

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2012-003836

11/06/2012

HON. RANDALL H. WARNER

CLERK OF THE COURT
K. Ballard
Deputy

TOP PRIORITY PROPERTIES L L C

WILLIAM A KOZUB

v.

ANDREW GOODSTEIN, et al.

MICHAEL T DENIOUS

SHAYNA N FERNANDEZ

UNDER ADVISEMENT RULING

Before the court is Plaintiff Top Priority Properties' April 6, 2012 Motion for Partial Summary Judgment, Defendant Bank of America's September 4, 2012 Counter-Motion for Summary Judgment and Defendant Andrew Goodstein's July 10, 2012 Motion for Summary Judgment. For the reasons stated below, all three motions are denied.

The undisputed facts are these. Goodstein owned a condominium at the Artisan Lofts Condominiums. His property consisted of three units, 205, 207 and 405, built into a single, three-story, 4,000+ square foot unit. He took out a \$1 million+ loan on his property secured by a deed of trust. Bank of America's appraisal shows that it loaned the money based on a three-story, 4,000+ square foot condominium.

The deed of trust, however, was only on Unit 405, which is the third floor portion of the condominium. Though not conclusive, the evidence strongly suggests that this was a clerical error on Bank of America's part. The evidence also permits an inference that Goodstein did not know of the error and also thought his entire three-story unit was encumbered.

Goodstein defaulted and Bank of America foreclosed. Like the deed of trust, the notice of trustee's sale listed the property as "Unit 405, of Artisan Lofts Condominium." Top Priority

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2012-003836

11/06/2012

bought the property at the trustee's sale for \$455,000. The unpaid debt at the time exceeded \$1 million.

It is uncontroverted that Top Priority believed it was buying the entire 4,000+ square foot condominium, not just the top floor. Further, the evidence permits an inference that Bank of America, too, thought it had a lien on the entire condominium, and therefore thought it had foreclosed upon and was selling the entire unit, not just the top floor.

There is no evidence that Goodstein thought otherwise. Rather, the evidence presented by Top Priority coupled with the absence of an affidavit from Goodstein would permit a jury to find that all three parties here believed the entire three-story condominium was encumbered, foreclosed upon and sold.

The evidence would permit, but not require, a jury to find for Top Priority on three theories. First, A.R.S. § 33-808(E) provides that "[i]f there is an error or omission in the legal description so that the trust property cannot be identified . . . the trustee shall record a cancellation of notice of sale." A jury could find that the deed of trust and therefore the notice of trustee's sale were intended to attach to the entire unit, and that the legal description contained an error such that the trust property could not be properly identified. This finding would warrant rescission of the trustee's sale.

Second, a jury could find that Bank of America (and, by extension, the Trustee) and Top Priority sold and bought the property based on a mutual mistake. A jury could find that both were mistaken as to a basic assumption of the transaction, namely that it involved the entire 4,000+ square foot unit, and that the mistake had a material effect on the agreed exchange of performances. *Nelson v. Rice* 198 Ariz. 563, 566, 12 P.3d 238, 241 (App. 2000). Nothing in the deed of trust statutes precludes rescinding a trustee's sale based on mutual mistake.

Third, a jury could find for Top Priority on its quiet title action by finding that the deed it obtained was intended to and does refer to the entire condominium and not just the third story. *See Scalia v. Green*, 229 Ariz. 100, 103, 271 P.3d 479, 482 (App. 2011) (the rules of contract construction apply to the interpretation of deeds). A jury could make that finding based both on the language of the deed and the extrinsic evidence.

For these reasons,

IT IS ORDERED denying all three motions.

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

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2012-003836

11/06/2012

initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.