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AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

INVESTORS WARRANTY OF AMERICA, INC., an Iowa corporation,
Plaintiff/Appellee,

v.

ARROWHEAD BUSINESS CENTER, L.P., an Arizona limited partnership;
ELYSFA PROPERTIES, LLC, an Arizona limited liability company;
NEREO BAGATTO and JUDY BAGATTO, husband and wife; DELBERT
VOLK and EVELYN VOLK, husband and wife; PETRA LIEB and ERNST
LIEB, wife and husband, *Defendants/Appellants.*

No. 1 CA-CV 13-0255

FILED 07-22-2014

Appeal from the Superior Court in Maricopa County

No. CV2010-022978

The Honorable George H. Foster, Jr., Judge

AFFIRMED IN PART; REVERSED IN PART; REMANDED

COUNSEL

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MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Andrew W. Gould and Judge Peter B. Swann joined.

T H O M P S O N, Judge:

¶1 Arrowhead Business Center, L.P. and its general partner, Elysfa Properties, LLC (collectively, Arrowhead); as well as Nereo Bagatto and his wife, Judy Bagatto; Delbert Volk and his wife, Evelyn Volk; and Ernst Lieb and his wife, Petra Lieb (collectively, the Guarantors) appeal from the trial court's grant of summary judgment in favor of Investors Warranty of America, Inc. (Investors) and from the denial of a motion for new trial. For the following reasons, we affirm in part, reverse in part, and remand for further proceedings consistent with this decision.

FACTUAL AND PROCEDURAL HISTORY

¶2 In December 2004, Investors, through a predecessor in interest, loaned Arrowhead \$5,250,000 for the purchase of a commercial office building (Property) in Peoria, Arizona. The loan was secured by a promissory note, a deed of trust, and an absolute assignment of rents and leases (assignment of rents). The note was nonrecourse, limiting the lender's remedy upon default to recovery of the Property, but the note contained specific full recourse "carveout obligations" for accrued taxes and other damages.

¶3 The Guarantors guaranteed the loan up to \$350,000. Additionally, the Guarantors executed a carveout guarantee for expenses arising from any of the carveout obligations.¹

¶4 The deed and guarantee expressly stated that Arrowhead and the Guarantors agreed to "waive[] all provisions of A.R.S. § . . . 33-814 which might otherwise determine the Deficiency by the 'fair market value' of the collateral sold or by any other valuation in excess of such actual net purchase price." Arizona Revised Statutes (A.R.S.) section 33-

¹ Petra and Ernst Lieb executed only the carveout guarantee and were not included in the guarantee of the loan up to \$350,000.

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814 (2014)² provides that in a deficiency action, the borrower is entitled, upon request, to a hearing on the fair market value of the trust property at the date of the trustee's sale, and then to have that value deducted from the amount owed in determining the amount of the deficiency judgment. The carveout guarantee contained a similar albeit more general provision that stated the Guarantors "waive any right to assert that the amount paid for the Property at a lawfully conducted judicial or non-judicial foreclosure sale is less than the value of the Property."

¶5 The note mandated monthly payments on the first day of each calendar month from January 2005 through November 2009, with a loan maturity date of December 1, 2009. Arrowhead failed to pay the loan balance on the maturity date and defaulted on the loan. A Receiver was appointed and took possession of the property until Investors purchased the property at a trustee's sale for a bid of \$3,755,000.³

¶6 Investors filed a complaint against Arrowhead and the Guarantors (collectively, Appellants) for breach of the note, guarantee, and carveout guarantee. Specifically, Investors claimed Appellants were liable for \$163,780.40 in expenses incurred under the following carveout obligations of the note: misappropriation of tenant security deposits, failure to pay property taxes, and for the out-of-pocket expenses incurred in enforcing the loan documents following default. Investors also sought to recover \$350,000 from the Guarantors for Arrowhead's default on the loan, plus attorneys' fees and applicable interest.

¶7 Investors filed a motion for summary judgment arguing it was entitled to judgment as a matter of law because Appellants defaulted on their obligation to pay under the note and guarantees. Investors also argued that through the express language in the deed and guarantees, Appellants waived their rights under A.R.S. § 33-814 to have the court's fair market value determination govern the amount of the loan deficiency; and therefore, the purchase price at the trustee's sale was solely determinative of the value of the property. Appellants contested the motion, arguing that their waiver of a fair market value determination

² Absent material revision after the relevant date, we cite a statute's current version.

³ At the time of the trustee's sale the remaining balance due on the loan was \$4,888,051.

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was invalid and unenforceable because deficiency liability must be determined in accordance with A.R.S. § 33-814 (A).

¶8 Appellants filed a cross-motion for summary judgment, asserting that Investors' claims on the guarantee and carveout guarantee both fail as a matter of law. Appellants argued that Investors' acceptance of late payment and penalties waived any claim of default under the guarantee; and the guarantee expired prior to Arrowhead's default on December 2, 2009. Additionally, Appellants contended that they were not liable for the carveout obligations in the note and under the carveout guarantee because the undisputed facts were: 1. Arrowhead had the right to use tenant security deposits for normal operating expenses; 2. There were sufficient funds in the escrow account to cover the 2010 property taxes; and 3. The expenses incurred by Investors to enforce the loan documents occurred after Arrowhead offered to transfer the Property to Investors.

¶9 The trial court denied Appellants' cross-motion for summary judgment and granted Investors' motion for summary judgment, ruling there were no issues of material fact, and as a matter of law, Appellants defaulted under the guarantees. The trial court also found that Appellants waived their right to obtain an appraisal and to have the trial court determine the fair market value of the Property. The trial court noted that "nothing in A.R.S. § 33-814 indicates that its provisions may not be waived."

¶10 Appellants filed a motion for a new trial arguing that the trial court erred in its grant of summary judgment because a prospective contractual waiver of a fair market value determination was implicitly prohibited by law. The trial court denied Appellants' motion for a new trial and entered judgment granting Investors' motion for summary judgment, denying Appellants' cross-motion for summary judgment, and granting Investors' attorneys' fees and costs.

¶11 Arrowhead and the Guarantors timely appealed the judgment and denial of their motion for a new trial. We have jurisdiction pursuant to A.R.S. § 12-2101(A) and 5(A) (Supp. 2013).

DISCUSSION

¶12 Appellants argue that the trial court erred in granting Investors summary judgment because: 1. Borrowers and guarantors cannot prospectively waive the statutory right to a fair market value determination required by A.R.S. § 33-814(A) and (C); 2. The Guarantors'

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liability under the guarantee expired prior to Arrowhead's default; and 3. The evidence does not support a default of the note's carveout obligations and of the carveout guarantee. A court shall grant summary judgment when "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a).⁴ Summary judgment should be granted "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). We view the facts and any inferences in the light most favorable to the party against whom judgment was entered. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996). We determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000).

I. Waiver of Fair Market Value

¶13 We agree that the trial court erred in ruling Appellants waived their right to a fair market value determination. Although most rights may be waived, "a statutory right may not be waived where 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). Whether Appellants' contractual waiver of their right to a fair market value determination under A.R.S. § 33-814(A) is expressly or impliedly prohibited is a question of statutory interpretation that we review de novo. See *Haag v. Steinle*, 227 Ariz. 212, 214, ¶ 9, 255 P.3d 1016, 1018 (App. 2011).

¶14 Our court recently decided this exact issue in *CSA 13-101 Loop, LLC v. Loop 101, LLC*, 233 Ariz. 355, 312 P.3d 1121 (App. 2013) (*Loop 101*). In *Loop 101*, the lender sought a deficiency judgment against the borrower and guarantors after their default on a loan for commercial property. 233 Ariz. at 358, ¶ 4, 312 P.3d at 1124. The lender argued that the borrower and guarantors had waived - through express language in the deed of trust and guarantee - their right to have a judicial determination of the property's fair market value under A.R.S. § 33-814(A). *Id.* at 359, ¶ 12, 312 P.3d at 1125. Our court held that although

⁴ Former Arizona Rule of Civil Procedure 56(c) has been renumbered as 56(a), substituting the word "dispute" for "issue".

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A.R.S. § 33-814(A) does not expressly prohibit borrowers and guarantors of commercial property from waiving the fair market value determination, the statutory scheme implies the same prohibition. *Id.* at 360, ¶ 16, 312 P.3d at 1126. The court noted that the legislature created a detailed statutory scheme balancing a lender's benefit of a fast extrajudicial remedy with a borrower's need for protection. *Id.* Section 33-814(A) furthers that scheme by "protecting the borrower from inequitable deficiencies that may arise if the property is sold below market price." *Id.* at ¶ 17; *see also Baker v. Gardner*, 160 Ariz. 98, 101, 770 P.2d 766, 769 (1988) (stating the primary purpose of A.R.S. § 33-814 is to protect borrowers from "artificial deficiencies" that could arise in forced sales). We agree and find that A.R.S. § 33-814(A) does not permit a borrower or guarantor of commercial or residential property to contractually waive its right to a fair market value determination. *See Loop 101*, 233 Ariz. at 362, ¶ 24, 312 P.3d at 1128.

¶15 Investors points out that despite numerous legislative amendments to A.R.S. § 33-814(A) and explicitly prohibiting contractual waivers in other statutes, the legislature chose not to add language expressly prohibiting parties from waiving the right to a judicial determination of fair market value. Investors argues that the legislature must not have identified any compelling reason to preclude borrowers and guarantors on a commercial loan from waiving their right to have the court's fair market value determination govern the amount of the deficiency. We disagree with Investors' contention that the absence of language prohibiting a waiver of the statutory rights set forth in A.R.S. § 33-814 is determinative of legislative intent. If a statute's language is not clear and unambiguous, we determine legislative intent from "the statute's context; its language, subject matter, and historical background; its effects and consequences; and its spirit and purpose." *Hayes v. Continental Ins. Co.*, 178 Ariz. 264, 268, 872 P.2d 668, 672 (1994).

¶16 This court has repeatedly found that the primary purpose of A.R.S. § 33-814 is to "prohibit a creditor from seeking a windfall by buying property at a trustee's sale for less than fair market value." *First Interstate Bank of Ariz., N.A. v. Tatum & Bell Ctr. Assocs.*, 170 Ariz. 99, 103, 821 P.2d 1384, 1388 (App. 1991). Section 33-814(A) "does not contemplate that the purchase price will necessarily reflect the fair market value of the property" given the nature of a trustee's sale. *MidFirst Bank v. Chase*, 230 Ariz. 366, 368, ¶ 7, 284 P.3d 877, 879 (App. 2012). It is clear that by adopting the detailed statutory procedure set forth in A.R.S. § 33-814, which allows a borrower to request a court determination of the property's fair market value as an offset against any deficiency, the

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legislature intended to place the risk of a below market sale price with the lender and not the borrower. *In re Krohn*, 203 Ariz. 205, 212, ¶ 28, 52 P.3d 774, 781 (2002); *Parkway Bank & Trust Co. v. Zivkovic*, 232 Ariz. 286, 290, ¶ 17 n.4, 304 P.3d 1109, 1113 n.4 (App. 2013). Additionally, the legislative history of A.R.S. §33-814(A) clearly shows that the legislature has expanded fair market value protections to other areas of foreclosure and provided guarantors with the same protections as judgment debtors. *Loop 101*, 233 Ariz. at 362, ¶ 24, 312 P.3d at 1128; *see also Mid. Kansas Fed. Sav. & Loan Ass'n of Wichita v. Dynamic Dev. Corp.*, 167 Ariz. 122, 128, 804 P.2d 1310, 1316 (1991) (stating that although the legislature's primary intent in A.R.S. § 33-814 was to protect homeowners rather than commercial developers, the legislative history shows no intent to excluded other types of mortgagors). We thus conclude that the statutory scheme of A.R.S. § 33-814(A) prohibits a contractual waiver of the right to a fair market value determination of commercial property.

¶17 Because Arrowhead and the Guarantors were entitled to a determination of the fair market value of the Property, the trial court erred in finding that Investors was entitled to a deficiency judgment in the amount sought in its summary judgment motion.

II. Liability under the Guarantee

¶18 Appellants next argue that the trial court erred in finding that as a matter of law, the Guarantors were liable under the guarantee for Arrowhead's default. Appellants contend that the guarantee expired by its own terms at the end of the "sixtieth loan month" on November 30, 2009, and their default on the loan did not occur until Arrowhead's failure to pay the principal balance on December 1, 2009. Because the default occurred after the expiration of the guarantee, Appellants argue that the guarantee is unenforceable for the purpose of recovering a deficiency.

¶19 The nature and extent of the Guarantor's liability depends upon the terms of the guarantee. *See Tenet HealthSystem TGH, Inc. v. Silver*, 203 Ariz. 217, 219, ¶ 7, 52 P.3d 786, 788 (App. 2002). We interpret a guarantee to give effect to the parties' intent, and construe the contract in its entirety. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 153, 854 P.2d 1134, 1139 (1993). Although guarantees are generally construed to limit a guarantor's liability, we must give effect to its clear and unambiguous terms. *Consol. Roofing & Supply Co. v. Grimm*, 140 Ariz. 452, 455, 682 P.2d 457, 460 (App. 1984).

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¶20 Under the guarantee, the Guarantors agreed as follows:

The Guarantors hereby unconditionally guarantee to the Lender that all payment obligations of the Borrower, up to an aggregate total amount of \$350,000 . . . will be paid in the amounts, at the times and in the manner set forth in the Loan Documents, and that all of the terms, covenants and conditions required in the Loan Documents to be kept, observed or performed by the Borrower will be performed at the time and in the manner set forth in the Loan Documents.

. . . .

If no default occurs within the first sixty (60) loan months, this Guarantee shall expire by its terms. In the event an event of default does occur within the first 60 loan months, then this Guarantee shall not be discharged and the Guarantors shall not be released from liability until all Guaranteed Obligations have been satisfied in full.

¶21 The Guarantors agreed to guarantee “all payment obligations” of Arrowhead under the note, although the overall liability was capped. The note required fifty-nine monthly installment payments beginning on January 1, 2005, with a final sixtieth balloon payment⁵ of the entire unpaid principal balance on December 1, 2009. The foregoing indicates that the parties intended that the sixty month duration of the guarantee be coterminous with the loan. In order to harmonize and give effect to the guarantee as a whole, it must be read to provide that Investors may collect the unpaid payment, up to the capped amount, from the Guarantors. See *Provident Nat’l Assurance Co. v. Sbrocca*, 180 Ariz. 464, 465, 885 P.2d 152, 153 (App. 1994) (stating that we interpret a contract so that every part is given effect and each section is read in relation to each other to bring harmony between all parts of the contract); see also *First Credit Union v. Courtney*, 233 Ariz. 105, 110, ¶ 23, 309 P.3d 929, 934 (App.

⁵ A balloon payment is defined as “[a] final loan payment that is usu[ally] much larger than the preceding regular payments and that discharges the principal balance of the loan.” Black’s Law Dictionary 1165 (8th ed. 2004).

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2013) (stating one provision of a contract must not be interpreted to render a related provision meaningless). Accordingly, we reject Appellants' interpretation of the guarantee.

¶22 In their Reply Brief, Appellants also assert that even if the loan extended through December 1, 2009, there could be no default until December 2, 2009, and that again, there was no event of default before the expiration of the guarantee. We disagree. The contract contemplated that if at the end of the day on December 1, 2009 the final payment was not made, the guarantee would not expire "until all Guaranteed Obligations have been satisfied in full." Because Arrowhead did not repay all the amounts due under the note, the Guarantors are liable for the deficiency up to the maximum amount set forth in the guarantee.⁶ Thus, we affirm the trial court's grant of summary judgment in favor of Investors on the issue of the Guarantors' liability under the guarantee.

III. Liability for Carveout Obligations in the Note and under Carveout Guarantee

¶23 Appellants also argue that the trial court erred in finding that as a matter of law, Appellants were liable for the carveout obligations in the note and carveout guarantee for expenses resulting from misappropriated tenant security deposits, unpaid property taxes, and out-of-pocket expenses incurred in the enforcement of the loan documents. Reviewing these issues de novo, we find the trial court did not err in its grant of summary judgment in favor of Investors. *See Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003) (interpretation of contract is a question of law review de novo).

⁶ We also disagree with Appellants' argument that their belief that the loan would likely be extended beyond the sixty month term of the guarantee proved that all parties intended the guarantee to expire prior to the final payment on the maturity date. Even assuming the Guarantors thought the loan would be extended in the future, the Guarantors have guaranteed all payment obligations of Arrowhead at the time set forth in the loan documents. Arrowhead defaulted in its final payment to Investors as required in the note, and consequently, the Guarantors remain liable for the deficiency up to the amount set forth in the guarantee.

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A. Liability for Misappropriation of Security Deposits

¶24 Appellants contend that Arrowhead was authorized to utilize any collected tenant security deposits as “rents” for any lawful purpose, including its day-to-day operations; and therefore, the trial court erred in not granting summary judgment in favor of Appellants on this issue. The deed and assignment of rents expressly included security deposits in its definition of rents. Section 4 of the assignment of rents granted Arrowhead a conditional license to “collect the Rents, other than those Rents paid more than one month in advance.” While Arrowhead was authorized to “use the Rents so collected for any lawful purpose which is consistent with the Borrower’s ongoing performance of its obligations under the Loan Documents . . . [a]ny rents excluded from the scope of this license shall be trust funds for the benefit of the Lender.” Because tenant security deposits clearly constitute rent paid more than one month in advance, Arrowhead was required to hold the security deposits in trust for Investors.

¶25 We do not agree with Appellants’ argument that the language in sections 5.2 and 7.7 of the assignment of rents which excludes “security deposits” from “rent collected more than one month in advance” is evidence that security deposits should likewise be excluded from the advance rents required to be held in trust for the lender’s benefit. Section 5.2 of the assignment of rents granted Arrowhead a license to act as a landlord under any lease with certain exclusions, such as the acceptance “of any rent delivered more than one month in advance of the related period (other than a security deposit).” This provision merely granted Arrowhead the ability to collect security deposits from tenants, it did not eliminate the requirement that the security deposits were to be held in trust for the lender. Additionally, in section 7.7 of the assignment of rents, Arrowhead simply attested that it had not received any advance rents from tenants, with the exception of security deposits. It is clear that based on the terms of the assignment of rents, the parties intended tenant security deposits to be held in trust for the lender so that in the event of a default, Investors would have available funds for the reimbursement of tenant security deposits that were not actually received by Investors.⁷

⁷ Appellants’ citation to A.R.S. § 33-1321(G) (2014) is not relevant to this issue. This statute applies only to residential landlords and maintains the requirement that all refundable security deposits be returned to the tenant at the end of the tenancy.

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¶26 The record shows, and Appellants concede on appeal, that Arrowhead applied all tenant security deposits toward business expenses of the Property rather than leaving the security deposits in a trust account for Investors. Additionally, Appellants admit that the carveout obligations of the note and carveout agreement required Appellants to indemnify Investors for “actual losses associated with the misappropriation of tenant security deposits.” Accordingly, the trial court did not err in finding that as a matter of law, Appellants were liable under the note and carveout agreement for misappropriated security deposits.

B. Liability for Unpaid Property Taxes

¶27 Appellants next argue that the trial court erred in finding Appellants liable under the carveout obligations in the note and under the carveout guarantee for Arrowhead’s failure to pay the Property’s prorated 2010 property taxes. Appellants contend that because the Receiver paid the 2009 property taxes from Arrowhead’s operating account rather than the escrow fund, sufficient funds remained in the escrow fund to cover Appellants’ liability for the payment of 2010 property taxes. We will uphold a trial court’s findings of fact if supported by substantial evidence, but we review conclusions of law de novo. *See Sholes v. Fernando*, 228 Ariz. 455, 458, 268 P.3d 1112, 1115 (App. 2011) (citations omitted).

¶28 The deed required Arrowhead to make a monthly escrow payment into an escrow fund, which was to be used by Investors to pay all property taxes levied against the Property. The record shows that Arrowhead’s last payment into the escrow fund occurred in November 2009, leaving a balance of \$73,822.42 to be applied to the 2009 property taxes. The 2009 property taxes amounted to \$74,082.39, which the Receiver paid from the Property’s operating cash flow rather than the escrow fund. After the trustee sale, Investors applied the amount remaining in the escrow fund to offset the amount taken from the collected rents for the payment of the 2009 taxes.⁸ Investors then paid

⁸ The assignment of rents did not, as Appellants’ contend, require Investors to apply the collected rents to the payment of 2010 taxes before using the rents to reimburse the amount expended from the operating account. Rather, the assignment of rents expressly authorized Investors’ reimbursement, stating that rents collected by the lender shall be applied first to the payment of late charges, and then to “the repayment of any sums advanced by the Lender for the payment of any insurance premiums, taxes . . . or charges against the Real Property.”

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\$47,591.96 for the 2010 property taxes, prorated to the date of the trustee's sale. The note and carveout guarantee imposed full-recourse liability on Appellants for the "failure to pay property taxes, assessments or other lienable impositions." Arrowhead failed to remit payment for the accrued 2010 property taxes as required by the deed, note and carveout agreement. They cannot, as Appellants contend, avoid liability for the payment of the accrued 2010 property taxes by using the funds paid by Arrowhead for the 2009 property taxes. The trial court did not err in finding that as a matter of law, Appellants were liable for all unpaid property taxes that accrued up to the date of the trustee's sale.

C. Liability for Expenses Resulting from Enforcement of Loan

¶29 Lastly, Appellants argue that the trial court erred in finding them liable under the carveout obligations of the note and under the carveout guarantee for the expenses incurred by Investors during the enforcement of the loan documents. Appellants contend that because Arrowhead was fully cooperative in the foreclosure process, stipulated to the appointment of a Receiver, and offered to provide Investors with a deed in lieu of the foreclosure, they are not liable for the expenses Investors' incurred during the receivership and trustee sale.

¶30 The carveout obligations in the note and carveout guarantee obligated Appellants to pay "the out-of-pocket expenses of enforcing the Loan Documents following [d]efault, not including expenses incurred after the Borrower has agreed in writing to transfer the Real Property to the Lender by the Lender's choice of either an uncontested foreclosure or delivery of a deed in lieu of foreclosure." Under the deed, Investors was authorized to file for the appointment of a Receiver of the Property, and Arrowhead expressly and "irrevocably . . . consent[ed] to such an appointment." There is no evidence in the record that Arrowhead delivered a deed in lieu of foreclosure or agreed in writing to transfer the Property to Investors through an uncontested foreclosure. Appellants' general compliance in the foreclosure process and stipulation to Investors' filing for a court appointed Receiver do not amount to a written agreement by Arrowhead to transfer the Property to Investors.

¶31 Additionally, we reject Appellants' assertion that e-mail communications from Arrowhead's attorney discussing a deed in lieu of foreclosure was sufficient to preclude Appellants from liability for

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Investor's expenses incurred in the receivership and foreclosure process.⁹ This evidence of Arrowhead's general willingness to offer a deed in lieu of foreclosure falls short of a written contractual agreement by Arrowhead to transfer the Property to Investors. See *Contempo Constr. Co. v. Mountain States Tel. & Tel. Co.*, 153 Ariz. 279, 281-82, 736 P.2d 13, 15-16 (App. 1987) (finding that informational statements which did not request a promise or performance in return could not be construed as an offer); See also Restatement (Second) of Contracts § 24 (1981) ("An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."). The e-mail indicated that Arrowhead hoped to keep the Property, and merely suggested, in contingent fashion, that if that failed, a voluntary foreclosure could occur. This did not amount to an agreement.

¶32 Accordingly, the trial court did not err in finding Appellants liable under the note and carveout guarantee for expenses incurred by Investors in the enforcement of the loan documents.

CONCLUSION

¶33 For the foregoing reasons, we affirm the summary judgment in favor of Investors as to Appellants' liability under the guarantee, the carveout obligations of the note, and the carveout guarantee. We reverse the summary judgment as to Appellants' waiver of a right to a fair market value determination and remand for further proceedings consistent with this decision. We also reverse the deficiency judgment and award of attorney's fees and costs below as premature. On remand, the trial court may award fees and costs after a fair market value hearing and deficiency determination. See, e.g., *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 204, ¶ 37, 165 P.3d 173, 182 (App. 2007). As neither party has

⁹ In response to Investors' filing for the appointment of a receiver, Arrowhead's attorney delivered an e-mail to the attorney for Investors, stating: "My client would like to keep the property if it can get an extension of the loan, but if the lender wants the property back there should be no obstacle to a deed in lieu, thus making the receivership a needless expense."

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yet prevailed in this action, we decline to make any award of attorneys' fees.



Ruth A. Willingham · Clerk of the Court
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