given the opportunity to cure but had not, and that $59,381.95 remained due under the Note. The motion did not address the issues raised in Major's answer.

¶7 Major moved for an enlargement of time to respond to the motion for summary judgment, pursuant to Ariz. R. Civ. P. ("Rule") 56(f). Major contended that Citibank had not provided its Rule 26.1 disclosure statement and had not responded to his efforts to meet. He argued that he needed discovery to determine whether Citibank was the "holder in due course" of the original Note, whether it should have joined other parties, whether GB and Citibank were qualified to do business in Arizona, and whether government "bailout" funds or insurance would offset any amounts he owed.

¶8 Citibank responded to Major's Rule 56(f) request by asserting that it had submitted all documents required to support its motion for summary judgment, that it had responded appropriately to Major's discovery requests and that it had tried to make contact with Major.

¶9 Major's response to the motion for summary judgment reiterated his arguments that issues remained regarding whether Citibank was a "holder in due course," and whether Citibank was registered to do business in Arizona, arguing that if Citibank was not registered in Arizona, the court had no jurisdiction over the action. Major also asserted that a question remained as to whether the original loan from GB was void, claiming that GB may have illegally loaned its credit rather than money.

¶10 The court denied Major's Rule 56(f) motion. The court stated in part:

> None of the information [Major] hopes to uncover through further discovery would establish a relevant defense to [Citibank's] claim. Therefore, the Court determines that there is no legal basis to grant [Major] additional time to respond.

The court granted summary judgment for Citibank, finding that Citibank had established a prima facie case for its claim, and that Major had neither come forward with competent evidence showing a material issue of fact nor demonstrated a need for additional time for discovery. The court entered judgment against Major in the amount of $59,381.95, plus costs of $294.20 and attorney's fees in the amount of $559.50. Major timely appeals. We have jurisdiction pursuant to A.R.S. § 12-2101(B).

DISCUSSION

¶11 Summary judgment may be granted when "the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c). 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, 802 P.2d 1000, 1008 (1990). In reviewing a grant of summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). We review the decision on the record made in the trial court. *Phoenix Baptist Hosp. & Med. Ctr., Inc. v. Aiken*, 179 Ariz. 289, 292, 877 P.2d 1345, 1348 (App. 1994). We view the facts and the inferences to be drawn from those facts in the light most favorable to the party against whom judgment was entered. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996).

¶12 Rule 56(f) permits a party to request additional time to pursue necessary discovery to respond to a motion for summary

judgment. *Lewis v. Oliver*, 178 Ariz. 330, 338, 873 P.2d 668, 676 (App. 1993). The party requesting additional time must "present an affidavit informing the court of: (1) the particular evidence beyond the party's control; (2) the location of the evidence; (3) what the party believes the evidence will reveal; (4) the methods to be used to obtain it; and (5) an estimate of the amount of time the additional discovery will require." *Lewis,* 178 Ariz. at 338, 873 P.2d at 676. We do not disturb a trial court's decision on a Rule 56(f) motion absent an abuse of discretion. *Id*.

I. CITIBANK IS THE REAL PARTY IN INTEREST ON THE NOTE.

¶13 Major argues that Citibank had not established that it had standing to bring the claim and that Major was prevented from determining whether Citibank had standing because the court denied his Rule 56(f) motion. Major asserts that Citibank offered no evidence that it was the real party in interest. Contrary to Major's argument, Citibank presented sufficient evidence to establish a prima facie case that it is the current owner of the Note. Citibank presented a copy of the Credit Agreement and Disclosure as well as copies of the assignments from GB to CitiMortgage and from CitiMortgage to Citibank. Citibank also produced an affidavit from its custodian of records avowing that the copies were true and accurate copies of its business records. Major offered no evidence to contradict

Citibank's evidence that it owned the Note. Although Major now argues that the copy of the Note and assignments are of poor quality and were insufficient, Major admitted below that he had received the loan from GB and that the Note had been assigned to Citibank. In addition, Major's March 10, 2008 letter -- sent to inform Citibank that Major would be unable to continue to make the payments on the loan -- is an admission by Major that he owed the debt to Citibank.[3] The burden then fell to Major to produce evidence to demonstrate that a genuine issue of material fact existed on this point. *See Byars v. Ariz. Pub. Serv. Co.*, 24 Ariz. App. 420, 425, 639 P.2d 534, 539 (1975) (when party moving for summary judgment has made a prima facie showing that no issue of material fact exists, party opposing motion has burden to present controverting evidence). Major presented no such evidence, and he offers no argument as to what evidence any further discovery might produce to refute Citibank's ownership

[3] In his reply brief, Major argues that Ariz. R. Evid. 1002 required Citibank to produce the original Note. Generally, arguments first made on appeal in a reply brief are waived. *In re Marriage of Pownall*, 197 Ariz. 577, 583 n.5, ¶ 25, 5 P.3d 911, 917 n.5 (App. 2000). We note briefly, however, that Ariz. R. Evid. 1002 requires the original of a writing "except as otherwise provided" by the rules or an applicable statute. Ariz. R. Evid. 1003 provides that a duplicate "is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Given Major's admissions, neither of these exceptions would apply.

of the Note. We therefore affirm the trial court's ruling in this regard.

II. MAJOR'S "BAILOUT FUNDS" ARGUMENT HAS NO MERIT.

¶14 Major also contends that his discovery requests sought to determine whether Citibank had recovered either from "bailout funds" from the federal government or from insurance. Major argues that if Citibank received such funds then summary judgment would permit Citibank to improperly recover twice on the same debt.

¶15 The collateral source rule, which allows a plaintiff proceeding in tort to fully recover from a defendant for an injury even when the plaintiff has recovered from another source, does not apply in breach of contract cases. *Norwest Bank (Minnesota), N.A. v. Symington*, 197 Ariz. 181, 189, ¶ 36, 3 P.3d 1101, 1109 (App. 2000). Contractual damages are intended to be compensatory; applying the collateral source rule to a contract "would violate the contractual damage rule that no one shall profit more from the breach of an obligation than from its full performance." *Id*.

¶16 But Major fails to cite any legal authority that "bailout funds" Citibank may have received reduced or eliminated the impact of any individual debtor's failure to repay their loans. We therefore reject Major's unsupported "bailout funds" argument.

III. MAJOR WAS ENTITLED TO DISCOVER WHETHER CITIBANK HAD RECOVERED ON THE NOTE VIA INSURANCE.

¶17 We find, however, that the question whether Citibank carried insurance, and more specifically whether Citibank received insurance proceeds related to Major's default on the Note, could be relevant to a defense or offset against Citibank's claim. *See Grover v. Ratliff*, 120 Ariz. 368, 369-70, 586 P.2d 213, 214-15 (App. 1978) (offsetting a judgment to a creditor by the amount that that creditor's damages had been reduced by an insurance policy). Major requested information regarding the existence of insurance for his loan in his Request for Uniform and Non-Uniform Interrogatories. The record reflects that Citibank objected to the question rather than answering it substantively. No meritorious basis for that objection appears in the record.

¶18 Here, as in *Grover,* the collateral source rule does not apply. If Citibank received insurance funds to cover the loss caused by Major's default, its damages would be reduced by the amount Citibank received. If Citibank fully recovered through insurance, it lacks standing to bring this claim. *See United Pac./Reliance Ins. Co. v. Kelley,* 127 Ariz. 87, 89-90, 618 P.2d 257, 259-60 (App. 1980) (an insured paid in full is not a real party in interest and cannot bring a claim in its own name). Consequently, whether Citibank received insurance

proceeds as a result of Major's default was relevant to the action and, depending on the answer, could present a partial or complete defense to Citibank's claim. Because Citibank chose not to respond substantively to Major's interrogatories concerning insurance, his request pursuant to Rule 56(f) should have been granted on this point.

IV. MAJOR'S OTHER ARGUMENTS ARE WITHOUT SUPPORT OR MERIT.

¶19 Major asserts that questions exist as to whether the Note was valid because "[t]here may have been issues with G.B. Home Equity and possible misrepresentations that would invalidate the agreement." Major does not explain what misrepresentations purportedly occurred, does not point to any evidence in the record, and fails to present any argument or authority to support this assertion. We therefore reject it. *See Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, 93, ¶ 50, 977 P.2d 807, 815 (App. 1999) (rejecting assertion made "wholly without supporting argument or citation to authority").

¶20 Similarly, Major contends that a disputed issue of fact remained as to whether Citibank "engaged in Contributory Negligence by waiving their right to the property, which was the security for the note, in order to sue directly on the note." Again, Major offers no legal authority or argument for his proposition. We therefore decline to consider it. *See id.*; *Nationwide Res. Corp. v. Massabni*, 134 Ariz. 557, 565, 658 P.2d

210, 218 (App. 1982) (an appellate court need not develop an argument on behalf of a party).

¶21 Major next contends that an issue of fact remained as to whether any amount was actually due and owing on the Note. Major admitted that he had executed the Note and that he made no further payments after February 19, 2008. Citibank produced the transaction record for the loan showing that Major's last payment was made February 19, 2008, and that the balance at that time was $59,381.95 -- the amount Citibank sought in its complaint. Citibank also provided an affidavit that the Note had been properly accelerated. Other than Major's contention that Citibank may have been indemnified through insurance, Major offers no argument and points to no facts in the record to support his theory. We therefore reject this argument. *See Brown,* 194 Ariz. at 93, ¶ 50, 977 P.2d at 815; *Nationwide,* 134 Ariz. at 565, 658 P.2d at 215.

¶22 Finally, Major contends that an issue of fact remained as to whether "any indispensible parties [] should have been included in this action." Major's Answer named WaMu, the I. R. S. and the appraiser hired by GB as possible indispensible parties. He makes no legal argument in his opening brief to demonstrate why these or any other parties were indispensible parties, and we therefore reject this contention. *See Brown,*

194 Ariz. at 93, ¶ 50, 977 P.2d at 815; *Nationwide,* 134 Ariz. at 565, 658 P.2d at 215.

V. WE DECLINE TO AWARD ATTORNEY'S FEES TO CITIBANK.

¶23 Citibank seeks attorney's fees on appeal pursuant to A.R.S. §§ 12-341.01(A), -349(A)(1), (2), and (3), and the deed of trust. At this juncture, neither party is the successful party. We also decline to award fees pursuant to A.R.S. § 12-349. Because Major has partially prevailed on appeal, a fee award under A.R.S. § 12-349 is not appropriate.

¶24 Citibank also requests an award of attorney's fees on appeal pursuant to the deed of trust executed in conjunction with the Note. The deed of trust provides that "[i]f lender institutes any suit or action to enforce any of the terms of this Deed of Trust, lender shall be entitled to recover such sum as the court may adjudge reasonable as attorneys' fees at trial and upon any appeal." This provision applies to an action to enforce the deed of trust. However, Citibank seeks to collect on the Note, and has cited no portion of the deed of trust nor offered any argument or authority that would apply the deed of trust attorney's fee provision to a collection action on the Note. We therefore decline to award attorney's fees to Citibank.

CONCLUSION

¶25 We conclude that a question of fact remains as to whether Citibank received insurance proceeds that specifically indemnified it for the loss it claims against Major. We reject Major's other contentions, and affirm the decisions of the trial court on those issues. We remand to the trial court for further proceedings consistent with this decision.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PHILIP HALL, Presiding Judge

/s/
_____
SHELDON H. WEISBERG, Judge