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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ELOY LAND AND DEVELOPMENT COMPANY, L.L.C., an Arizona limited liability company, Plaintiff/Appellee, v. 87 & HANNA, L.L.C., a Nevada limited liability company, Defendant/Appellant.	2 CA-CV 2009-0120 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV2007-01947

Honorable Gilberto V. Figueroa, Judge

VACATED AND REMANDED

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E S P I N O S A, Presiding Judge.

¶1 In this appeal from a judicial foreclosure action, appellant 87 & Hanna, L.L.C. (Hanna) challenges the trial court's judgment in favor of Eloy Land and Development Company, L.L.C. (Eloy Land). For the following reasons we reverse.

Factual Background and Procedural History

¶2 In September 2006, Robert McDaniel purchased a 160-acre parcel of real property (the Property) from Eloy Land with a down payment of $2,300,000 and a $1,300,000 promissory note (the Note), which was secured by a deed of trust on the Property. McDaniel and Eloy Land agreed McDaniel's semi-annual payment on the Note would be made to NoteWorld Servicing Center (NoteWorld). The payments were scheduled to begin in March 2007.

¶3 Shortly after buying the Property, McDaniel sold it to Hanna for a higher price. Hanna gave McDaniel a down payment and a $1,765,000 promissory note, which was also secured by a deed of trust on the Property. Hanna's payments were to be made to NoteWorld as well and were on the same schedule as those McDaniel was to make on the Note. McDaniel and Hanna arranged for NoteWorld to apply Hanna's payments to the Note and forward the remainder to McDaniel.

¶4 In March 2007, Hanna's first payment was applied to the Note, as planned, with the remainder to McDaniel. When Hanna made its second payment, however, which was due September 1, 2007, NoteWorld did not disperse any of the payment for

the Note.[1] Seven days later, Eloy Land filed this action against McDaniel and Hanna to accelerate the unpaid balance due under the terms of the Note and to judicially foreclose the deed of trust on the Property.

¶5 At the commencement of the litigation, Eloy Land was unable to locate McDaniel and began the process of service by publication. Counsel for Hanna then filed an answer on behalf of both Hanna and McDaniel. Hanna and Eloy Land subsequently filed cross-motions for summary judgment. In its motion, Hanna argued Eloy Land was not entitled to foreclosure because NoteWorld had authority from Eloy Land to accept the September 2007 payment and therefore the Note was not in default. The trial court denied both motions, finding a disputed issue of material fact as to whether, under an agency theory, the required payment on the Note had been timely made.

¶6 After McDaniel repeatedly failed to appear for his deposition, Eloy Land moved to have his answer stricken and default entered against him. The trial court granted this motion, struck McDaniel's answer, and signed a judgment foreclosing his interest in the Property.[2] Over Hanna's objection, the judgment also contained language that Eloy Land's deed of trust was superior to the claim, interest, or lien "of all Defendants, and each of them . . . and they are hereby forever barred and foreclosed of

[1]At some point during this period, McDaniel had assigned his interest in the payments to a third party, and Noteworld dispersed all of the second payment to McDaniel's assignee.

[2]Hanna's counsel explained his firm had originally believed it had authority to represent McDaniel after being initially retained by First American Title Insurance Company (affiliated with NoteWorld), but later learned this belief was in error and filed a motion to withdraw as counsel for McDaniel in connection with its response to Eloy Land's motion to strike McDaniel's answer.

and from all equity of redemption and claim in or to the property . . . except such rights of redemption as they may have by law from said sale." In opposing the judgment, Hanna argued this language improperly and prematurely served to foreclose Hanna's interest in the Property.

¶7 The trial court nevertheless denied Hanna's subsequent motions for a new trial, to amend the judgment, for relief from judgment, and to stay the execution of the judgment based on the foreclosure of Hanna's interest in the Property. At the hearing on these motions, the trial court stated that the judgment previously entered was final as to both McDaniel and Hanna. We have jurisdiction over Hanna's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(B) and (F)(1).[3]

Discussion

¶8 Hanna challenges the trial court's judgment in favor of Eloy Land, arguing the court improperly utilized McDaniel's default to foreclose Hanna's interest in the Property. Eloy Land responds that because McDaniel's default served to admit the allegations against him, including his failure to make his required payment on the Note, the trial court properly entered the judgment permitting judicial foreclosure. Eloy Land further points out that the judgment did not foreclose all of Hanna's interest in the Property because it recognized Hanna's right of redemption. Because in granting Eloy

[3]Although procedurally irregular, we conclude the trial court's judgment was final as to both McDaniel and Hanna and thus properly appealable to this court by virtue of its language stating that "all Defendants" were "hereby forever barred and foreclosed" from any interest in the Property, as well as from the trial court's later acknowledgement that the judgment was final as to both parties.

Land's motion for entry of judgment the trial court thereby essentially denied Hanna's defenses as a matter of law, it effectively granted summary judgment for Eloy Land. *See Pride of San Juan, Inc. v. Pratt*, 221 Ariz. 337, n.1, 212 P.3d 29, 31 n.1 (App. 2009). We therefore review the court's judgment de novo, and view the evidence in the light most favorable to Hanna as the non-prevailing party. *See id.*

¶9 Citing *Clugston v. Moore*, 134 Ariz. 205, 655 P.2d 29 (App. 1982), Hanna argues that "an innocent defendant should not be bound by the default judgment against a co-defendant." Hanna further maintains it should be able to litigate its defenses, including "whether a default occurred under the promissory note when Eloy Land's agent timely received payment," which the trial court previously had held involved a disputed issue of material fact. Because the facts of *Clugston* are significant to our analysis, we present them here in detail.

¶10 Clugston had filed suit against Burke to specifically enforce an oral agreement that required Burke to transfer title of a mobile home and real property to him. *Id.* at 205, 655 P.2d at 29. Burke filed an answer to the complaint in which he denied he was required to transfer the property to Clugston and asserted he had transferred his interest in the property to Moore. *Id.* Moore was then joined as a party and filed an answer in which she claimed to be the owner of the property, alleged that Clugston was a tenant in default, and asserted the statute of frauds as a defense to the oral agreement. *Id.* at 205-06, 655 P.2d at 29-30. When Burke subsequently failed to appear for his deposition, the court struck his answer and entered default against him. *Id.* at 206, 655 P.2d at 30. Over Moore's objection, the default judgment quieted title to the mobile

home and real property in Clugston and provided that "all persons claiming under, by or through [Burke] . . . are hereby declared to have no estate, right, title, lien, or interest" in the property. *Id.*

¶11 Clugston thereafter moved for summary judgment against Moore based on the language included in the default judgment against Burke. *Id.* Although Moore argued that Burke's default could not be used to preclude her from presenting her claims and defenses, the trial court granted Clugston's motion. *Id.* On appeal, this court determined the effect of Burke's admissions, which were implied by the default judgment, on "appellant Moore[,] who had not defaulted and who had expressly denied and placed in issue the truth of the allegations deemed admitted." *Id.* at 207, 655 P.2d at 31. After noting the general rule "that the default of one defendant, acting as an admission by him of the allegations of the petition, does not operate as an admission of the allegations by a defendant who is contesting the allegations," we held that Burke's admissions were not binding against Moore "so as to preclude [her] from defending against the allegations in Clugston's complaint." *Id.* We therefore concluded the default judgment entered against Burke could not be the basis for entering summary judgment against Moore and she was "entitled to her own day in court" on the issues raised in the complaint and the defenses asserted in her answer. *Id.* at 208, 655 P.2d at 32.

¶12 We agree with Hanna that *Clugston* compels the same result here. Furthermore, the result reached in *Clugston* is in accord with decisions from other jurisdictions and authorities. *See, e.g., Khazaal v. Browning*, 717 So. 2d 1124, 1124-25 (Fla. Dist. Ct. App. 1998) (reversing default final judgment against appellant because it

was based upon codefendant's failure to appear in suit; appellant had denied allegations in complaint and his "defenses remained to be tested by trial" and could not be disposed of by codefendant's default); *Peek v. S. Guar. Ins. Co.*, 241 S.E.2d 210, 212 (Ga. 1978) (admissions predicated upon default do not bind non-defaulting codefendants); *Chromacolour Labs, Inc. v. Snider Bros. Prop. Mgmt., Inc.*, 503 A.2d 1365, 1370 (Md. Ct. Spec. App. 1986) ("The default of one defendant, although an admission by it of the allegations in the complaint, does not operate as an admission of such allegations as against a contesting co-defendant even though the defendants may be inextricably joined."); *Gearhart v. Pierce Enters., Inc.*, 779 P.2d 93, 94-95 (Nev. 1989) (principal's default not binding on surety; improper for lower court to enter default judgment until matter had been adjudicated with respect to surety codefendant); *see also* 46 Am. Jur. 2d *Judgments* § 251 ("The default of one defendant does not operate as an admission as against a contesting codefendant even though the defendants may be inextricably joined. An answering defendant's defenses remain to be tested by a trial and cannot be disposed of by the nonanswering defendant's default." (footnotes omitted)).

¶13 Eloy Land argues, however, that *Clugston* is distinguishable for several reasons. First, Eloy Land maintains that, unlike in *Clugston*, the judgment here did not extinguish all of Hanna's rights to the Property because it preserved Hanna's right of redemption. It also contends that, unlike the quiet title action in *Clugston*, its judicial foreclosure action did not affect Hanna's redemption rights. Finally, it argues that *Clugston* involved an appeal from a summary judgment motion, whereas here "the

admissions and subsequent default judgment against McDaniel simply limit [Hanna's] defenses as a junior interest holder in the property."

¶14 We find these arguments unpersuasive. That Hanna's post-foreclosure rights were preserved does not change the fact that the trial court extinguished Hanna's defenses to the foreclosure action itself based solely on McDaniel's default. As Hanna argues, "[t]he implication is that a court may take away (without due process) [Hanna]'s primary defense that no payment default occurred" so long as the court "allows [Hanna] the secondary right to buy back the property after the foreclosure happens (with [Hanna] paying the 8% statutory penalty for redemption required under A.R.S. § 12-1285)."[4] Furthermore, as noted above, the trial court essentially treated Eloy Land's motion for entry of judgment as a motion for summary judgment when it entered final judgment against both McDaniel and Hanna. Accordingly, although the procedure followed in *Clugston* was more correct than what occurred here, this fact does not meaningfully distinguish *Clugston*.

¶15 Finally, we reject Eloy Land's argument that Hanna's position as a "junior interest holder" limits its remedies here. At the outset, as set forth above, this argument rests on Eloy Land's incorrect conclusion that it is entitled to foreclose solely on the entry of McDaniel's default. Moreover, as Hanna correctly notes in its reply brief, although Eloy Land holds the senior lien interest, Hanna "obtained the fee title interest in the

[4]Section 12-1285(A), A.R.S., provides as follows: "In redeeming property the judgment debtor shall pay the amount of the purchase price with eight per cent added thereto, together with the amount of any assessments or taxes which the purchaser has lawfully paid thereon after purchase, and interest on such amount."

property as a result of its purchase from McDaniel," and thus may assert "all of McDaniel's property rights as a successor in interest, including the right to be foreclosed by the senior lien interest only if a payment default occurs." We therefore conclude the trial court erred when it entered final judgment against Hanna based upon McDaniel's default.

Disposition

¶16 For the reasons stated above, the judgment is vacated and the case remanded to the trial court for further proceedings consistent with this decision. Both parties have requested their attorney fees incurred on appeal pursuant to A.R.S. § 12-341.01(A). At this time, we deny both requests, but grant leave to the trial court to award reasonable fees incurred on appeal to the prevailing party at the conclusion of this matter. *See Highland Vill. Partners, L.L.C. v. Bradbury & Stamm Constr. Co.*, 219 Ariz. 147, ¶ 20, 195 P.3d 184, 189 (App. 2008) (declining to award fees because neither party had yet prevailed).

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge