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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Rozann G. Bergdale,)	
)	
Plaintiff,)	3:16-cv-08198 JWS
)	
vs.)	ORDER AND OPINION
)	
Quality Loan Service Corp., et al.,)	[Re: Motion at Docket 7]
)	
Defendants.)	
)	

I. MOTION PRESENTED

At docket 7 defendant Quality Loan Service Corporation (“QLS”) moves for summary judgment pursuant to Federal Rule of Civil Procedure 56, supported by a separate statement of facts at docket 8. Plaintiff Rozann G. Bergdale (“Bergdale”) opposes at docket 14, supported at docket 15 by a separate statement of facts and response to QLS’ separate statement of facts. QLS replies at docket 19.

Oral argument was not requested and would not assist the court.

II. BACKGROUND

This case presents a dispute regarding whether QLS violated Arizona law by recording a Notice of Trustee’s Sale (“Notice”) that announced the foreclosure of Bergdale’s home. The underlying note and deed of trust at the center of the parties’

1 dispute was issued by Countrywide Bank, FSB (“Countrywide”) in 2007.¹ Bergdale
2 contends that Countrywide violated the Truth in Lending Act (“TILA”)² in issuing the
3 loan. On September 29, 2009, she sent Countrywide a letter stating two inherently
4 contradictory things: (1) she was exercising her right under TILA to rescind the loan³
5 and (2) she was willing to entertain a reasonable offer from Countrywide to modify that
6 same loan.⁴

8 Countrywide did not take any actions toward rescinding the loan or the security
9 interest. Instead, Bergdale executed a loan modification agreement in 2010 that
10 expressly amended and supplemented the 2007 note and deed of trust.⁵ The loan
11 modification agreement states in pertinent part that “[e]xcept as otherwise specifically
12 provided in this Agreement, the [original] Note and Security Instrument will remain
13 unchanged, and the Borrower and Lender will be bound by, and comply with all terms
14 and provisions thereof, as amended by this Agreement.”⁶

17 In 2015 Bergdale recorded a Notice of Rescission of Deed of Trust with the
18 Yavapai County Recorder’s Office, stating that she rescinded the 2007 note and deed
19 of trust via her September 29, 2009 letter.⁷ Yet, in May 2016 QLS, purportedly acting
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21 ¹Doc. 1 at 11 ¶ 10.

22 ²15 U.S.C. § 1601, *et seq.*

23 ³See 15 U.S.C. § 1635.

24 ⁴Doc. 16-1 at 4–5.

25 ⁵Doc. 8 at 17–19.

26 ⁶*Id.* at 17.

27 ⁷Doc. 1 at 59–60.

1 as the successor trustee under the 2007 deed of trust, recorded the Notice of Trustee's
2 Sale stating that it planned to sell Bergdale's home at a public auction on August 29,
3 2016.⁸ On August 10 Bergdale sued QLS in the Superior Court for Yavapai County,
4 alleging two causes of action related to the Notice: (1) false recordings under A.R.S.
5 § 33-420(A)-(D); and (2) negligence *per se*.⁹ QLS removed the case to this court under
6 28 U.S.C. § 1332.
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8 III. STANDARD OF REVIEW

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10 Summary judgment is appropriate where "there is no genuine dispute as to any
11 material fact and the movant is entitled to judgment as a matter of law."¹⁰ The
12 materiality requirement ensures that "only disputes over facts that might affect the
13 outcome of the suit under the governing law will properly preclude the entry of summary
14 judgment."¹¹ Ultimately, "summary judgment will not lie if the . . . evidence is such that
15 a reasonable jury could return a verdict for the nonmoving party."¹² However, summary
16 judgment is appropriate "against a party who fails to make a showing sufficient to
17 establish the existence of an element essential to that party's case, and on which that
18 party will bear the burden of proof at trial."¹³
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22 ⁸*Id.* at 88-89.

23 ⁹*Id.* at 9-24.

24 ¹⁰Fed. R. Civ. P. 56(a).

25 ¹¹*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

26 ¹²*Id.*

27 ¹³*Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
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1 contains a material misstatement or false claim[,] or is otherwise invalid.”¹⁹ Bergdale’s
2 first cause of action essentially alleges that QLS knew or should have known that the
3 Notice is groundless and invalid because it knew that in 2009 she rescinded the note
4 and deed of trust upon which the Notice is based.
5

6 “The purpose of § 33–420 is to protect property owners from actions clouding
7 title to their property.”²⁰ The statute achieves this purpose by proscribing the recording
8 of various types of invalid property claims. If a property owner attacks a recorded
9 document because its asserted claim to real property is factually “groundless” (or
10 because it is invalid for the same reason it is groundless),²¹ the recording party is liable
11 under A.R.S. § 33–420 if (1) the claim “has no arguable basis or is not supported by
12 any credible evidence” and (2) the recording party knew of should have known this.²²
13 To satisfy the first prong, the claim must be frivolous; the statute does not apply “merely
14 because [the recording party] may lose on the merits of his action.”²³ For example, in
15 *SWC Baseline* the Arizona Court of Appeals held that a party was not liable for making
16 a groundless claim in a recorded document (or for recording a claim that was invalid
17 because it was groundless) because there was “widespread confusion over title . . . and
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23 ¹⁹A.R.S. § 33–420(A).

24 ²⁰*Wyatt v. Wehmueller*, 806 P.2d 870, 875 (Ariz. 1991).

25 ²¹*Evergreen W., Inc. v. Boyd*, 810 P.2d 612, 619 n.2 (Ariz. Ct. App. 1991).

26 ²²*Id.* at 619. See also *SWC Baseline & Crismon Inv’rs, L.L.C. v. Augusta Ranch Ltd.*
27 *P’ship*, 265 P.3d 1070, 1080 (Ariz. Ct. App. 2011).

28 ²³*Evergreen*, 810 P.2d at 619.

1 the intent of the parties.”²⁴ Due to this legitimate confusion, the court held that the
2 property claim made in the recorded document was not frivolous as a matter of law.²⁵

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4 The statute also applies to documents that are invalid due to procedural
5 deficiencies. If a property owner attacks a recorded document on this basis, the
6 recording party is liable if (1) the document is invalid and (2) the defendant knew or
7 should have known this.²⁶ In *Delmastro*, a contractor performed work for the owner of
8 one block at a commercial complex located at 2190 W. River Road in Tucson.²⁷ The
9 contractor subsequently sent three poorly-drafted preliminary twenty-day notices
10 pursuant to A.R.S. § 33–992.01 that mistakenly included property at a different block of
11 the same complex that was owned by an unrelated third party.²⁸ After the contractor
12 filed a complaint to foreclose its mechanic’s lien, the third party answered and filed a
13 counterclaim under A.R.S. § 33–420(A). The Arizona Court of Appeals held that the
14 lien was invalid because the preliminary notices failed to describe any work performed
15 at the third party’s property as required by A.R.S. § 33–992.01(C).²⁹ The court also
16 held that the third party was entitled to summary judgment on its statutory counterclaim
17 because (1) the lien was invalid and (2) the contractor knew or should have known that
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22 ²⁴*SWC Baseline*, 265 P.3d at 1082.

23 ²⁵*Id.*

24 ²⁶*Delmastro & Eells v. Taco Bell Corp.*, 263 P.3d 683, 691 (Ariz. Ct. App. 2011).

25 ²⁷*Id.* at 686.

26 ²⁸*Id.*

27 ²⁹*Id.* at 687.

1 the lien would be invalid unless its twenty-day notices complied with A.R.S.

2 § 33–992.01(C).³⁰

3 Bergdale’s argument in support of her § 33-420 claim is somewhat thin.³¹ She
4 appears to rely on *Delmastro*, but the case does not apply because she does not allege
5 that the Notice is invalid because QLS failed to comply with any procedural
6 prerequisites. Instead, her claim attacks as groundless the Notice’s assertion of QLS’
7 interest in her property.³² In support of her claim, she cites the 2009 letter in which she
8 states that she was exercising her TILA rescission rights. If the letter said nothing
9 more, her claim might have merit. But the letter’s next paragraph goes on to state that
10 Bergdale was willing to entertain a reasonable loan modification offer as a “settlement.”
11 Thus, when the 2009 letter is read as a whole, QLS has at least an arguable basis for
12 asserting that Bergdale was merely threatening to rescind the deed of trust if she did
13 not receive a loan modification. QLS supports this interpretation with credible evidence
14 in the form of the loan modification agreement that Bergdale subsequently executed in
15 which she affirmed her obligations under the 2007 note and deed of trust.
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17 Under A.R.S. § 33–420 the court’s task is not to determine whether QLS’
18 property interest would ultimately prevail, but rather, whether QLS had an arguable
19 basis for asserting that interest in the Notice. Because QLS’ claim is supported by an
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25 ³⁰*Id.* at 691–93.

26 ³¹Doc. 14 at 14–16.

27 ³²*See Stauffer v. U.S. Bank Nat. Ass’n*, 308 P.3d 1173, 1177 (Ariz. Ct. App. 2013) (“[B]y
28 recording the Notice of Trustee Sale, FATCO is asserting an interest in the Property; it is
putting others on notice that it has the right to sell, and is in fact selling, the Property.”).

1 arguable basis and credible evidence, it is not groundless. Bergdale’s A.R.S. § 33–420
2 claim fails as a matter of law.

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4 **B. Bergdale Cannot Establish Negligence *Per Se***

5 Bergdale’s second cause of action alleges negligence *per se*. “A person who
6 violates a statute enacted for the protection and safety of the public is guilty of
7 negligence *per se*.”³³ Bergdale’s negligence *per se* claim asserts that QLS violated the
8 following three statutes: A.R.S. §§ 33–420; 39–161; and 13-2320(A)(4). For the
9 reasons discussed above, Bergdale’s negligence *per se* claim based on A.R.S.
10 § 33–420 fails. Her cause of action also fails under the other two statutes.

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12 A.R.S. § 39–161 states that a person who records “an instrument he knows to be
13 false or forged, which, if genuine, could be . . . recorded under any law of this state or
14 the United States, or in compliance with established procedure is guilty of a class 6
15 felony.” This statute does not apply here because Bergdale does not contend that the
16 Notice is counterfeit, inauthentic, or otherwise not genuine.³⁴

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18 A.R.S. § 13–2320(A)(4) states that “[a] person commits residential mortgage
19 fraud if, with the intent to defraud, the person” “[f]iles or causes to be filed with the office
20 of the county recorder of any county of this state any residential mortgage loan
21 document that the person knows to contain a deliberate misstatement,
22 misrepresentation or material omission.” Although the statute does not define
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26 ³³*Good v. City of Glendale*, 722 P.2d 386, 389 (Ariz. Ct. App. 1986).

27 ³⁴*State v. Jones*, 218 P.3d 1012, 1013 (Ariz. Ct. App. 2009) (“[A]n instrument that
28 contains an untrue statement falls within A.R.S. § 39–161 only if the instrument is counterfeit,
inauthentic or otherwise not genuine.”).

