



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**CSA 13-101 LOOP, LLC v. LOOP 101, LLC, et al.
CV-14-0029-PR**

PARTIES:

Petitioner/Plaintiff: CSA 13-101 Loop, LLC (“CSA”)

Respondents/Defendants: Loop 101, LLC (“Loop 101”); Paul S. Anton and Valerie J. Christie, husband and wife; Oscar E. Swanky and Helen L. Swanky, as Co-Trustees of the Oscar E. Swanky and Helen L. Swanky Revocable Family Trust, created July 19, 1997 (“Guarantors”)

FACTS:

Overview. This appeal arises out of the Court of Appeals’ affirmance of the superior court’s denial of CSA’s motion for summary judgment and its grant of Loop 101 and the Guarantors’ cross-motion for summary judgment, in a lawsuit filed by CSA to collect on a deficiency judgment. Both the superior court and the Court of Appeals ruled that Loop 101 and the Guarantors were not bound by a contractual waiver of their rights to a “fair market value” determination and credit granted by A.R.S. §§ 33-814(A).

Factual Background. In 2007, Loop 101 borrowed \$15.6 million from MidFirst Bank to build a commercial office building. Loop 101 gave MidFirst a promissory note secured by a deed of trust, and the Guarantors guaranteed the loan. The promissory note, the deed of trust and the guarantees all provided that the signatories waived any rights under A.R.S. § 33-814, including the right to a “fair market value” determination and credit under A.R.S. § 33-814(A).

In 2009, Loop 101 defaulted on the loan, and MidFirst initiated non-judicial foreclosure under the deed of trust. Just before the trustee’s sale, MidFirst assigned all of its rights under the loan and deed of trust to CSA. CSA then bought the office building at the trustee’s sale for \$6.15 million. That left a deficiency of about \$5 million on the loan.

In November 2009, CSA sued Loop 101 and the Guarantors for breach of the promissory note and the guarantees, and sought to recover the \$5 million deficiency on the loan. Loop 101 and the Guarantors counterclaimed and brought a third-party claim against MidFirst, alleging (among other things) that CSA set an “unreasonabl[y] low credit bid at the trustee’s sale.” CSA and MidFirst moved to dismiss the claim, arguing that the Loop 101 and the Guarantors had waived their statutory right to a “fair market value” determination.

The superior court denied the motion to dismiss, ruling that “[t]he parties cannot waive the rights protected by statute” and that “[t]he fair market value hearing will determine the value at the time of the sale.” After a two-day evidentiary hearing, the court issued a ruling that found that the property’s “fair market value” was \$12.5 million.

CSA then filed a summary judgment motion on its claims, arguing that Loop 101 and the Guarantors had waived their statutory right to have the court's "fair market value" determination govern the amount of the loan deficiency. Loop 101 and the Guarantors cross-moved for summary judgment, contending that no deficiency existed because the property's "fair market value" exceeded the amount of the debt.

In August 2011, the superior court entered a ruling denying CSA's summary judgment motion because it was untimely, reasoning that the motion should have been filed before the "trial" of the "fair market value" determination in August 2010. It also granted the cross-motion for summary judgment, reasoning that "[n]o deficiency exists based on the results of the fair market value hearing." Judgment was entered, leading to CSA's appeal to the Court of Appeals.

The Court of Appeals' Ruling. The Court of Appeals affirmed, ruling that Loop 101 and the Guarantors had not waived their right to a "fair market value" determination and credit under A.R.S. § 33-814(A).

The court noted that the statute did not explicitly bar contractual waivers of such rights, but contended that "[t]he statutory scheme implies the same prohibition." It explained that that in developing a more expeditious alternative to judicial foreclosure, the legislature "established a detailed statutory scheme that balances a lender's benefit of a quick extrajudicial remedy with a borrower's need for protection because the borrower is stripped of many of the protections" he or she would have in a judicial foreclosure. A.R.S. § 33-814(A) furthers that statutory scheme, the court reasoned, "by protecting the borrower from inequitable deficiencies that may arise if the property is sold below market price."

Given the nature and purpose of this protection, the court concluded that "[p]ermitting advance waivers" of rights under A.R.S. § 33-814(A) "would not only contradict the legislature's carefully-crafted statutory scheme, but it would also eliminate the only protection a borrower has under the scheme to challenge an artificial deficiency." It also found that the statute's legislative history supported its conclusion that the "fair market value" determination may not be waived. It traced the evolution of the statutory framework and provisions for non-judicial foreclosure from their inception in 1971 through 1990, when the statute at issue was last amended. That history, it concluded, "shows that the legislature expanded the fair market value protections to other areas of foreclosures and granted guarantors the same protections available to judgment debtors under § 33-814(A)."

Based on all this, the court concluded by "hold[ing] that the statutory scheme does not permit the fair market value protection under § 33-814(A) to be waived."

ISSUE:

Whether a commercial guarantor, represented by counsel, may contractually waive A.R.S. § 33-814(A) to induce a lender to make a \$15.6 million secured loan?

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