

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

*** FILED ***
02/04/2002

01/29/2002

CLERK OF THE COURT
FORM V000A

HON. ROLAND J. STEINLE

J. Escarcega
Deputy

CV 2001-004096

FILED: _____

GENERAL ELECTRIC CAPITAL BUSINESS, JOE T STROUD III
et al.

v.

COUNTRY SURPRISE LLC, et al.

HAROLD N MAY - PRO HAC VICE
440 LOUISIANA
STE 1440
HOUSTON TX 77002-0000

MINUTE ENTRY

9:05 a.m. This is the time set for an oral argument on Plaintiff's Motion for Summary Judgment and Defendant's Motion for Strike.

FOR REASONS stated on the record: The Motion to Strike is denied.

Oral argument is heard on the Motion for Summary Judgment.

IT IS ORDERED taking this matter under advisement.

* * *

LATER:

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The Court has received and reviewed the Plaintiff's Motion for Summary Judgment Against Defendants Prakash and Hansa Patel, the Response, the Reply, and the separate statement of facts.

Under Rule 56, a movant who has the burden of proof at trial must carry the burden of producing uncontroverted prima facie evidence in support of its motion. Once the movant establishes a prima facie case entitling it to summary judgment, the other party has the burden of showing available competent evidence that would justify a trial. A party cannot rely solely upon unsupported contentions that a dispute exists to create a factual issue that would defeat summary judgment. In ruling on a motion, the trial court will generally consider "facts" as admissible in evidence when set forth in an affidavit or deposition; unsworn and unproven assertions are not "facts", State v. Mecham 173 Ariz. 474, 478 (1993); United Bank of Arizona v. Allyn 167 Ariz. 191, 197 (1991); and Orme School v. Reeves 166 Ariz. 301, 310 (1990). Conclusory statements will not suffice but the movant need not affirmatively establish the negative of the element, Orme School v. Reeves 166 Ariz. At 310. Affidavit that contains inadmissible evidence, that are internally inconsistent, that tend to contradict the affiant's sworn testimony at deposition are insufficient to withstand a motion for summary judgment, Orme School v. Reeves 166 Ariz. at 310. Any evidence contrary to the material facts - i.e., the facts which the moving party needs to show his entitlement to judgment - will preclude summary judgment, mere speculation or unsubstantial doubt as to the material facts will not suffice, but where one evidence or inferences would permit a jury to resolve a material issue in favor of either party, summary judgment is improper, United Bank of Arizona v. Allyn 167 Ariz. at 195.

Here, the Court has found the abatement of facts contained in the response are sufficient to meet the standard in Tobel v. State 189 Ariz. 168 (1988). The Court further finds that based upon the exhibits attached to the verified complaint and affidavits attached to the separate statement of facts filed by

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plaintiff, the plaintiff has met the burden in Orme School v. Reeves, Supra. The defendant has the burden of showing facts through competent evidence that would justify a trial. The affidavit of the Patels does not meet the burden. The unsworn and unproven assertions by counsel are not facts. Conclusory statements will not suffice.

Here, there is no affidavit by an expert that the trustee sale was not commercially reasonable, nor is there an expert affidavit which challenges the appraisal contained in the plaintiff's Statement of Facts. While the defendant challenges the notice, notice is not required under the documents Mr. Patel signed. The denials in the response contain merely legal argument that there is a genuine issue without establishing the availability of competent evidence to justify a trial.

Counsel for the Patels has conducted no discovery, taken no deposition, and has retained no experts to testify to what is commercially reasonable or to what the value of the property was. Accordingly, the Patels have failed to meet the burden set forth in Omre School v. Reeves, Supra.

IT IS ORDERED granting the Motion for Summary Judgment to the plaintiff as set forth in the motion.

IT IS FURTHER ORDERED granting plaintiff reasonable attorney fees under the contract and ARS 12-341.01. The amount shall be determined upon the filing of a China Doll affidavit followed by a response in opposition to the amount. The plaintiff may thereafter file a reply.