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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 05/24/2011
RUTH A. WILLINGHAM,
CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CLAUDIA CASTRO,)
) No. 1 CA-CV 10-0293
)
 Plaintiff/Appellant,) DEPARTMENT E
)
 v.) Yuma County
) Superior Court
 DENNIS PATANE and JANE DOE) No. S1400CV200400991
 PATANE, husband and wife; KEVIN)
 PELROY and JANE DOE PELROY,) **DECISION ORDER**
 husband and wife; GARY WILLIAM)
 NAYLOR and JANE DOE NAYLOR,)
 husband and wife; ADELPHIA)
 PROPERTIES, L.L.C., an Arizona)
 limited liability company; MGF)
 FUNDING, INC., an Arizona)
 corporation; FIRST AMERICAN)
 TITLE INSURANCE COMPANY,)
)
 Defendants/Appellees.)
)

This appeal was considered by Presiding Judge Peter B. Swann and Judges Patrick Irvine and Maurice Portley during a regularly scheduled conference held on March 14, 2011.

This case has followed a convoluted procedural path to appeal. We have an independent duty to examine our own jurisdiction, and have done so. *Riendeau v. Wal-Mart Stores, Inc.*, 223 Ariz. 540, 541, ¶ 4, 225 P.3d 597, 598 (App. 2010). After a comprehensive review of the history of the case and the

issues within the scope of the appeal, we conclude that the appeal must be dismissed for lack of jurisdiction.

FACTS¹ AND PROCEDURAL HISTORY

In February 2004, Claudia Castro ("Plaintiff") was in default on the loan on her home, and Wells Fargo had begun foreclosure proceedings under its deed of trust. On August 16, 2004, the home was sold at a trustee's sale to Adelpia Properties, L.L.C. ("Adelpia"), for \$105,000. Plaintiff claims she learned of the sale amount that same day. However, it was later alleged that the actual high bid was \$167,500, and that defendants Dennis Patane, Kevin Pelroy, Gary William Naylor and Adelpia conspired to forge the records from the auction to make it appear that the house had been sold for the lower figure.

Adelpia then secured a purchase-money loan secured by a deed of trust from defendant MGF Funding, Inc. ("MGF"). The deed of trust was recorded on September 9, 2004. On November 2, 2004, Adelpia filed a forcible detainer action against Plaintiff.

In response, on December 17, 2004, Plaintiff filed this suit seeking quiet title relief and damages. Plaintiff did not join Wells Fargo as a defendant, or allege any impropriety by Wells Fargo in her original complaint. Plaintiff also did not

¹ The facts recited below are undisputed by the parties.

join MGF to her quiet title action, though MGF had a recorded interest in the property.

Eventually Adelpia defaulted on the loan from MGF, and on January 19, 2007, MGF commenced proceedings, setting April 23, 2007, as the date for a trustee's sale. Plaintiff then moved to join MGF as a defendant and for a restraining order to prevent the trustee's sale. Plaintiff argued that MGF was an essential party because she could not be "accorded complete relief without a determination as to the validity of the Trustee's Deed in question and the validity of the MGF deed of trust." For the first time, Plaintiff sought to have MGF's deed of trust declared void.

On April 20, 2007, the trial court issued a Temporary Restraining Order ("TRO") preventing the trustee's sale through April 27, 2007, setting the bond at \$1,000.

In June 2007, defendants Naylor and Adelpia filed a Motion to Compel Plaintiff to Elect Her Remedy, asking Plaintiff to choose between rescinding the sale and expectancy damages, arguing that Plaintiff could not both regain ownership of her home and collect damages on account of the sale.² Eventually, Plaintiff asserted that she did not seek rescission of any

² On August 20, 2007, Judge Donato recused himself. Judge Plante was assigned to the case on August 22, and Plaintiff filed a Notice of Change of Judge on September 28. Judge Kenworthy was assigned to the case on October 25.

contract or compensatory damages on any contract claim, nor any claim for excess proceeds under A.R.S. § 33-812,³ making the request for election of remedies moot. In essence, plaintiff elected quiet of title to the home in her name as her remedy.

On November 15, 2007, Patane requested that the court stay all evidentiary proceedings in the case because of a pending criminal matter arising from the same events.⁴ Pelroy joined the motion. Plaintiff and defendant Naylor opposed the stay. A hearing on that and other matters was scheduled for April 9, 2008.

On February 26, 2008, MGF -- a non-party -- filed an unusual Motion to Dismiss for failure to join MGF itself, Norwest Mortgage (now part of Wells Fargo), and the Dana Pankey & Ruth E. Pankey 1985 Trust ("DP&RPT"), arguing they were indispensable parties. Each either previously had or still had a recorded lien on the property. MGF argued that all the alleged indispensable parties had an interest at stake in the quiet title action, that Plaintiff had been aware of those interests for almost a year and that Plaintiff had refused to join them even though ordered to do so by the court. MGF also

³ A.R.S. § 33-812 establishes the "order of priority" for the disposition of proceeds of a trustee's sale.

⁴ Subsequently, at a November 19 status hearing, Judge Kenworthy recused himself because of a possible conflict. Judge Reeves was assigned the case on November 27, 2007.

argued that because it was a bona fide encumbrancer for value without notice, A.R.S. § 33-811(B) conclusively established the validity of its deed of trust, and that MGF must be dismissed from the case, and the TRO lifted. When no response to the motion was filed, on April 29, 2008, MGF filed for a ruling on its uncontested motion to dismiss. Plaintiff then filed a response to the motion.

On August 12, 2008, Plaintiff filed an amended complaint naming MGF and DP&RPT as defendants, but did not name Wells Fargo/Norwest Mortgage. Plaintiff alleged that she had no claim against Wells Fargo, and that Wells Fargo had no "continuing interest" in the property. Plaintiff claimed, without authority, that this was because Wells Fargo's interest in the property would not be revived by any of the relief that Plaintiff sought.⁵ Plaintiff also argued that MGF was not protected by the provisions of A.R.S. § 33-811. The court ordered the parties to brief the issues.

After extensive briefing, on February 6, 2009, the court found that MGF was an encumbrancer for value without notice of any defects in the trustee sale process. It then held that "purely from a statutory perspective, interpreting ARS § 33-811(B), the lender, MGF should prevail in the instant case."

⁵ The dispute over the need to join Wells Fargo was still ongoing at the time of this appeal.

However, the court noted that a trustee's sale could and should be set aside using the court's equitable powers when the winning bidder knew that the price paid was well below the fair market value, citing *In re Krohn*, 203 Ariz. 205, 52 P.3d 774 (2002).

In response, on March 4, 2009, MGF then moved for an increase in the TRO bond. Subsequently, MGF moved for an emergency hearing regarding a tax foreclosure on the property, which was being prosecuted only against MGF and other recorded lien holders, but not against Plaintiff. After Plaintiff learned of the suit, the tax certificate and right to continue the tax foreclosure were acquired by Masadi Investment Group, L.P., of which Plaintiff's counsel was the co-counsel. After an emergency hearing, on September 24, 2009, the court ordered Plaintiff to timely pay the \$17,040.54 in delinquent taxes. On a motion for reconsideration, the court ordered Plaintiff to pay the delinquent taxes by October 14, 2009, and failing that, granted MGF the right to pay the taxes. When Plaintiff failed to pay the taxes by the date ordered, MGF paid them, and asked the Court to immediately dissolve the TRO.

On December 8, 2009, after briefing and an evidentiary hearing, the court ordered the TRO bond increased. On February 17, 2010, the court issued a new order, detailing the basis of the increase in the bond and ordering Plaintiff to post an additional \$42,000 bond within 20 days.

On March 2, 2010, Plaintiff filed a "Motion to Dismiss MGF Funding Inc.'s Claims, To Vacate This Court's Orders Of October 13, 2009, December 8, 2009, and February 17, 2010, And Request for an Emergency Hearing." In the motion, Plaintiff argued that the court's February 6, 2009 holding (more than a year earlier) that MGF was entitled to the protection of A.R.S. § 33-811(B) was incorrect "as a matter of law," and that Plaintiff was "the sole owner of all rights, interests and title in the property." Plaintiff then asserted that if the TRO was to be dissolved, it should only be after an order "dismissing MGF's claims against [Plaintiff's] home for lack of any legal title interest in the property - with prejudice;" in essence, a summary declaratory judgment regarding MGF's rights. Alternatively, Plaintiff asked that the court set a supersedeas bond pending appeal. On March 8, 2010, a hearing was held on the motion, and the court denied the Motion to Dismiss. On March 10, the court filed a signed order, ordering that Plaintiff comply with the February 17 order to timely post the revised bond for the TRO, that the TRO would be automatically lifted if Plaintiff did not comply, and that the supersedeas bond in the event Plaintiff appealed would be \$21,900.

On March 12, Plaintiff filed a motion for reduction in the supersedeas bond. On March 16, 2010, Plaintiff filed a Notice of Appeal of the March 10 order.

On March 30, 2010, Plaintiff filed a special action petition contesting the amount of the supersedeas bond. On April 7, this court stayed the superior court's March 10 order dissolving the TRO "pending resolution of the petition for special action." On April 28, we granted relief to plaintiff and reduced the supersedeas bond to \$6,900. MGF believed that this terminated the April 7 stay.

On May 3, 2010, Plaintiff had not yet posted the supersedeas bond, and MGF conducted a trustee's sale of the property, and recorded the resulting trustee's deed on May 6. Plaintiff then filed the supersedeas bond on May 7. On June 3, 2010, MGF filed a motion to dismiss this appeal in its entirety, arguing (1) the appeal concerning the sale was moot because the sale had occurred and (2) the denial of plaintiff's motion to dismiss was a non-appealable order. But on June 16 we clarified our April 28 order:

Petitioner Castro's posting of bond on May 7, 2010 complied with this court's order;

Any proceedings (including eviction) or transfers of legal or equitable title based upon a purported trustee's sale of May 3, 2010 are stayed during the pendency of Petitioner's appeal; and,

Further transfers or encumbrances of title to the subject property are stayed during the pendency of Petitioner's appeal.

Order, June 16, 2010, 1 CA-SA 10-0064.

In her response to the motion to dismiss the appeal, Plaintiff pointed out that this court's June 16 order invalidated MGF's mootness argument. MGF acknowledged that the June 16 order essentially mooted the issue raised in its motion to dismiss concerning the appeal of the termination of the TRO. It argued, however, that this court should dismiss the appeal to the extent that Plaintiff is appealing the denial of her motion to dismiss MGF's claims.

In her civil appeals docketing statement, Plaintiff identified the issue to be raised on appeal solely as whether the superior court committed error in requiring Plaintiff to pay a \$43,000 bond (the \$1,000 already paid plus \$42,000 more) and in dissolving the TRO. Because the issues to be raised on appeal were not yet clear, we denied the motion to dismiss at that time.

In her briefing, Plaintiff presents no facts, argument or authorities challenging the court's increase in the TRO bond. Instead, Plaintiff argues that the trial court erred in February 2009 when it held that MGF was entitled to the conclusive presumption of validity for its deed of trust afford by A.R.S. § 33-811(B). Plaintiff therefore seeks to have this court order that the trial court enter summary judgment in favor of Plaintiff on the issue of what rights MGF has in the real property at issue.

DISCUSSION

"The right of appeal in this State exists only by force of Statute. The right is both defined and limited by A.R.S. § 12-2101. If the order in question does not come within the judgment and orders listed therein as those from which an appeal can be taken, this appeal must be dismissed." *Kemble v. Porter*, 88 Ariz. 417, 418-19, 357 P.2d 155, 156 (1960) (internal citations omitted). A trial court's denial of a motion to dismiss is a non-appealable, interlocutory order. *Henke v. Superior Court (Gerst)*, 161 Ariz. 96, 98, 775 P.2d 1160, 1162 (App. 1989).

The briefing on appeal makes clear that the only argument advanced is that the court erred in denying Plaintiff's motion to dismiss MGF's claims and enter judgment in her favor -- it does not substantively attack the proceedings regarding injunctive relief on any other ground. Because the trial court's interlocutory order was not appealable, we conclude that A.R.S. § 12-2101(F)(2) does not provide us jurisdiction to hear Plaintiff's appeal.

CONCLUSION

Because the character of Plaintiff's motion was a request for summary adjudication on the merits, and because on appeal Plaintiff only disputes the trial court's refusal to grant that motion, we dismiss this appeal for lack of jurisdiction. With

the conclusion of this appeal, the stay we issued in our order of April 28, 2010, in 1 CA-SA 10-0064 is lifted.

/s/

PETER B. SWANN, Presiding Judge