

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2010-010943

12/22/2017

HONORABLE KAREN A. MULLINS

CLERK OF THE COURT

P. Culp

Deputy

I M H SPECIAL ASSET N T 168 L L C, et al.

CHRISTOPHER H BAYLEY

v.

APERION COMMUNITIES L L L P, et al.

DAVID J CANTELME  
DON C FLETCHER  
BRIAN HOLOHAN  
THOMAS D LAUE  
PHILIP G MITCHELL  
JEFFREY M PROPER  
JOEL E SANNES  
RICHARD R THOMAS

RULING

The Court has considered: Plaintiff's Memorandum Regarding Effect of the Mandate on Post-Judgment Orders; Judgment Debtors' Memorandum on the Effect of the Mandate on Further Proceedings in this Court; Hart Parties' Statement of Position re: Effect of November 6, 2017 Mandate from the Arizona Court of Appeals; Intervenor Beck's Memorandum Regarding Effect of Court of Appeals Mandate; Motion of Robert M. Semple, in his Capacity as Trustee of NDM Trust, for Leave to File Legal Memorandum<sup>1</sup>; Johnson Bank's Joinder in Judgment Debtors' Memorandum on the Effect of the Mandate on Further Proceedings in this Court; Plaintiff's Response to Judgment Debtors' Memorandum on the Effect of the Mandate on Further Proceedings in this Court; Plaintiff's Response to Memoranda on the Effect of the Mandate Filed by (1) Gregory M. Beck, (2) Hart Parties, (3) Johnson Bank, and (4) NDM Trust;

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<sup>1</sup> Leave is hereby granted.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2010-010943

12/22/2017

Motion of Robert M. Semple, in his Capacity as Trustee of NDM Trust, for Leave to file Responsive Legal Memorandum<sup>2</sup>; Notice of Filing Exhibit 1 to Response to Judgment Debtors' Memorandum on the Effect of the Mandate on Further Proceedings in this Court; Judgment Debtors' Response Memorandum in Support of their Interpretation of the Impact of the Mandate; Hart Parties' Objection to Forms of Judgment; Judgment Debtors' Expedited Objection to Form of Judgment Submitted to the Court on December 8, 2017 as Exhibit 1 to Response to Judgment Debtors' Memorandum on the Effect of the Mandate on Further Proceedings in this Court; Plaintiffs' Reply in Support of Form and Substance of Proposed *Nunc Pro Tunc* Rule 54(b) Judgment; Motion of MW2 Investments, LLC for Leave to File Joinder and Motion Objecting to IMH Special Asset NT 168, LLC's Proposed Form of Order and Memorandum with Respect to the Court of Appeals Mandate<sup>3</sup>; and the oral argument of counsel on December 20, 2017.

The question before the Court is how to implement the November 3, 2017 Mandate and Memorandum Decision by the Arizona Court of Appeals. The parties to this action and the Intervenor have diametrically opposed views of the manner in which the mandate should be addressed. Because each opposing path has dramatic legal and financial consequences, the Court sought input by the parties/intervenor and has given considerable thought to each party/intervenor's position and whether those positions are consistent with the mandate. But first, some context is required.

This case arises from two separate loans made by Plaintiffs to Defendants in early 2007, one in the amount of \$6,580,000 and the second in the amount of \$3,450,000, both of which were secured by real properties. The Defendants defaulted on both loans, trustee sales on the secured real properties ensued, Plaintiffs purchased the secured real properties by credit bids, and this consolidated deficiency action was instituted by Plaintiffs. In ruling on Plaintiffs' Motion for Summary Judgment, this Court found that as of the date of the trustee's sales, the fair market value of the Eladio property was \$3,000,000 and the fair market value of the Aperion property was \$2,800,000. Based on the credit bids of \$3,460,000 for the Eladio property and \$3,200,000 for the Aperion property, and default balances of \$9,909,026.06 for the Eladio loan and \$5,364,935.21 for the Aperion loan, this Court calculated the Eladio deficiency as \$6,449,026.06 and the Aperion deficiency as \$2,164,935.21. The Court further held that as to both deficiencies, interest accrued from the date of the trustee's sales at the rate of 24%.

A Final Form of Judgment was filed on December 21, 2012. That Judgment has two parts. The first part of the Judgment is in favor of Plaintiff IMH Special Asset NT 161 and against Defendants Aperion Communities, LLLP, Eladio Properties, LLLP, and David P. Maniatis, jointly and severally, "in the amount of \$6,449,026.06, plus interest accruing at the

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<sup>2</sup> Leave is hereby granted.

<sup>3</sup> The Court has considered MW2's joinder in the other objections to Plaintiff's form of order.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2010-010943

12/22/2017

default rate of 24% per annum from January 5, 2010”. The second part of the Judgment is in favor of Plaintiff IMH Special Asset NT 168 and against Aperion Communities, LLLP, David P. Maniatis individually and as trustee of the DPM-TT Trust, jointly and severally, “in the amount of \$2,164,935.21, plus interest accruing thereon at the default rate of 24% per annum from January 5, 2010”.

In its Memorandum Decision (the “Decision”), the Court of Appeals affirmed the entry of summary judgment “regarding the fact of the defendants’ defaults”, but found that Plaintiffs “were not entitled to summary judgment on their claimed default balances”. *Decision*, ¶1, 21. Specifically, the Court of Appeals held that certain evidence offered by Defendant Maniatis “raise[d] a genuine dispute of material fact regarding the default balances, and the lenders were not entitled to summary judgment on the balances.” *Decision*, ¶31. The Court of Appeals then concluded:

A known default balance is critical to the calculation of a deficiency judgment: the judgment is calculated as the difference between the default balance and the greater of the trust property’s trustee’s-sale price or its fair market as of the sale date. A.R.S. §33-814(A). Because we hold that the [Plaintiff] lenders were not entitled to summary judgment on the default balances, we must vacate the deficiency judgment and remand for further proceedings.

We note, however, that even if the lenders do not prove their claimed deficiency balances upon remand, substantial deficiency balances will still exist even under the defendants’ version of the facts. Extrapolating the data from Maniatis’s declaration and the June 2009 loan statements (and in view of the defendants’ failure to assert that they made payments after those statements issued), it is undisputed that as of the date of the trustee’s sales the defendants owed about \$7,500,000 on the Eladio loan and more than \$3,900,000 on the Aperion loan. On remand, the lenders’ judgment-collections efforts must be considered as they apply to those undisputed amounts.

*Decision*, ¶¶32, 33. In the final paragraph of its Decision, the Court of Appeals stated: “Because the judgment relied on [the deficiency] balances, we vacate it and remand for further proceedings consistent with this decision...” *Decision*, ¶53.

Plaintiffs/Appellees then filed a Motion for Reconsideration which the Court of Appeals granted in part, “by clarifying the remand to reflect that any modified judgment entered as a

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2010-010943

12/22/2017

consequence to this court's decision shall be ordered *nunc pro tunc* to the date of the original judgment." *Order Granting Motion in Part and Denying Motion in Part, April 17, 2017, p. 2.*<sup>4</sup>

This Court concludes from all of the foregoing that (1) the December 21, 2012 Judgment must be vacated because it relied on the deficiency balances, (2) any modified judgment must be entered *nunc pro tunc*, (3) post-judgment collections efforts must be considered on remand, and (4) further proceedings by this Court must be consistent with the Decision.

Since entry of the December 21, 2012, four years of substantial post-judgment collection efforts have ensued. Those efforts include two receiverships.<sup>5</sup> The so-called Stockholder Receivership was the result of a stipulation between the parties; in other words, Defendants stipulated to the entry and terms of one of the two receivership orders.<sup>6</sup> These and other Orders entered over the last four years have resulted in the transfer of title to real property and corporate stock, the sale of assets, the garnishment of funds, and other collection activities by Plaintiffs to satisfy the substantial judgment against Defendants.

Defendants and some Intervenors now argue that the Decision renders all post-judgment orders *void ab initio*, requiring this Court to immediately unwind all post-judgment collections. Plaintiffs argue that given the substantial debt owed by Defendant and affirmed in the Decision, unwinding these post-judgment collections would create chaos and defies logic and common sense, and that all post-judgment orders should remain in place until trial is completed and the deficiency balances and default interest determined.

In order to meet the mandates of the Decision, as set forth above, this Court must vacate the December 21, 2012 Judgment. However it would not be inconsistent with the Decision to enter at this time a Rule 54(b) judgment on the fact of default, as affirmed by the Court of Appeals. Also, given the recognition by the Court of Appeals that substantial sums are owed by Defendants and that post-judgment collection efforts must be considered, this Court need not enter an order rendering all post-judgment collection efforts *void ab initio*. Instead, the sensible approach is to stay all collection efforts until trial is completed and a Rule 54(c) judgment is entered, and in the meantime determine what sums have been collected to date. Once collections

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<sup>4</sup> Defendants contend that the Motion for Reconsideration was denied, citing an obviously erroneous statement made by a Deputy Clerk in the Mandate, which reads, "The motion for reconsideration was denied and notice thereof was given on April 13, 2017." However the April 13, 2017 Order Granting Motion in Part and Denying Motion in Part, signed by Presiding Judge Peter Swann states that the Motion was in fact granted in part. It is, of course, Judge Swann's Order that prevails.

<sup>5</sup> *Order Appointing a Receiver Over the DPM-TT Trust and Property Owned and Controlled By David P. Maniatis*, entered August 22, 2013; *Order Appointing a Receiver Over Stockholder, LLC*, entered June 12, 2013.

<sup>6</sup> *Stipulation to Quash Temporary Restraining Order and Lifting Order Freezing Schwab Accounts*, filed February 21, 2013.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2010-010943

12/22/2017

have been determined, the Court may entertain some of the fact specific objections to post-collection efforts raised by Defendants and the Intervenor.

Therefore,

**IT IS ORDERED** entering a Rule 54(b) Judgment this date, as modified by the Court consistent with the Court of Appeals Decision.

**IT IS FURTHER ORDERED** that all collection efforts by Plaintiffs are stayed until the entry of a Rule 54(c) judgment and further court order.

**IT IS FURTHER ORDERED** that Plaintiffs shall not transfer any interest in any real or personal property, including shares or interests in any stock, or exercise any managerial power in any corporate entity arising from its ownership interests in any stock, that it holds as a result of any receivership order, court order, or post-judgment collection activity in this action except upon further court order. This order amends the order entered in open court on December 20, 2017.

**IT IS FURTHER ORDERED** that Plaintiffs shall prepare a detailed accounting of the value of all funds, monies, real property, personal property (including, without limitation, interests and/or shares of stock) it has obtained in whole or partial satisfaction of the December 21, 2012 Judgment, whether by transfer by an appointed Receiver, Court order, garnishment, execution, or other collection activity. The accounting shall include for each entry the date the funds/monies/real property/personal property was/were received, the authority under which it was received (for example, by court order of X date, or by writ of garnishment of X date, etc.), the identification of the person or entity from which it was received, its value, and how specifically that value was calculated (including the identity of any writings which reflect that calculation, such as, for example, an appraisal). The accounting shall be written in a manner that it may be understood on its face without the need for interpretation by a third-party. The accounting shall be filed by February 2, 2018.

Filed this date, *Amended and Superseding Rule 54(b) Judgment*, as modified.

/s/ HONORABLE KAREN A. MULLINS  
JUDICIAL OFFICER OF THE SUPERIOR COURT  
KAREN A. MULLINS