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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

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



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FILED: 05/26/2011  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

DARREN STEVENSON, an individual, ) 1 CA-CV 10-0584  
)  
Plaintiff/Appellant, ) DEPARTMENT A  
)  
v. )  
) **MEMORANDUM DECISION**  
) Not for Publication  
PROPERTY MASTERS REAL ESTATE ) (Rule 28, Arizona  
TRUST, LLC, an Arizona limited ) Rules of Civil  
liability company; BRUCE A. ) Appellate Procedure)  
NELSON, JR., an individual, )  
)  
Defendants/Appellees. )  
)  
)

Appeal from the Superior Court of Maricopa County

Cause No. No. CV2009-022111

The Honorable John Buttrick, Judge

**AFFIRMED**

Harper Law, PLC  
By Kevin R. Harper  
Attorneys for Plaintiff/Appellant

Gilbert

Mecham & Associates, Chartered  
By M. Kent Mecham  
Attorney for Defendants/Appellees

Phoenix

**T H O M P S O N**, Judge

¶1 Darren Stevenson (plaintiff) appeals the trial court's judgment, after cross-motions for summary judgment, on his breach of contract and foreclosure claims against Property Masters Real

Estate Trust, LLC, and Bruce A. Nelson, Jr. (collectively, buyer) and its award of attorneys' fees to buyer. Finding no error, we affirm.

#### **DISCUSSION**

¶2 In May 2003, plaintiff conveyed his property on West Columbine Drive to buyer. The purchase price was \$133,585.00 which was an "exact wrap" of his two existing mortgages. Buyer was contractually obligated to make all payments directly to the mortgage holders. The Agreement had a time is of the essence clause and included a term which read:

Should default be made in making any payment hereunder when due, Sellers may elect to accelerate and to declare due the whole sum of principal and interest immediately due and payable and proceed to foreclose this Agreement pursuant to A.R.S. § 33-748.

An Addendum was executed shortly thereafter which required both plaintiff and buyer to have online access to the mortgage details, where the mortgage account remained in plaintiff's name.

¶3 At various times buyer had made late mortgage payments which had always been accepted by Wells Fargo. In early 2009, buyer got behind on the Wells Fargo mortgage. On March 2, 2009, buyer was up to date on the mortgage. In May 2009, plaintiff informed buyer that it was in default and that he was exercising his contractual rights and accelerating the principal and interest due and owing under the loan and that he intended to pursue a foreclosure sale if full payment was not received within thirty days.

In July 2009, plaintiff filed a complaint asserting breach of contract and "Foreclosure of Promissory Note/Agreement for Sale" citing Arizona Revised Statutes (A.R.S.) § 33-748. Buyer answered. Buyer admitted late payments, but asserted as of the time the default letter was issued and the complaint filed, it was caught up on payments. That buyer was caught up after March 2, 2009, and then remained current, through at least December 2009, is undisputed. At that time buyer had paid a total of \$85,890.32 toward the mortgages.

¶4 Cross-motions for summary judgment were filed. The trial court found for buyer, stating

These cross-motions turn on the issue whether a notice of default is effective to accelerate payments where, in fact, the payor was current on the date of the notice letter. While there is no Arizona case law directly on point, the Court believes the notice was not effective in the unusual circumstances of this case as a matter of law and equity.

The trial court entered judgment for buyer, and against plaintiff, and awarded buyer \$5,000 in attorneys' fees. Plaintiff timely appealed.

¶5 On appeal, plaintiff asserts that he was allowed by the Agreement to accelerate the debt for "any" late payment and that he properly exercised that right in May 2009. He further argues that the fact that Wells Fargo accepted late payments or that buyer was current at the time of the notice of default is irrelevant.

¶6 On an appeal from summary judgment, we must determine

whether any material factual disputes exist and, if not, whether the trial court correctly applied the law. *In re Estate of Johnson*, 168 Ariz. 108, 109, 811 P.2d 360, 361 (App. 1991) (citation omitted). We review the trial court's application of the law de novo. *City of Phoenix v. Mangum*, 185 Ariz. 31, 34, 912 P.2d 35, 38 (App. 1996). We view the evidence in the light most favorable to the party against whom summary judgment was granted. *Estate of Hernandez v. Flavio*, 187 Ariz. 506, 509, 930 P.2d 1309, 1312 (1997). In this matter, therefore, we view the facts in the light most favorable to plaintiff, however summary judgment may be granted where the facts produced in response to summary judgment have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion. See *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

¶7 This court has previously noted that occasional late mortgage payments are common and that, where the seller fails to comment or fails to reject late payments, tardy payments will not justify acceleration of the debt or foreclosure. *Miller v. Uhrick*, 146 Ariz. 413, 414, 706 P.2d 739, 740 (App. 1985). Our Supreme Court has noted that foreclosure is an equity action and, therefore, a seller "must do more than merely establish that defendant has violated the strict terms or the mortgage or note." *Vonk v. Dunn*, 161 Ariz. 24, 26, 775 P.2d 1088, 1090 (1989) (holding

seller's invocation of acceleration clause was "unnecessary to protect their security" for unpaid property taxes) *citing also Arizona Coffee Shops v. Phoenix Downtown Park Ass'n*, 95 Ariz. 98, 100-101, 387 P.2d 801 (1963).

¶8 The facts here are not like *First Federal Savings and Loan Assoc v. Ram*, 135 Ariz. 178, 659 P.2d 1323 (App. 1982). In *First Federal*, a case cited by plaintiff as support for the principal that acceptance of late payments does not preclude foreclosure, buyer's payments had been tardy for several months, buyers were given five notice letters and foreclosure was filed while buyers were four months behind in payments. *Id.* at 179-80, 659 P.2d at 1324-25. Nor is this a situation like *Dorn v. Robinson*, 158 Ariz. 279, 286, 762 P.2d 566, 573 (App. 1988) which allowed acceleration without additional notice where had there been, not only, a run of payments late by a week or two but where, importantly, foreclosure was filed while the buyers were more than two months behind. Further, we bring the parties attention to *Chaparral Dev. v. RMED Inter., Inc.*, where this court held that a buyer may reinstate his mortgage contract under A.R.S. § 33-813 by paying past due amounts to prevent both a judicial foreclosure and trustee's sale. 170 Ariz. 309, 313, 823 P.2d 1317, 1321 (App. 1991). Where the buyer-trustor "reinstates before the foreclosure action is filed, then the beneficiary is made whole." *Id.* Section 33-813(B) provides that upon full payment of past due amounts and

associated fees, the foreclosure proceedings "shall be cancelled and the contract or contracts and trust deed shall be deemed reinstated and in force as if no breach or default had occurred . . . ." (2007). Here, there was no notice to buyer, the majority of payments were timely, and the buyer was current when the notice of default was issued. Under these facts, we find no error in the trial court's grant of summary judgment to buyer.

¶9 Plaintiff next complains that the trial court abused its discretion in awarding attorneys' fees against him. [OB at 12] We find no such abuse. See *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 571, 694 P.2d 1181, 1185 (1985). The trial court's fee award is affirmed.

#### **ATTORNEYS' FEES ON APPEAL**

¶10 Both plaintiff and buyer request attorneys' fees on appeal pursuant to A.R.S. § 12-341.01(A) and the contract. We award fees to buyer in an amount to be determined after compliance with Rule 21, Arizona Rule of Civil Appellate Procedure.

**CONCLUSION**

¶11 For the foregoing reasons, the trial court is affirmed.

/s/

\_\_\_\_\_  
JON W. THOMPSON, Judge

CONCURRING:

/s/

\_\_\_\_\_  
PHILIP HALL, Presiding Judge

/s/

\_\_\_\_\_  
LAWRENCE F. WINTRHOP, Judge