

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2012-010875

10/13/2014

HONORABLE LORI HORN BUSTAMANTE

CLERK OF THE COURT  
T. Nosker  
Deputy

WELLS FARGO BANK N A

MALCOLM T SLOAN

v.

ROBERT A NANN, et al.

FREDERICK C HORN

RULING MINUTE ENTRY

The court has considered the oral arguments presented and reviewed and considered the following:

- Defendant's Motion to Set Aside Order Granting Plaintiff's Motion for Summary Judgment
- Plaintiff's Response to Defendant's Motion to Set Aside Order
- Defendant's Reply to Motion to Set Aside Order Granting Motion for Summary Judgment
- Plaintiff's Sur-Reply to Defendant's Reply to Plaintiff's Response to Rule 60(c)(1) Motion to Set Aside Order Granting Plaintiff's Motion for Summary Judgment
- Defendant's Supplemental Rule 60(c) Motion
- Plaintiff's Response to Defendant's Supplemental Rule 60(c) Motion
- Reply to Defendant's Supplemental Rule 60(c) Motion
- Defendant's Supplemental Rule 60(c) Motion
- Plaintiff's Response to Defendant's Supplemental Rule 60(c) Motion
- Defendant's Reply to Supplemental Rule 60(c) Motion

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Arizona Civil Rule 60(c) provides for what a party must do in order to seek relief from a judgment:

On motion and upon such terms as are just the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence . . . (3) fraud . . . misrepresentation or other misconduct of an adverse party . . . or (6) any other reason justifying relief from the operation of the judgment.

Ariz.R.Civ.P.60(c). "[T]he test of what is excusable is whether the neglect or inadvertence is such as might be the act of a reasonably prudent person under similar circumstances." Daou v. Harris, 139 Ariz. 353, 359, 678 P.2d 934, 940 (1984). "Carelessness does not equate with excusable neglect." Ulibarri v. Gerstenberger, 178 Ariz. 151, 163, 871 P.2d 698, 710 (Ariz. App. Div. 1 1993) (citing Almarez v. Superior Court, 146 Ariz. 189, 704 P.2d 830 (App. 1985)).

"A party seeking relief from a default judgment pursuant to Rule 60(c) must demonstrate 1) that its failure to file a timely answer was excusable under one of the subdivisions of Rule 60(c), 2) that it acted promptly in seeking relief and 3) that it had a substantial and meritorious defense to the action." Almarez v. Superior Court, 146 Ariz. 189, 191, 704 P.2d 830, 831 (App. Div. 2, 1985) (citing Daou v. Harris, 139 Ariz. 353, 678 P.2d 934 (1984)); *see also* Coconino Paper Co. v. Marvin, 83 Ariz. 117, 317 P.2d 550 (1957) (stating that one of the requirements for seeking relief under Rule 60(c) is the existence of a meritorious defense).

Even if there was excusable neglect and even if the defendants' failure to respond was excusable, the defendants still must demonstrate that they have a meritorious defense in order to prevail on their Rule 60(c) motion. "A meritorious defense must be established by facts and cannot be established through conclusions, assumptions or affidavits based on anything other than personal knowledge." Richas v. Superior Court, 133 Ariz. 512, 517, 652 P.2d 1035, 1040 (1982).

The court has reviewed the declarations, assertions, and exhibits claiming the defendants have meritorious defenses. The defendants are claiming fraud based upon a document entitled Lot Loan Treatment Form (hereinafter the Form). The defense asserts that the Form proves the value of the property exceeded the value of the loan and the plaintiffs withheld this information from the defendants. However, their argument fails for several reasons. First, the Form itself provides dates that would not be consistent with the defendant's argument. The Form is dated 4/30/2012 – five years after the original loan was made. The date for the "original value" is 6/19/2010 – approximately three years after the original loan date and the "current value" date is listed as 5/16/2011 – approximately four years after the loan originated. In addition, Plaintiffs

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filed an affidavit of an employee who is familiar with the internal form and the affidavit indicates the property values are based upon appraisals obtained by Wells Fargo in 2010 and 2011. Furthermore, the property was appraised in 2007 at the time of the original loan with Wachovia and the value of the appraisal is consistent with the loan extended to the defendants. Finally, the defendants have no evidence to contradict the dates presented on the Form, have nothing to contradict the affidavit presented explaining the dates and definitions on the Form, and have insufficient evidence to demonstrate a valid fraud defense. The court finds the defendants have failed to show fraud.

The court further finds the defendants have failed to show they have any other meritorious defense. Absent the presentation of a meritorious defense, there is no basis to vacate the summary judgment under Rule 60(c).

IT IS ORDERED denying Defendant's Motion to Set Aside Order Granting Plaintiff's Motion for Summary Judgment.