Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-022978 04/24/2012

HONORABLE GEORGE H. FOSTER, JR.

CLERK OF THE COURT
J. Polanco
Deputy

INVESTORS WARRANTY OF AMERICA INC MONTY L GREEK

v.

ARROWHEAD BUSINESS CENTER L P, et al. MELISSA G IYER

UNDER ADVISEMENT RULING

The Court took under advisement the Plaintiff's Motion for Summary Judgment on the issues regarding Fair Market Value and Unjust Enrichment. The Defendants have also filed a Motion for Summary Judgment on the issues of the liability under the personal guarantees. The Court has considered the Motions, the Responses and the Replies and the arguments of counsel and finds as follows

THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

The Plaintiff seeks summary judgment on the basis of the terms of the loan documents that provide for waivers of the provisions of ARS §33-814 as well as several other statutes. This waiver essentially purports to be an agreement that for purposes of establishing the fair market value of the property, the Court would not have any involvement. Rather, the parties agreed that the purchase price at the Trustee's Sale would constitute the fair market value of the property. They waived the right to obtain an appraisal and to have the Court determine value. The Defendant argues that such a waiver violates the purpose behind the anti-deficiency statutes. The Court disagrees.

As noted by the parties' briefs, there is no reported appellate decision in Arizona allowing for the waiver of any of the provisions of 33-814. However, the common law recognizes generally the right of parties to waive by agreement the benefits of a statute. Persons protected by a statutory provision can waive that protection, *Herstam v. Deloitte & louche, LLP*, 186 Ariz. 110, 115–16, 919 P.2d 1381, 1386–87 (App.1996), unless "waiver is expressly or impliedly prohibited by the plain language of the statute," *Verma v. Stuhr*, 223 Ariz. 144, 157, ¶ 68, 221 P.3d 23, 36 (App.2009). When a statutory protection can be waived, the waiver must be clearly intended. *Id.* at ¶ 69. The waiver in this case is clear and nothing in ARS § 33-814 indicates that its provisions may not be waived.

The Defendant also argues that the policy behind 33-814 prohibits such a waiver. The argument is not supported in the law or the record. In Mid Kansas the Supreme Court discussed the policy behind the anti-deficiency statutes and who they were designed to protect. Indeed, the question was not who, but what kind of property. The Court stated:

> As we noted in *Baker*, both anti-deficiency statutes were enacted in 1971, along with several other laws designed to protect consumers. 160 Ariz. at 101, 770 P.2d at 769. As with virtually all anti-deficiency statutes, the Arizona provisions were designed to temper the effects of economic recession on mortgagors by precluding "artificial deficiencies resulting from forced sales." *Id*. (quoting Boyd and Balentine, *Arizona's Consumer Legislation: Winning the Battle But ...*, 14 ARIZ.L.REV. 627, 654 (1972)). Anti-deficiency statutes put the burden on the lender or seller to fairly value the property when extending the loan, recognizing that consumers often ****1316 *128*** are not equipped to make such estimations. *See generally* *Spangler v. Memel*, 7 Cal.3d 603, 102 Cal.Rptr. 807, 812–13, 498 P.2d 1055, 1060–61 (1972); Leipziger, *Deficiency Judgments in California: The Supreme Court Tries Again*, 22 U.C.L.A. L.REV. 753, 759–61 (1975). Indeed, the articulated purpose behind A.R.S. § 33–729(A) (and presumably behind its deed of trust counterpart, as we held in *Baker*) was to protect "homeowners" from deficiency judgments. *See* *Baker*, 160 Ariz. at 101, 770 P.2d at 769.
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> [5] [6] However, absent express limiting language in the statute or explicit evidence of legislative intent, we cannot hold that the statute excludes residential developers. Where the language of a statute is plain and unambiguous, courts must generally follow the text as written. *Mid Kansas*, 163 Ariz. at 238, 787 P.2d at 137 (citing *State Farm Mut. Ins. Co. v. Agency Rent–A–Car, Inc.*, 139 Ariz. 201, 203, 677 P.2d 1309, 1311 (Ct.App.1983); *cf.* *Ritchie v. Grand Canyon Scenic Rides*, 165 Ariz. 460, 799 P.2d 801 (1990) (rule inapplicable where it would produce absurd result)). While we can infer that the legislature's primary intent was to protect individual

homeowners rather than commercial developers, neither the statutory text nor legislative history evinces an intent to *exclude* any other type of mortgagor. [FN5] Indeed, the North Carolina Supreme Court decided to apply a similar anti-deficiency statute to a commercial borrower, finding that the statute expressed no intent to exclude commercial transactions and therefore that the court could not read in such an intent. *Barnaby v. Boardman*, 313 N.C. 565, 330 S.E.2d 600, 603 (1985). Therefore, we hold that so long as the subject properties fit within the statutory definition, the identity of the mortgagor as either a homeowner or developer is irrelevant.

FN5. We take notice of the fact that the legislature has included such a limitation in other statutory provisions. For example, A.R.S. § 33–806.01(D), which deals with a trustee's right to transfer his interest in trust property, applies only to trust property that is limited to and utilized for dwelling units and that is *not* used for commercial purposes.

[7] In contrast to the lack of legislative limitation as to the type of mortgagor protected, there is specific textual expression as to the type of property protected. Both statutes require that the property be (1) two and one-half acres or less, (2) limited to and utilized for a dwelling that is (3) single one-family or single two-family in nature. In applying a statute, we have long held that its words are to be given their ordinary meaning, unless the legislature has offered its own definition of the words or it appears from the context that a special meaning was intended. *State Tax Comm'n v. Peck*, 106 Ariz. 394, 395, 476 P.2d 849, 850 (1970).

A.R.S. § 33–814(G) calls for the property to be "limited to" a single one-or two-family dwelling. The word "dwelling" is susceptible to several interpretations, depending on the context of its use. *See* 28 C.J.S. *Dwelling* (1941 and 1990 Supp.). However, the principal element in all such definitions is the "purpose or use of a building for human abode," meaning that the structure is wholly or partially occupied by persons lodging therein at night or *intended* for such use. *Id.; see also Smith v. Second Church of Christ, Scientist*, 87 Ariz. 400, 405, 351 P.2d 1104, 1107 (1960) (defining "dwelling" as "a building suitable for residential purposes").

The anti-deficiency statutes require not only that the property be limited to dwelling purposes, but also that it be "utilized for" such purposes.

*Mid Kansas Federal Sav. and Loan Ass'n of Wichita v. Dynamic Development Corp.,*167 Ariz. 122, 804 P.2d 1310 (1991). Here the parties are dealing not with residential properties or consumers in the sense that there is unequal bargaining power for necessities of life. Rather, the parties are dealing in a commercial context where the courts have long allowed statutory protects to be contracted away in many transactions including commercial guarantees. *McClelland Mortgage v Storey*, 146 Ariz. 185, 188, 704 P.2d 826, 829 (1985).

The Court finds the waivers are enforceable as written and do not violate public policy under the current state of the law. If the legislature wanted to make the provisions of 33-814 non-waivable, particularly for properties beyond those that are residential and two and a half acres or less, it could have done so but did not.

On the matter of the default under the guarantees, the Court finds there is no issue of material fact and the Plaintiff is entitled to judgment as a matter of law.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

The Defendants' Motion asks the Court to find that the loan documents that were dated December 2nd should have been dated December 1st which would have the effect of eliminating liability under the guarantees. The Court finds that the Defendants have not met their burden that they are entitled to judgment as a matter of law. The Court finds there is no material issue of fact in this case. The documents are clearly and unambiguously dated. The evidence in support of the reformation of the contract is based merely on conclusory statements which are insufficient to survive summary judgment. Rule 56(e).

IT IS ORDERED granting Plaintiff's Motion for Summary Judgment and denying Defendants' Motion for Summary Judgment.

The foregoing ruling is in accordance with the formal written Order signed by the Court on April 24, 2012 and filed (entered) by the Clerk on April 25, 2012.

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.