

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2011-013398

03/29/2013

HONORABLE J. RICHARD GAMA

CLERK OF THE COURT  
C. Danos  
Deputy

NATIONAL BANK OF ARIZONA

MICHAEL J FARRELL

v.

AARON A MUTH

KENNETH W SCHUTT JR.

**RULING**  
**EVIDENTIARY HEARING SET**  
**PRETRIAL CONFERENCE RESET**

The Court received and has now considered Defendant Aaron A. Muth's [Defendant] Motion for Summary Judgment, the responsive pleading received by Plaintiff National Bank of Arizona [Plaintiff] and the corresponding reply submitted by Defendant. In addition, Plaintiff has itself filed a Motion for Partial Summary Judgment and this motion has also been fully briefed. As the parties' dispositive motions raise similar issues, the Court will address both in this ruling. The parties' have requested oral argument. The Court finds that the briefing is sufficient and that oral argument would not add to the Court's consideration of the issues presented. According, oral argument is waived pursuant to Ariz. R. Civ. P. rule 7.1[c][2] to expedite the business of the Court. The Court issues the following ruling.

**General Background.** In April 2005, Plaintiff loaned \$319,000 to Defendant to finance the purchase of a vacant residential lot.<sup>1</sup> The loan was evidenced by a promissory note and it was secured by a Deed of Trust on the real property. It is undisputed that Defendant has defaulted on

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<sup>1</sup> Defendant did not begin construction of a residential home on the premises. The real property remained vacant. Nor did Defendant obtain a separate loan to finance construction of a residence on the property.

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the underlying terms of the promissory note by failing to make payments. As a consequence of the default, and pursuant to the terms of the Deed of Trust and the parties' agreement, Plaintiff conducted a non-judicial trustee sale on the property. It is also undisputed that at the time of the foreclosure sale there was due and owing on the promissory note the sum of \$336,978.45. Further, that Plaintiff was the successful bidder at the auction placing a winning bid of \$90,000.

This breach of contract action followed the foreclosure sale. In this action Plaintiff is seeking a deficiency judgment.

Defendant asserts that Plaintiff's claim for a deficiency judgment is barred, as a matter of law, by Arizona's anti-deficiency statute. That is, that he is entitled to anti-deficiency protection within the meaning and intent of A.R.S. §33-814[g].

Plaintiff asserts that, under these circumstances, the anti-deficiency statute is not applicable and further that it is entitled to a deficiency judgment in this matter.

**Standard of Review.** To grant summary judgment the Court must determine that the record before it contains "no genuine issue as to any material fact" and, thus, "that the moving party is entitled to judgment as a matter of law." [Rule 56 [c]. In determining whether to grant summary judgment, the Court will view the facts and inferences from these facts in the light most favorable to the nonmoving party.[Matsushita Elec. Co. V. Zenith Radio Corp. 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 [1986]].

Summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." [Celotex Corp.v Catrett, 477 U. S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 [1986]]. In such a situation, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. In such a case, the moving party is entitled to judgment as a matter of law.

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. A material fact is any factual dispute that might affect the outcome of the case under the governing substantive law. A factual dispute is genuine if the evidence is such that a reasonable jury could resolve the dispute in favor of the nonmoving party.

A party opposing a motion for summary judgment cannot rest upon mere allegations or denials in the pleadings or papers, but instead must set forth specific facts demonstrating a genuine issue for trial.

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**Discussion.** The Court finds that Defendant's anti-deficiency, set-off and discharge of indebtedness defenses all fail as a matter of law. Further, that Plaintiff is entitled to judgment on its breach of contract claim against Defendant. As for the amount of any deficiency, the court will conduct an evidentiary hearing to determine the "fair market value" of the property as of the date of the trustee foreclosure sale.

**Application of the Anti-Deficiency Statute.** The anti-deficiency statute does not apply if the property at issue was not "utilized for" a dwelling.<sup>2</sup> Under these circumstances, it is undisputed that the property remained vacant and further that no construction loan was secured to build a residence. The mere intent to someday construct a residence on the premises and occupy it as a family residence is simply not enough to bring it within the definition of "utilized for," as those words are used in §33-814[g].<sup>3</sup> This Court is obligated to apply the clear meaning of words used in the applicable statute.

In this case, it is undisputed that the property has remained vacant since purchased. Further, there is no evidence of any effort to construct a residence on the premises. The Court finds that the property was not "utilized for either a single one-family or a single two-family dwelling."<sup>4</sup>

**Set-Off.** Defendant contends that Plaintiff misrepresented the value of the property through an allegedly defective appraisal. Briefly stated, the Court previously ruled that the negligent misrepresentation counterclaim failed as a matter of law because it was prepared by a non-party's actions for whom Plaintiff could not be held vicariously liable. The set off requested is based on the same alleged defective appraisal and for the reasons previously stated is likewise not actionable.

**IT IS ORDERED** denying Defendant's Motion for Summary Judgment;

**IT IS FURTHER ORDERED** granting Plaintiff's Motion for Partial Summary Judgment on its breach of contract claim.

**IT IS FURTHER ORDERED** setting an Evidentiary Hearing on **June 14, 2013 at 10:00 a.m. (time allotted: one hour)** before:

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<sup>2</sup> A.R.S. Section 33-814[g].

<sup>3</sup> Mid-Kansas Fed. Saving & Loan Ass'n v. Dynamic Dev. Corp., 167 Ariz. 122 [1991].

<sup>4</sup> A.R.S. §33-814[g].

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**HON. J. RICHARD GAMA**  
**Judge of Superior Court of Arizona**  
**201 W. Jefferson - CCB**  
**7th Floor – Courtroom 701**  
**Phoenix, Arizona 85003**  
**(602) 506-1245**

to determine the “fair market value” of the real property as of the date of the trustee sale in order to determine the amount, if any, of any deficiency judgment.

**IT IS FURTHER ORDERED** vacating the Pretrial Conference currently scheduled for **July 12, 2013 at 9:45 a.m.** in this division to be heard in conjunction with the Evidentiary Hearing scheduled June 14, 2013.

**IT IS FURTHER ORDERED** the parties shall prepare and submit to the Court a Joint Pretrial Memorandum by **June 5, 2013**.

All exhibits, if any, shall be exchanged 15 days before the hearing. Counsel shall confer regarding exhibits so duplicates are avoided and list any stipulations to those exhibits which can be received in evidence. **At least ten days before the hearing, counsel or their knowledgeable assistants shall call the division clerk at (602) 506-0984 to discuss procedures for marking exhibits.**

**IT IS FURTHER ORDERED** that all motions, responses, replies and other Court requested filings in this case must be submitted individually. **Counsel shall not combine any motion with a responsive pleading.** All motions are to be filed separately and designated as such. No pleadings will be accepted if filed in combination with another.

**NOTE:** All Court proceedings are recorded by audio method and not by a court reporter. Any party may request the presence of a court reporter by contacting the division three (3) court business days before the scheduled hearing.

**ALERT:** The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.