

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-003864

12/10/2010

HONORABLE J. RICHARD GAMA

CLERK OF THE COURT
D. Harding
Deputy

FIRST ARIZONA SAVINGS

PETER J RATHWELL

v.

SAID ABBASIAN, et al.

SAID ABBASIAN
4822 E BLUEFIELD AVE
SCOTTSDALE AZ 85254

SHIDOKHT ABBASIAN
4708 E WEAVER RD
PHOENIX AZ 85050

MINUTE ENTRY

The Court received and reviewed Plaintiff's *Motion For Summary Judgment*, against Defendants Said Abbasian and Shidokht Abbasian, hereinafter referred to as Defendants. Plaintiff seeks summary judgment on all claims advanced in its complaint and the counterclaims filed by Defendants in this matter. Defendants are pro se litigants and did untimely file responsive pleadings. The Court has considered these responsive pleadings and Plaintiff's reply.

The Court, in the interest of expediting its business, does herein waive oral arguments pursuant to Ariz. R. Civ. P., rule 7.1[c][2]. The issues are well presented in the pleadings and oral arguments will not assist the Court in reaching an informed determination.

Factual Background. This is an action seeking a deficiency judgment pursuant to A.R.S. §33-814. On February 18, 2005, Plaintiff and Defendants entered into a promissory note

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-003864

12/10/2010

in the sum of \$1,614,300. This note was secured by a Deed of Trust on approximately 5.72 acres.

Defendants defaulted on the note and a trustee sale was performed on January 13, 2010. At this sale, Plaintiff was the high bidder at \$1.3 million. Plaintiff had conducted a real estate appraisal of the property on December 17, 2009 and offered the appraised value at sale.

Plaintiff was the successful bidder at the foreclosure sale.

At the time of this sale, Defendants' liability under the note payable was \$1,576,763.99. It is thus, Plaintiff's position that there remains a deficiency in the sum of \$276,763.99.

The Court finds that from the evidence presented that Plaintiff has fully performed under the terms of the promissory note and deed of trust. Further, that these Defendants have collectively failed to timely meet their payment obligations. Thus, they have been and remain in default on the terms of the promissory note.

Plaintiff has made a prima facie showing that it is entitled to judgment against these Defendants on the underlying loan agreement and deed of trust and that they are entitled to a deficiency judgment for an amount equal to the sum of the total amount owed as of the date of sale less the fair market value of the trust property.

Under these circumstances, Defendants have the affirmative burden of producing sufficient competent evidence to show the existence of a genuine issue.¹ Defendants have failed to substantively set forth specific facts that show that there exist genuine issues of fact for trial on the underlying indebtedness.

Defendants may not simply rest on the pleadings, but must show by competent evidence specific facts that create a genuine issue of fact for trial. A.R.C.P., rule 56 [e] clearly provides that when a motion for summary judgment has been filed and appropriately supported, "...an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits...must set forth specific facts showing that there is a genuine issue for trial."

The Court finds as follows:

- That on March 18, 2005 Defendants obtained a loan on real property. A Deed of Trust was executed on this property by the parties.

¹ Gen.Dev.Corp. v Cmty .Am .Mortgage Corp, 165 Ariz. 1, 795 P.2d 827 [App. 1990].
Docket Code 019 Form V000A

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-003864

12/10/2010

- Plaintiff had a first priority lien interest on the real property.
- That pursuant to the terms of this loan agreement Plaintiff extended funds totaling \$1,614,000 to Defendants.
- That Plaintiff has performed its obligations under the promissory loan agreement and deed of trust.
- That these Defendants are in default of the terms of the promissory loan agreement, and deed of trust. Defendants failed to make scheduled monthly payments as due and owing.
- On January 13, 2010 a non-judicial trustee foreclosure sale was conducted on this property. Plaintiff was the successful purchaser of the property through a credit bid.
- At the time of sale, Defendants' liability was \$1,576,763.99. After the sale there remains a deficiency.
- Plaintiff is entitled, pursuant to A.R.S. §33-814[a] to the loan balance due minus the successful bid amount or the "fair market value" of the property whichever is higher.

The Court having reviewed the motion does find that there is no genuine issue as to any material fact and further that the Plaintiff, the moving party, is entitled to judgment as a matter of law on all issues of liability under this promissory loan agreement, and deed of trust for the mortgage deficiency balance with exception of the determination of the "fair market value" as of the foreclosure sales date.

Defendants' Counterclaims. Defendants have filed a number of counterclaims against Plaintiff. As stated, the Court found that Plaintiff fully performed pursuant to its obligations under the promissory note and deed of trust. In addition, Defendants have failed to raise a genuine issue of material fact as to any of their alleged counterclaims.

The Court finds that Plaintiff is entitled to judgment as a matter of law on the counterclaims alleged by Defendants in this matter. Briefly stated, the basis for the Court's determination is as follows:

- Defendants' request seeking "judgment". This does not set forth a viable cause of action;
- Violations of section 18 USC § 472-474. This Court does lack subject matter jurisdiction in this matter and in addition Defendants do lack standing to advance these allegations;
- Truth & Lending Act. This cause of action is barred by the applicable statutes of limitation;
- Privacy Act Violation alleged pursuant to section 5 USC§ 552[b][4]. This statutory provision is not applicable to these circumstances; and
- Violation of the Fair Debt Collection Practice Act. Plaintiff is not a "debt collector" as that term is defined by statute. In addition, plaintiff is excluded from liability by the statute pursuant to section 15 USC §1692[a][6][a].

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-003864

12/10/2010

For the reasons stated in Plaintiff's pleadings,

IT IS ORDERED granting Plaintiff's *Motion For Summary Judgment* on all issues related to Plaintiff's Mortgage deficiency claim, except for determination of the amount of the A.R.S. §33-814 [a] "fair market value" credit against the loan balance as of the foreclosure sale date.

IT IS FURTHER ORDERED granting Plaintiff's *Motion For Summary Judgment* as to Defendants counterclaims.

IT IS FURTHER ORDERED setting this matter for a joint pre-trial conference on **February 11, 2011 at 1:30 p.m.** (time allotted: 30 minutes) for the purpose of scheduling an evidentiary hearing to determine "fair market value", in this division.

**THE HONORABLE J. RICHARD GAMA
JUDGE OF THE SUPERIOR COURT
MARICOPA COUNTY
201 WEST JEFFERSON
CENTRAL COURT BUILDING
7TH FLOOR- COURTROOM 701
PHOENIX, AZ 85003
602-506-1245**

Dated: December 14, 2010

/ s / HONORABLE J. RICHARD GAMA

JUDICIAL OFFICER OF THE SUPERIOR COURT

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>