

The Continued Use Of A.R.S. § 33-811C As A Shield Against Post-Foreclosure Claims

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Courts vary in their interpretation of Arizona Revised Statute § 33-811C and its use to shield foreclosing parties from claims asserted by borrowers post-foreclosure. Arizona Revised Statute § 33-811 was amended in May 2002 to include entirely new subsections C and D. The amended subsection C (“the Statute”) is regularly utilized to oppose claims asserted by borrowers attempting to challenge trustee sales post-foreclosure. The statute sets forth that “the trustor...shall waive all defenses and objections to the sale not raised in an action that results in the issuance of a court Order granting relief pursuant to rule 65, [ARCP], entered before 5:00 p.m. mountain standard time on the last business day before the scheduled sale date of the sale.” Rule 65 governs temporary restraining orders and preliminary injunctions. Succinctly stated, the borrower waives the right to assert claims challenging the trustee’s sale if the borrower fails to obtain injunctive relief to stop the sale.

Courts are split on their application and interpretation of the Statute. Some courts interpret the Statute strictly, holding that it precludes nearly all claims related to the sale including claims for breach of contract and fraud.ⁱ While other courts take a less stringent view and hold that the phrase “all defenses and objections to the sale” may only be construed as those defenses and objections relating to the non-judicial foreclosure process as set forth under Arizona Revised Statutes §§ 33-801 *et seq.*ⁱⁱ Under this interpretation, the borrower waives all claims challenging the technical requirements of the non-judicial foreclosure process, but would not waive claims for breach of a contractual duty under the deed of trust or fraud.

Until recently there were no published Arizona state court decisions interpreting the Statute. In September 2011, the Arizona Court of Appeals issued a decision in *BT Capital, LLC v. TD Service Co. of Arizona*.ⁱⁱⁱ *BT Capital* is the first published state court decision undertaking a substantial analysis of the Statute. In *BT Capital*, the foreclosure trustee made a gross error by failing to enter a correct credit bid on behalf of the beneficiary at a trustee’s sale. After the property was sold to a third

party, the foreclosure trustee attempted to invalidate the sale based upon conceded defects in the foreclosure sale process. The Court noted that “courts are under a duty to give statutes operation and effect and should avoid construction that leaves a statute meaningless and of no effect.” The Court then held that the sale could not be invalidated for procedural errors because of ARS § 33-811C.

Although, *BT Capital* did not involve a borrower’s failure to obtain injunctive relief after receiving notice of an impending foreclosure sale, it did result in the Arizona Court of Appeals recognizing the strict application of the Statute. *BT Capital* provides judicial gloss on ARS § 33-811C and suggests a strict interpretation of the Statute and the continued use of the Statute to defeat a wide array of post-foreclosure claims asserted by borrowers.

ⁱ See *Cettolin v. GMAC*, 2010 WL 3834628 at *3 (D. Ariz., Sept. 24, 2010); *Spielman v. Katz*, 2010 WL 4038838 at *3 (D. Ariz., Oct. 14, 2010); *Coleman v. American Home Mortg. Servicing, Inc.*, 2010 WL 1268141 (D. Ariz., Mar. 30, 2010); *Jewell v. Countrywide Home Loans, Inc.*, 2012 WL 170942 (D. Ariz., 2012); and *Yares v. LaSalle Bank, National Association, As Trustee, Et. Al.*, CV-2010-2575 (D. Ariz, Jan. 19, 2012).

ⁱⁱ See *Martenson v. RG Financing*, 2010 WL 334648 (D. Ariz., Jan. 22, 2010), See also *Silving v. Wells Fargo Bank, NA*, 800 F.Supp.2d 1055 (D. Ariz., 2011).

ⁱⁱⁱ 228 Ariz. 188 (Ariz.App. Div. 1, 2011).