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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

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9 BMO Harris Bank NA,

No. CV-13-01692-PHX-DGC

10 Plaintiff,

**ORDER**

11 v.

12 D.R.C. Investments LLC, et al.,

13 Defendants.

14 Pursuant to the Court's order, Plaintiff and Defendants have filed motions for  
15 partial summary judgment. Docs. 25, 27. The motions have been fully briefed. For the  
16 reasons stated below, the Court will grant partial summary judgment for Defendants.<sup>1</sup>

17 **I. Background.**

18 This case involves four loans. The parties agree that Arizona's anti-deficiency  
19 statute, A.R.S. § 33-814, does not apply to Loans 1, 3, and 4. Doc. 25 at 2. The parties  
20 dispute whether the statute applies to Loan 2.

21 Loan 2 involves a note for \$980,128.30, secured by a deed of trust on four  
22 properties in Wittman, Arizona, each with a residential home. Doc. 25 at 2; Doc. 28,  
23 ¶¶ 1-5. Defendants own the homes, have never lived in them, and rent them to residential  
24 tenants. *Id.* When Defendants defaulted on Loan 2, Plaintiff conducted trustees' sales of  
25 the properties. Doc. 25 at 2. Proceeds from the sales were not sufficient to satisfy the  
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28 <sup>1</sup> Defendants' request for oral argument is denied because the issues have been fully briefed and oral argument will not aid the Court's decision. *See* Fed. R. Civ. P. 78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

1 first position deed of trust, leaving a deficiency of \$241,544.16. *Id.* Plaintiffs now seek  
2 to collect the deficiency under the terms of the contract between the parties, arguing that  
3 A.R.S. § 33-814 does not protect Defendants from liability because Defendants never  
4 occupied or intended to occupy the homes.

5 **II. Analysis.**

6 A.R.S. § 33-814(G), the provision of the anti-deficiency statute at issue here, reads  
7 as follows:

8 If trust property of two and one-half acres or less which is  
9 limited to and utilized for either a single one-family or a  
10 single two-family dwelling is sold pursuant to the trustee's  
11 power of sale, no action may be maintained to recover any  
12 difference between the amount obtained by sale and the  
amount of the indebtedness and any interest, costs and  
expenses.

13 Neither party disputes that the properties at issue are two and one-half acres or  
14 less. Plaintiff argues, however, that § 33-814(G) does not apply because Defendants are  
15 developers who personally had no intention of living in the homes on the properties, and  
16 Arizona case law has clarified that the statute was never meant to apply to investors like  
17 Defendants. Doc. 25 at 3-5. Defendants assert that the anti-deficiency statute applies  
18 without regard to whether a homeowner is a developer or investor, or ever intended to  
19 live in the home, so long as the home is completed and actually used as a residence.  
20 Doc. 27 at 7. Defendants argue that because the homes at issue were in fact used as  
21 homes – albeit by tenants, rather than Defendants themselves – they satisfy the terms of  
22 the statute. *Id.* at 9.

23 Plaintiff's argument is based on *M&I Marshall & Ilsley Bank v. Mueller*, 268 P.3d  
24 1135 (Ariz. Ct. App. 2011). The court of appeals in *Mueller* found that owners of a  
25 single family home were entitled to the protection of the anti-deficiency statute where,  
26 even though the residence had not yet been completed, the owners intended to live there.  
27 *Mueller* distinguished *Mid Kansas Fed. Sav. & Loan Ass'n of Wichita v. Dynamic Dev.*  
28 *Corp.*, 804 P.2d 1310 (Ariz. 1991), where the Arizona Supreme Court held that homes

1 owned by a developer and not yet fully constructed were not entitled to protection under  
2 the statute. In making its argument, Plaintiff relies on language in *Mueller* that  
3 distinguishes unfinished homes on properties owned by individuals who plan to occupy  
4 the homes from unfinished homes on properties owned by developers who plan to sell the  
5 homes upon completion. Plaintiffs argue from this distinction that developers are not  
6 entitled to protection under § 33-814(G).

7 While the court of appeals does make this distinction in *Mueller*, it is dicta. More  
8 importantly, it is contrary to the holding in *Mid Kansas* that the identity of the mortgagor  
9 as either a homeowner or developer is irrelevant for purposes of the anti-deficiency  
10 statute so long as the subject properties fit within the statutory definition. 804 P.2d at  
11 1316. The Arizona Supreme Court provided this clear explanation and holding with  
12 respect to the meaning of § 33-814(G):

13 [A]bsent express limiting language in the statute or explicit  
14 evidence of legislative intent, we cannot hold that the statute  
15 excludes residential developers. Where the language of a  
16 statute is plain and unambiguous, courts must generally  
17 follow the text as written. While we can infer that the  
18 legislature’s primary intent was to protect individual  
19 homeowners rather than commercial developers, neither the  
20 statutory text nor legislative history evinces an intent to  
21 exclude any other type of mortgagor. . . . Therefore, we hold  
22 that so long as the subject properties fit within the statutory  
23 definition, the identity of the mortgagor as either a  
24 homeowner or developer is irrelevant.

25 804 P.2d at 1316 (citations and footnote omitted).

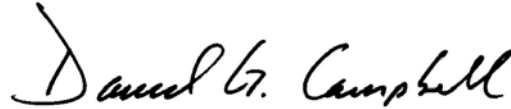
26 In *Mueller*, the identity of the mortgagor was relevant to determine whether the  
27 home would be used as a single-family home when finished. 268 P.3d at 1137. In this  
28 case, the homes were built and occupied as single-family homes. Any uncertainty about  
the mortgagor’s intent that existed in *Mueller* does not exist here. *Mueller* is further  
distinguishable because the property in that case was “[c]ommercial residential properties  
held by the mortgagor *for construction and eventual resale* as dwellings,” and therefore

1 did not fall within the definition of the statute. 268 P.3d at 1137 (emphasis added). The  
2 properties at issue here were not held for resale; Defendants owned and used them as  
3 residential rental properties.

4 The holding of *Mid Kansas* controls. The only requirement imposed by *Mid*  
5 *Kansas* is that the subject property “fit within the statutory definition.” 804 P.2d at 1316.  
6 That definition requires that the property be two and one-half acres or less and “limited to  
7 and utilized for either a single one-family or a single two-family dwelling.” A.R.S. § 33-  
8 814(G). Because the properties that secured Loan 2 satisfy this definition, the anti-  
9 deficiency statute applies and eliminates Defendants’ liability for the deficiency.

10 **IT IS ORDERED** that Defendant’s motion for partial summary judgment  
11 (Doc. 27) is **granted** and Plaintiff’s motion for partial summary judgment (Doc. 25) is  
12 **denied**. The Court will schedule a final pretrial conference by separate order.

13 Dated this 6th day of May, 2014.

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18 David G. Campbell  
19 United States District Judge  
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