IN THE
SUPREME COURT OF ARIZONA

Tang Investment Company, LLC, an Arizona limited liability company, Petitioner/Appellee, v. Jose R Aroca and Kirstin Aroca, husband and wife, Respondent/Appellants.	Arizona Supreme Court No CV24-_____ Court of Appeals Division Two No. 2 CA-CV 2023-0046 Pinal County Superior Court of Arizona S1100CV202200940

PETITIONER TANG INVESTMENT COMPANY, LLC'S PETITION FOR REVIEW

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INTRODUCTION

This case presents a novel question of whether this Court's decision in *Provident Mut. Bldg.-Loan Ass'n v. Schwertner,* 15 Ariz, 517, 140 P. 495 (1914) is still valid law. In *Provident*, *supra*, this Court relied on equity in holding that in order to remove a mortgage lien, the borrower must first pay the debt off (even if the debt is barred by the statute of limitations).

The Court of Appeals rejected *Provident* (and the many decisions that followed it) based on A.R.S. § 12-1104 (enacted in 1941) which allows for a lien to be removed *if* it is barred by statute of limitations. This statute does not define when a lien "expires" (or when it is barred, satisfied, reconveyed, released or otherwise discharged). The Court of Appeals held that the lien "has been discharged" and the Arocas are entitled to judgment under A.R.S. § 12-1104 in their action to quiet title.

ISSUE

The sole issue is whether the 1914 *Provident* decision is binding law?

There is one additional issue presented to, but not decided by, the Court of Appeals that this Court may need to decide if it grants review.

> Is the holding in *Provident* (equity requires a borrower to pay off a lien to remove it) modified by A.R.S. § 33-714 (enacted in 2002) which defines when a lien "expires" (meaning "satisfied, reconveyed, released or otherwise discharged")?

Under A.R.S. § 33-714(A), a lien expires ten years after its maturity date or 50

years after the date the lien was recorded if its maturity is not ascertainable from the county recorder's records.

BACKGROUND

The factual background is simple, has never been disputed, and the Court of Appeals Opinion at ¶ 2 correctly summarized in:

> In 2007, the Arocas executed a promissory note and deed of trust wherein they promised to pay Tang $40,000 for value received, secured by real property in Pinal County owned by the Arocas. The terms and conditions of the note required the Arocas to make semi-annual, interest-only payments commencing in 2008, with the entire unpaid balance due and payable on April 30, 2012. Tang recorded the deed with the Pinal County Recorder's Office. The Arocas made interest-only payments on the note for one year, but then stopped making payments and subsequently defaulted on the note in 2012. Tang failed to initiate collection proceedings or bring any action on the underlying debt for the next ten years.

I. Trial Court Proceedings.

Aroca filed a complaint to quiet title and Tang responded with a motion to dismiss. Index of Record on Appeal ("IRA") 3, 15. The trial court by an order granted Tang's motion to dismiss and entered final judgment that included an award of attorneys' fees in favor of Tang. IRA 23 and 1.

II. Court of Appeals Decision.

The Court of Appeals reversed the trial court in its Opinion filed January 31, 2024. See Appendix A. The Court concluded that Tang's deed of trust was "discharged" (because an action on the underlying note would be barred by the

statute of limitations).

In the Opinion, the Court of Appeals concluded:

> "… because Tang's recorded deed of trust is barred by limitation, the lien has been discharged and the Arocas are entitled to judgment under § 12-1104 in their action to quiet title." *Id.* @ ¶ 16.

In support of this conclusion, the Court of Appeals stated:

> Tang argues that because a quiet title action is an action in equity, under equitable principles, the Arocas are not entitled to that relief until and unless they pay off their debt, even though it is barred by the statute of limitations. *See Provident Mut. Bldg.-Loan Ass'n v. Schwertner*, 15 Ariz. 517, 518-519 (1914). However, in 1941 the legislature enacted A.R.S. § 12-1104, which provides that in a quiet title action: "If it is proved that the interest or lien or the remedy for enforcement thereof is barred by limitation … plaintiff shall be entitled to judgment barring and forever estopping assertion of the interest or lien in or to or upon the real property adverse to plaintiff." § 12-1104(B). *Id.* @ ¶ 15.

Appellee filed a Motion to Reconsider on February 15, 2024, which was denied on February 20, 2024.

REASONS TO GRANT REVIEW

This Court should grant review for the following reasons:

1. Determining when (if at all) an unpaid lien should be removed from title is an important statewide issue of law that should be decided by this Court.

2. This Court's 1914 decision in *Provident* has been binding precedent, followed in many cases, which the Court of Appeals may not disregard.

3. In Arizona, equity still requires a borrower to pay off a note (even if it is barred by the statute of limitations) to have a lien removed.

4. *Provident* should be modified to provide that a borrower must pay off a note to have the lien removed until it expires under A.R.S. § 33-714.

LEGAL ARGUMENT

I. *PROVIDENT* IS STILL BINDING AND EQUITY REQUIRES THAT AROCA PAY THE DEBT IN ORDER TO REMOVE THE LIEN.

This Court should confirm that *Provident* is still binding law and not altered by A.R.S. § 12-1104 (adopted in 1941).

In *Provident, supra* the plaintiff also filed an action to clear clouded title. Although the statute of limitations barred filing suit on the debt, the Arizona Supreme Court held that the statute of limitations did "not *extinguish or satisfy* the debt . . ." *Id. at 517 (emphasis added)*. The statute of limitations is "a shield and not a sword" for the debtor. *Id*. This Court emphasized the issue of equity:

> The maximum that 'he who seeks equity must do equity' voices a just and universal rule in determining the equitable rights of suitors, and should always be applied in cases like this. The plaintiff seeks equity. They must do equity. Every man should pay his just debts. It is right that he should do so. The fact that he may not be coerced to discharge them by legal means affects only the legal character of his obligation. It does not alter the primary fact that he owes an obligation which in equity and good conscience he should pay. *Id*. at 519.

Thus, this Court held that in order to require the removal of the defendant's mortgage lien, the plaintiff must pay the debt. *Id*. at 520.

Following *Provident*, Arizona law has long recognized that even if the statute of limitations has expired on the ability to sue on a note, a lien on property securing that debt is not invalid, and the statute of limitations does not extinguish the lien if the balance remains outstanding.

1941: *Farrell v. West*, 51 Ariz. 491, 491 (1941) (judgment to quiet title may only be rendered upon payment by the plaintiff of any remaining mortgage balance or lien, "though it be barred by limitation");

1977: *Best Fertilizers of Ariz., Inc. v. Burns*, 116 Ariz. 492, 493 (1977) (when debtor completely satisfies the debt, it is extinguished and the mortgage discharged);

1983: *De Anza Land and Leisure Corp. v. Raineri*, 137 Ariz. 262, 266 (App. 1983) (recognizing that a statutory bar to enforcement of the debt is not equivalent to its extinguishment);

1985: *Stewart v. Underwood*, 146 Ariz. 145, 148 (App. 1985) (rejecting debtor's argument that mortgage was rendered "null and void" because personal debt discharged in bankruptcy; holding discharge did not extinguish debt, but only barred subsequent actions against debtor personally).

2014: *Manicom v. CitiMortgage, Inc*., 236 Ariz. 153, 336 P.3d 1274 (App. 2014) held in 2014 that the 1914 *Provident* decision is still binding. M*anicom* was decided long after the 1941 enactment of A.R.S. § 12-1104.

The *Manicom* decision recognized that "since our early statehood, we have followed the rule that the statutory action to quiet title cannot be sustained as against a mortgage debt confessedly unpaid", and held:

> [**The court of Appeals] is bound by our supreme court's decision in *Provident Mutual Building–Loan Ass'n v. Schwertner*, 15 Ariz. 517, 140 P. 495 (1914). In that case, the court held that when a property owner brings suit to remove a cloud on his title caused by an unsatisfied mortgage from his predecessor, he first must pay off the predecessor's debt.** *Id*. at 517, 519, 140 P. at 495, 496. The court reasoned that "equity will not grant relief, except upon condition that the debtor pay or tender payment of the debt secured." *Id*. at 519, 140 P. at 496. Thus, since our early statehood, we have followed the rule that "the statutory action to quiet title cannot be sustained as against a mortgage debt confessedly unpaid." *Id*.; accord *Farrell v. West*, 57 Ariz. 490, 491, 114 P.2d 910, 911 (1941); *Sec. Trust & Sav. Bank v. McClure*, 29 Ariz. 325, 333, 241 P. 515, 517 (1925). While we may be inclined to qualify this statement, making an equitable exception for situations in which the successor to a mortgagor has paid money for the property that could have satisfied the undiscovered debt, it is the role of our supreme court, not this court, to limit or modify the principle announced in *Schwertner* to accommodate such circumstances. *See State v. Bejarano*, 219 Ariz. 518, ¶ 6, 200 P.3d 1015, 1017 (App. 2008) **("[W]e may not disregard or modify the law as articulated by the Arizona Supreme Court."**). *Id* at ¶34 (*emphasis added*).

2017: *RCBT Holdings, LLC v. CIT Bank, N.A. 2017 WL 173911 (No. 1 CA-CV 16-0177* (2017)).[1] ("…RCBT cites no authority supporting its claim that if the debt is barred by the statute of limitations, thereby precluding a trustee's sale as a remedy available to CIT, see A.R.S. § 33-816, the deed of trust is rendered "null and void." Indeed, the case law dictates otherwise. *See De Anza Land and Leisure Corp. v. Raineri,* 137 Ariz. 262, 266 (App. 1983); *Schwertner,* 15 Ariz. at 518[2]; *cf. Best Fertilizers of Ariz., Inc. v. Burns,* 116 Ariz. 492, 493 (1977); *Stewart v. Underwood,* 146 Ariz. 145, 148 (App. 1985)" (case descriptions omitted).

2018: *Andra R Miller Designs LLC v. US Bank NA,* 244 Ariz. 265, 269, ¶ 11 (App. 2018) (A time barred debt is not extinguished).

The 1914 decision in *Provident, supra,* should still be binding over 100 years later. Further the Court of Appeals Opinion never mentioned *Manicom, supra* or even tried to distinguish that case and its progeny.

II. A.R.S. § 12-1104 DID NOT CHANGE THE LAW IN ARIZONA.

A.R.S. § 12-1104 does not define when a lien "expires" (or is satisfied, reconveyed, released or otherwise discharged). This statute merely allows for a lien to be removed if it is barred by limitation:

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[1] This is a Memorandum Decision being cited under S. Ct. Rule 111(c)(1)(C) for persuasive value because of the factual similarities and the citations to controlling published decisions.

[2] *Provident Mut. Bldg.-Loan Ass'n v. Schwertner,* 15 Ariz. 517, 140 P. 495 (1914).

> B. If it is proved that the *interest or lien or the remedy for enforcement thereof is barred by limitation*, or that plaintiff would have a defense by reason of limitation to an action to enforce the interest or lien against the real property, the court shall have jurisdiction to enter judgment and plaintiff shall be entitled to judgment barring and forever estopping assertion of the interest or lien in or to or upon the real property adverse to plaintiff. (*emphasis added*).

In this case, there was never any proof that the Tang DOT or remedy for enforcement is barred by any statute of limitation. It is a *suit on the note* that is barred by the six-year statute of limitations. Under *Provident*, the Tang DOT remains a valid lien until the note is satisfied or at least until the DOT expires under A.R.S. § 33-714 (discussed below).

A.R.S. § 12-1104 did not change the law in Arizona. Most of the Arizona court decisions discussed in Section I above were decided after the 1941 enactment of A.R.S. § 12-1104 and agreed that *Provident* is still valid law.

III. *PROVIDENT* MAY BE ALTERED BY A.R.S. § 33-714, WHICH EXPRESSLY DEFINES WHEN AN UNPAID DEED OF TRUST (DOT) "EXPIRES".

A.R.S. § 33-714(A) was enacted in 2002 and provides that a lien expires 10 years after its maturity date (or 50 years after the date the lien was recorded if its maturity cannot be ascertainable from the county recorder's records).

33-714. Expiration of mortgage and deed of trust; applicability.

> A. The lien of any mortgage or deed of trust on any real property that is not otherwise satisfied or discharged expires at the later of the following times:

> 1. If the final maturity date or the last date fixed for payment of the debt or performance of the obligation is ascertainable from the county recorder's records, ten years after that date.
>
> 2. If the final maturity date or the last date fixed for payment of the debt or performance of the obligation is not ascertainable from the county recorder's records or if there is no final maturity date or last date fixed for payment of the debt or performance of the obligation, fifty years after the date the mortgage or deed of trust was recorded…
>
> C. **Expiration of the lien of a mortgage or deed of trust pursuant to this section is equivalent for all purposes to a satisfaction, reconveyance, release or other discharge of the lien.** (*emphasis added*).

This statute defines the "expiration" of a lien as being "equivalent for all purposes to a satisfaction, reconveyance, release or other discharge of the lien".

The Tang DOT does not identify a final maturity date. IRA3, Ex 1. Therefore under A.R.S. § 33-714(A)(2), the DOT expires in October 2057 (50 years after the date the DOT was recorded).

A.R.S. § 33-714(A) was enacted after when *Provident* was decided. Provident may need to be qualified to provide that a borrower must pay off a debt in order to have an unexpired lien removed.

IV. SECURED CREDITORS HAVE ALWAYS HAD THE RIGHT TO ELECT THEIR REMEDY: COLLECT ON THE DEBT, OR FORECLOSURE.

A.R.S. § 33-714 preserves the remedy of foreclosure for an extended period. There is no ambiguity in *Provident* or A.R.S. § 33-714. The Opinion, however,

under the guise of assuming arguendo that an ambiguity exists resorts to legislative history (Op. at ¶ 14). That should not be permitted. Only the Legislature may address (or modify) A.R.S. § 33-714 and only this Court may modify *Provident*.

V. PETITIONER IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES.

This matter arises under contract and Petitioner should be awarded its attorneys' fees and costs pursuant to A.R.S. §12-341 and §12-341.01.

CONCLUSION

This Court should reverse the portion of the Court of Appeals Opinion holding that the Tang DOT has been discharged (Opinion at ¶¶ 15 and 16) (and its award of attorneys' fees). This Court should confirm that the 1914 *Provident* decision is binding. The Tang DOT remains a valid lien even if a different statute of limitations precludes an action on the note.

In Arizona, equity still requires a borrower to pay off the note to have the lien removed (until it expires under ARS § 33-714).

RESPECTFULLY submitted this 5th day of March, 2024.

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