DIVISION ONE
FILED: 07/14/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WILLIAM MICHAEL TOMPKINS,	)	No. 1 CA-CV 10-0548
	)	
Plaintiff/Appellant,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
BAYVIEW LOAN SERVICING, L.L.C.,	)	Rule 28, Arizona Rules
	)	of Civil Appellate
Defendant/Appellee.	)	Procedure)
	)	
	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-050982

The Honorable Stephen J. P. Kupiszewski, Commissioner

AFFIRMED

William Michael Tompkins — Scottsdale
In Propria Persona

Gust Rosenfeld, PLC — Phoenix
By Timothy J. Watson
Gerard R. O'Meara
Attorneys for Appellee

T H O M P S O N, Judge

¶1 William Tompkins (Tompkins) appeals from the trial court's decision granting Bayview Loan Servicing (Bayview), L.L.C.'s motion to dismiss his complaint.[1] For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On May 12, 2006, William and Kimberly Tompkins (the Tompkinses), and Christopher Tompkins granted a deed of trust as security for a promissory note (the Note) in the amount of $251,400, from defendant Wachovia Mortgage Corporation (Wachovia). The deed of trust identified Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary, acting as a nominee for Wachovia and Wachovia's successors and assigns.

¶3 On February 17, 2010, the Tompkinses filed a pro se complaint against Bayview, Arizona Title Agency, Inc., Wachovia, CitiMortgage Inc., MERS, and others. The complaint alleged Bayview had refused the Tompkinses' request that Bayview produce for inspection and forensic mortgage loan examination the original Note as well as documentation of the chain of title of the Note and the deed of trust and all documents required to be legally recorded. The Tompkiness generally alleged that the defendants were involved in a "securitization scheme. . . to

[1] Kimberly Tompkins is not a party to the appeal. She did not sign the Notice of Appeal or the briefs and her non-attorney husband may not represent her. *See State v. One Single Family Residence*, 193 Ariz. 1, 2, fn 1., 969 P.2d 166, 167 (App. 1997).

reap millions of dollars in profits at the expense of the plaintiffs' [sic] and other investors in certain trust funds." They sought a declaration that the title was vested in them and that none of the named or unnamed defendants had any right or interest in the property. They further sought an order directing the defendants to transfer or release to the Tompkinses any legal title and alleged encumbrances on the property and to enjoin the defendants from claiming any interest in the property.

¶4 Bayview filed a motion to dismiss which the trial court granted. Bayview filed an application for attorneys' fees pursuant to Arizona Revised Statutes (A.R.S.) sections 12-341.01 and 12-349(A)(1-2). The court entered judgment pursuant to Rule 54(b), Arizona Rules of Civil Procedure, in favor of Bayview, awarding attorneys' fees and costs in the amounts of $6,450 and $223 respectively. The court denied the Tompkinses' motion for reconsideration, and William Tompkins filed a timely notice of appeal.[2]

[2] CitiMortgage and MERS also filed a separate motion to dismiss. The court granted that motion, entering the order after Tompkins filed a notice of appeal from the judgment in favor of Bayview. The Tompkins filed a second notice of appeal from the judgment in favor of CitiMortgage and MERS, but that appeal was deemed abandoned pursuant to A.R.S. § 12-322(A) (2003). Tompkins raises arguments in this appeal related to CitiMortgage and MERS. Such arguments, however, could be properly raised only in an appeal from the judgment in favor of

DISCUSSION

¶5 In reviewing the dismissal of a complaint for failure to state a claim pursuant to Rule 12(b)(6), Arizona Rules of Civil Procedure, we accept as true the facts alleged in the complaint and will affirm the dismissal only if the plaintiff would not be entitled to relief under any interpretation of the facts susceptible of proof. *Fidelity Sec. Life Ins. Co. v. State*, 191 Ariz. 222, 224, ¶ 4, 954 P.2d 580, 582 (1998). We accept the allegations in the complaint as true and resolve all reasonable inferences in favor of the plaintiff. *McDonald v. City of Prescott*, 197 Ariz. 566, 567, ¶ 5, 5 P.2d 900, 901 (App. 2000). We review a trial court's decision granting a motion to dismiss for an abuse of discretion, but review issues of law de novo. *Dressler v. Morrison*, 212 Ariz. 279, 281, ¶ 11, 130 P.3d 978, 980 (2006). We may affirm for reasons other than those relied on by the trial court. *Linder v. Brown & Herrick*, 189 Ariz. 398, 402, 943 P.2d 758, 762 (App. 1997).[3]

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those defendants. This appeal concerns only the judgment in favor of Bayview.

[3] Bayview suggests that pursuant to Arizona Rule of Civil Procedure 12(b)(6), the dismissal should be treated as a summary judgment because it attached a copy of the Note to its motion to dismiss to refute Thompkinses' claims that Bayview did not have the Note. Where the extraneous matters are unnecessary to the outcome, treating the motion as a motion to dismiss is appropriate. *Brosie v. Stockton*, 105 Ariz. 574, 576, 468 P.2d 933, 935 (1970). In addition, the parties are entitled to some indication from the court that it will treat the matter as one

¶6 On appeal, Tompkins argues that the complaint stated a cause of action for quiet title and should not have been dismissed. He does not argue that any of his other claims were wrongfully dismissed. We thus limit our review to the quiet title claim.

¶7 A person having or claiming an interest in real property may bring an action to quiet title to that property "against any person . . . when such person . . . claims an estate or interest in the real property which is adverse to the party bringing the action." A.R.S. § 12-1101(A) (2003). The complaint must be under oath, must set forth the nature of the plaintiff's estate, must describe the premises, must "[s]tate that plaintiff is credibly informed and believes defendant makes some claim adverse to plaintiff," and must seek to establish plaintiff's estate and pray that the defendant be barred from ever claiming an interest in the property. A.R.S. § 12-1102 (2003). The plaintiff need not declare the adverse interest of

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for summary judgment. *Gatecliff v. Great Republic Life Ins. Co.*, 154 Ariz. 502, 508, 744 P.2d 29, 35 (App. 1987).

The attachment of the note would not appear to have contributed to the determination of the motion, which was based substantially on the expiration of statutes of limitation and the lack of specific damages. Moreover, the trial court gave no indication that it would treat the motion as a motion for summary judgment, and the ruling granted "the motion to dismiss," which suggests that the court did not convert the motion. We find that the motion is properly treated as a motion to dismiss.

the defendant in the language of the statute if the complaint shows that the defendant claims an interest and that the interest claimed is adverse to the claim of the plaintiff. *Salt River Valley Water Users' Ass'n v. Norviel*, 29 Ariz. 360, 375, 241 P. 508 (1925).

¶8 Tompkins argues that he sufficiently stated a claim for quiet title by alleging Bayview had failed to comply with requests seeking documents tracking ownership of the mortgage and asking for proof as to who owned the mortgage after the initial signing. He further argues that the claim is supported by allegations that the mortgage and deed of trust had been transferred several times, but such conveyances had not been recorded making them void, and thereby making "it difficult if not impossible for the Tompkins' [sic] to sell or remortgage the condominium."

¶9 These allegations do not support a claim for quiet title against Bayview. Even taken as true, they do not show that Bayview, which Tompkins's complaint describes as "the current loan servicing agent," claims any interest in the property adverse to the interest claimed by Tompkins. The complaint does state, "Plaintiffs' [sic] are informed and believes [sic] thereupon and alleges that and [sic] each of the Defendants claim, or might claim an interest in the property adverse to the Plaintiffs' herein." Although an allegation

merely stating that the defendant claims an adverse interest may be sufficient in other circumstances, that is not so here. Tompkins does not assert that Bayview claims an interest in the property, but rather alleges that the "defendants" claim "or might claim" an interest; the allegation itself is speculative. Moreover, given the number of defendants, many unidentified[4], and given that the specific allegations against Bayview pertain only to its alleged failure to respond to requests for documents, we conclude that Tompkins has not sufficiently stated a claim against Bayview for quiet title.

¶10 Tompkins also argues that the court erroneously awarded attorneys' fees to Bayview. Bayview had requested an award of attorneys' fees pursuant to A.R.S. § 12-341.01(A), as a matter arising out of contract, and pursuant to A.R.S. § 12-349 (2003), as an unjustified action brought without substantial justification or solely or primarily for delay or harassment. A.R.S. §§ 12-341.01(A), 12-349(A)(1-2) (2003). The court awarded the full amount of fees requested.

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[4] The complaint lists as defendants "Bayview Loan Servicing, LLC (DOE 1), Arizona Title Agency, Inc. (DOE 2), Wachovia Mortgage Corporation, (DOE 3), CitiMortgage Inc. (DOE 3), Mortgage Electronic Registration System (DOE 5), (DOE'S 60-100) Undisclosed Mortgage Aggregators, Mortgage Originators, Loan Seller, Trustee of Pooled Assets, Trustee for holders of Certificates of Collateralized Mortgage Obligations, et al, individually, jointly, or severally, RESPA."

¶11 Tompkins argues that fees could not be awarded under A.R.S. § 12-349, because Bayview made no allegation that the case was brought for purposes of harassment and because the record does not show bad faith. The statute provides in pertinent part:

> [I]n any civil action . . . the court shall assess reasonable attorney fees . . . against an attorney or party . . . if the attorney or party . . .
>
> 1. Brings or defends a claim without substantial justification.
>
> 2. Brings or defends a claim solely or primarily for delay or harassment.

A.R.S. § 12-349(A)(1), (2). "Without substantial justification" means that the claim constitutes "harassment, is groundless and is not made in good faith." A.R.S. § 12-349(F). The party seeking an award of fees must prove all three elements by a preponderance of the evidence. *Phoenix Newspapers v. Dep't of Corr.*, 188 Ariz. 237, 244, 934 P.2d 801, 808 (App. 1997). An objective standard is used to determine groundlessness; a subjective standard is applied to determine intent to harass and bad faith. *Id.* The application of the statute presents a question of law that we review de novo. *City of Casa Grande v. Arizona Water Co.*, 199 Ariz. 547, 555, ¶ 27, 20 P.3d 590, 598 (App. 2001).

¶12 In awarding fees pursuant to A.R.S. § 12-349, the court is required to make findings setting forth the specific reasons for its decision. A.R.S. § 12-350 (2003). The court here made no findings to support the application of A.R.S. § 12-349, which suggests that the court did not award fees under the statute. We find that Bayview has not established that the statute applies in these circumstances.

¶13 Bayview argued in the trial court and argues on appeal that the complaint was groundless, was full of inconsistent, conclusory statements, and required Bayview's attorneys to spend significant time responding to "a myriad of misstatements and frivolous accusations." These contentions, even if true, do not support a finding that the claims were brought with a subjective intent to harass or in bad faith. Without such a showing, an award of fees under A.R.S. § 12-349(A)(1) or (2) is not permissible. Bayview has made no other argument and has pointed to no other evidence in the record to support an award of fees under A.R.S. § 12-349.

¶14 As for an award of fees under A.R.S. § 12-341.01, Tompkins argues that Bayview was not the successful party and so was not eligible for an award of fees under the statute. Under A.R.S. § 12-341.01,

> In any contested action arising out of a contract, . . . the court may award the successful party reasonable attorney fees.

> If a written settlement offer is rejected and the judgment finally obtained is equal to or more favorable to the offeror than an offer made in writing to settle any contested action arising out of a contract, the offeror is deemed to be the successful party from the date of the offer and the court may award the successful party reasonable attorney fees.

We consider de novo the application and interpretation of an attorneys' fee statute. *Dooley v. O'Brien*, 226 Ariz. 149, 152, ¶ 9, 224 P.3d 586, 589 (App. 2010).

¶15 In interpreting a statute, our goal is to determine the intent of the legislature, and to that end we look first to the language of the statute. *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.*, 177 Ariz. 526, 529, 869 P.2d 500, 503 (1994). If the statutory language is unambiguous, we give effect to that language as written. *Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991).

¶16 Tompkins, relying on the second sentence of the statute, argues that Bayview is not the successful party, and therefore not eligible for an award of fees, because no written offer was made prior to litigation. Tompkins misinterprets the statute.

¶17 The first sentence of the statute provides that attorneys' fees may be awarded to the "successful party" in "*any* contested action arising out of contract." The second sentence provides the means of determining the "successful party" only in

that subset of contract cases where a written settlement offer is rejected; when no offer has been rejected, that method of determining the "successful party" is inapplicable.

¶18 Given that Bayview succeeded in obtaining the dismissal of Tompkins's action against it, the trial court was within its discretion to conclude that Bayview was the successful party. *See Sanborn v. Brooker & Wake Prop. Mgmt., Inc.*, 178 Ariz. 425, 430, 874 P.2d 982, 987 (App. 1994) (decision regarding successful party for purposes of awarding attorneys' fees is within discretion of trial court and will not be disturbed on appeal if any reasonable basis for determination exists).

¶19 Bayview requests an award of attorneys' fees on appeal pursuant to A.R.S. §§ 12-341.01 and 12-349(A). We have determined that A.R.S. § 12-349 does not apply, and we decline to award fees pursuant to A.R.S. § 12-341.01.[5]

[5] The only dismissal that Tompkins appealed is the dismissal of the quiet title action. The exclusive basis for attorneys' fees for a quiet title action is A.R.S. § 12-1103 (2003). *Lewis v. Pleasant Country, Ltd.*, 173 Ariz. 186, 840 P.2d 1051 (App. 1992). Consequently, an award would not be available under A.R.S. § 12-341.01 for Bayview's attorneys' fees expended in defending that portion of the appeal.

CONCLUSION

¶20 The trial court's ruling is affirmed.

/s/
_____
JON W. THOMPSON, Judge

CONCURRING:

/s/
_____
DIANE M. JOHNSEN, Presiding Judge

/s/
_____
MARGARET H. DOWNIE, Judge