NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED 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: 06/07/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BERNT K. LOVENBERG,

Plaintiff/Appellant,

v.

DEUTSCHE BANK TRUST COMPANY, AMERICA, as Trustee Residential Funding Company, LLC fka Residential Funding Corporation; SUNTRUST MORTGAGE, INC.,

Defendants/Appellees.

1 CA-CV 10-0624 A

DEPARTMENT C

MEMORANDUM DECISION
(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-070070

The Honorable Harriett E. Chavez, Judge

AFFIRMED

Bernt K. Lovenberg Surprise
Appellant

Wolfe & Wyman, LLP Las Vegas, NV
By Colt B. Dodrill
Attorneys for Appellee Deutsche Bank Trust Company, America

Shapiro Van Ess & Sherman, LLP Phoenix
By Christopher R. Perry
Jason P. Sherman
Attorneys for Appellee Suntrust Mortgage, Inc.

O R O Z C O, Judge

¶1 Bernt K. Lovenberg appeals the trial court's order dismissing his action for failure to state a claim upon which relief can be granted. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Deutsche Bank Trust Company, L.L.C. (DeutscheBank) is the current holder of a promissory note issued by Lovenberg in exchange for a home loan he used to purchase real property in Surprise, Arizona (the Property). The note is secured by a lien against the Property. *Suntrust Mortgage, Inc. (SunTrust) is the loan servicer.*

¶3 After falling behind on his payments, Lovenberg entered into a forbearance agreement with SunTrust. Pursuant to this agreement, Lovenberg was required to make six monthly payments of $4,213.54. The agreement provided that upon breach by Lovenberg, SunTrust "may terminate this agreement and institute foreclosure proceedings in accordance with the security instrument." Lovenberg timely made five payments, with the sixth and final payment due on October 21, 2008.

¶4 Prior to the sixth payment required by the forbearance agreement, SunTrust notified Lovenberg that his monthly payments on the loan would be $3,558.97, starting November 1, 2008, and that he had a surplus of $2,599.14 in his escrow account. The

same notification also indicated that, “Due to the delinquent status of your account we will retain your surplus.” Lovenberg’s next payment was not for $4,213.54 as required by the forbearance agreement; but rather, it was for $959.83, i.e., $3,558.97 less the amount of surplus in escrow.[1]

¶5 SunTrust returned the sixth payment, stating that it was insufficient, and requested payment of the full balance of the loan, which exceeded thirty-five thousand dollars. Lovenberg did not contest the foreclosure proceedings and trustee sale that ensued after his non-payment and the Property was sold to DeutscheBank.

¶6 Lovenberg sued DeutscheBank and SunTrust (collectively, the Defendants), for breach of contract and implied covenant of good faith and fair dealing.[2] The trial court dismissed the action with prejudice under Arizona Rule of Civil Procedure 12(b)6 for failure to state a claim upon which relief can be granted.

¶7 Lovenberg timely appealed and we have jurisdiction in accordance with Article 6, Section 9, of the Arizona

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[1] The letter sent by SunTrust rejecting this payment indicates that Lovenberg actually tendered $974.59.

[2] Lovenberg’s second claim for relief was amended from lack of good faith negotiation to breach of the implied covenant of good faith and fair dealing.

Constitution, and Arizona Revised Statutes (A.R.S.) section 12-2101.B (2003).

DISCUSSION

¶8 The trial court dismissed Lovenberg's action because Lovenberg failed to make the sixth payment required by the forbearance agreement, which resulted in SunTrust's commencing foreclosure proceedings. Lovenberg did not contest the foreclosure proceedings by timely seeking an injunction, and accordingly waived all of his defenses pursuant to A.R.S. § 33-811.C (2007).

¶9 "We review an order granting a motion to dismiss for abuse of discretion, and review issues of law, including issues of statutory interpretation, de novo." *Dressler v. Morrison*, 212 Ariz. 279, 281, ¶ 11, 130 P.3d 978, 980 (2006) (internal citations omitted). However, "[i]f a complaint is facially sufficient but unpled facts establish a legal bar to relief, then the appropriate motion is under Rule 56." *Moretto v. Samaritan Health Sys.*, 190 Ariz. 343, 346, 947 P.2d 917, 920 (App. 1997). That is, "reliance on evidence extrinsic to the pleadings requires the court to treat the motion to dismiss as a motion for summary judgment." *Dube v. Likins*, 216 Ariz. 406, 417 n.2, ¶ 34, 167 P.3d 93, 104 n.2 (App. 2007); *accord Blanchard v. Show Low Planning and Zoning Comm'n*, 196 Ariz. 114, 117, ¶ 11, 993 P.2d 1078, 1081 (App. 1999) ("Because the trial court in considering

the motion to dismiss heard evidence extrinsic to the complaint, we treat this motion to dismiss as a motion for summary judgment."). Because the trial court relied on facts outside the complaint, we treat the motion to dismiss as a motion for summary judgment.

¶10 "A motion for summary judgment should be granted if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.'" *Smith v. CIGNA HealthPlan of Ariz.*, 203 Ariz. 173, 176, ¶ 8, 52 P.3d 205, 208 (App. 2002) (quoting Ariz. R. Civ. P. 56(c)). "We review de novo a grant of summary judgment, viewing the evidence and reasonable inferences in the light most favorable to the party opposing the motion." *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003); *accord Blanchard*, 196 Ariz. at 117, ¶ 11, 993 P.2d at 1081 ("we view all facts and the reasonable inferences therefrom in the light most favorable to the party against whom the judgment was entered"). We also determine "whether the trial court erred in application of the law." *Guo v. Maricopa Cnty. Med. Ctr.*, 196 Ariz. 11, 15, ¶ 16, 992 P.2d 11, 15 (App. 1999).

¶11 In his opening brief, Lovenberg argues that: (1) SunTrust breached the forbearance agreement by refusing his sixth payment required by the forbearance agreement and then foreclosing on the Property; (2) SunTrust breached the implied

covenant of good faith and fair dealing by refusing to modify the terms of the loan; and (3) due to SunTrust's conduct, DeutscheBank should be compelled to sell the Property back to Lovenberg for a price equal to its fair market value.

¶12 Lovenberg does not cite to any legal authority in support of his arguments, which are accordingly waived. *See* ARCAP 13(a)6. (a brief shall contain arguments with citations to authorities, statutes, and parts of the record relied upon); *Cullum v. Cullum*, 215 Ariz. 352, 355 n.5, ¶ 14, 160 P.3d 231, 234 n.5 (App. 2007) (appellate courts will not consider arguments posited without authority). Nevertheless, because we prefer to decide cases on the merits, in the exercise of our discretion we choose to decide this case on the merits. *See Clemens v. Clark*, 101 Ariz. 413, 414, 420 P.2d 284, 285 (1966) ("we remain inclined to decide cases on their merits"). Because the trial court's dismissal is predicated on application of A.R.S. § 33-811, which is a question of law, we review it de novo. *See Dressler*, 212 Ariz. at 281, ¶ 11, 130 P.3d at 980.

¶13 "In interpreting a statute, we first look to the language of the statute itself." *Lincoln v. Holt*, 215 Ariz. 21, 24, ¶ 7, 156 P.3d 438, 441 (App. 2007) (citation and quotation marks omitted). "Words are given their ordinary meaning unless the context of the statute requires otherwise." *HCZ Constr., Inc. v. First Franklin Fin. Corp.*, 199 Ariz. 361, 364, ¶ 10, 18

P.3d 155, 158 (App. 2001). "[A] statute should be construed in conjunction with other statutes that relate to the same subject or purpose . . . ." *Johnson v. Mohave Cnty.*, 206 Ariz. 330, 333, ¶ 11, 78 P.3d 1051, 1054 (App. 2003). "In construing statutes we give full effect to the intent of the lawmaker, and each word, phrase, clause and sentence must be given meaning so that no part will be void, inert, redundant or trivial." *Lincoln*, 215 Ariz. at 24, ¶ 9, 156 P.3d at 441 (citation and quotation marks omitted); *accord Mejak v. Granville*, 212 Ariz. 555, 557, ¶ 9, 136 P.3d 874, 876 (2006) ("We must interpret the statute so that no provision is rendered meaningless, insignificant, or void.").

¶14 In part, A.R.S. § 33-811.C states that "[t]he trustor . . . shall waive all defenses and objections to the sale not raised in an action that results in the issuance of a court order granting [injunction] entered *before* . . . the last business day before the scheduled date of the sale." (Emphasis added.) Additionally, § 33-811.B reads, in part:

> The trustee's deed shall raise the presumption of compliance with the requirements of the deed of trust and this chapter relating to the exercise of the power of sale and the sale of the trust property. . . . A trustee's deed shall constitute conclusive evidence of the meeting of those requirements in favor of purchasers . . . without actual notice.

¶15 A plain reading of § 33-811.C implies that any objection to a trustee sale is waived unless an injunction is

sought prior to the sale. Moreover, § 33-811.B implies that after a trustee sale, all requirements of the sale are presumed to have been conclusively met in favor of the purchaser, unless the purchaser had actual notice of a defect. *See Sec. Sav. & Loan Ass'n v. Milton*, 171 Ariz. 75, 76, 828 P.2d 1216, 1217 (App. 1991) (precluding examination into the merits of appellant's trustee sale challenge based on the presumption contained within A.R.S. § 33-811); *Triano v. First Am. Title Ins. Co. of Ariz.*, 131 Ariz. 581, 583, 643 P.2d 26, 28 (App. 1982) ("issuance of the trustee's deed to the appellees-purchasers is conclusive evidence that the statutory requirements were satisfied").

¶16 It follows that the trustee sale is intended to be final once completed, regardless of any alleged defect, unless the purchaser had actual knowledge of such defect. Accordingly, in order to challenge a trustee sale on appeal, the trustor must have first sought to enjoin the sale prior to its completion. To hold otherwise would render the language pertaining to injunction in § 33-811.C a practical nullity.

¶17 In this case, it is undisputed that Lovenberg did not seek, nor did he obtain an injunction of the trustee sale. In fact, Lovenberg states in his opening brief that he "does not challenge" the trustee sale, "but accepts it." His complaint states that the trustee sale was a "natural, legal and . . .

unavoidable consequence." Thus, Lovenberg has waived all objections and defenses to the trustee sale.

¶18 Nevertheless, though he does not allege there was a defect, Lovenberg's claims for relief are essentially objections to the trustee sale because the relief sought, i.e., title to the Property, is what Lovenberg would be entitled to had he prevailed on a trustee sale challenge. That is, but for the facts pleaded by Lovenberg supporting the claims for relief alleged in his complaint, there would not have been a trustee sale; Lovenberg's success on the merits of his claims would defeat the grounds for having the trustee sale in the first place. Thus, the trial court properly held that Lovenberg's complaint failed to substantiate a genuine issue of material fact because, by failing to seek injunction prior to the sale, Lovenberg waived any and all objections to the trustee sale, and Defendants are entitled to judgment as a matter of law.

CONCLUSION

¶19 For the foregoing reasons, the trial court's order of dismissal is affirmed. The Defendants are entitled to their appellate costs upon compliance with Arizona Rule of Civil Appellate Procedure 21.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

DONN KESSLER, Judge

/S/

MICHAEL J. BROWN, Judge