

I. INTRODUCTION

The trial court correctly determined that A.R.S. § 33-814(G) does not shield the Appellants (the “Guarantors”) from liability for the deficiencies on the business loans they personally guaranteed after the properties were sold at a non-judicial trustee’s sale. This Court should therefore affirm the trial court’s January 3, 2013 Judgment (the “Judgment”) that is the subject of this appeal. In addition, this Court should clarify the trial court’s Ruling Minute Entry (the “Minute Entry”) and confirm that while guarantors are free to waive any protections afforded to them by A.R.S. § 33-814 (the 90-days limitations period and the right to a fair market value hearing under certain circumstances), A.R.S. § 33-814(G) – Arizona’s anti-deficiency statute – does not apply to guarantors, including those in this case, regardless of the nature of the property at issue.

Inconsistent with Arizona law, the trial court’s Minute Entry states that “it appears that the anti-deficiency statute can preclude an action on a guaranty.”

[R.A. ___] Arizona’s anti-deficiency statute was meant to protect consumers, not residential developers. Indeed, the anti-deficiency statute was specifically intended to protect *homeowners* from further financial distress caused by a deficiency judgment following the sale of their home at a trustee’s sale. Arizona courts have construed the statute to also protect residential investment property and residential

property under construction if the *homeowner* can establish its intent to occupy a qualified anti-deficiency property.

If this Court were to now extend the protection to guarantors, the entire residential real estate market, including lenders, developers and homebuyers will greatly suffer. Arizona's residential construction industry and the banks that finance these residential construction projects will be particularly hard hit.

As the Arizona Supreme Court has recognized, residential construction loans are inherently much more riskier than other more traditional loans. *Altherr v. Wilshire Mort. Corp.*, 104 Ariz. 59, 61, 448 P.2d 859, 861 (1968) (“Construction loans . . . involve more complicated problems and higher risks than ordinary long-term loans.”). Because residential development loans involve such a heightened risk, banks very often require guaranties for those loans. If those guaranties are now rendered meaningless, Arizona banks will be forced to greatly restrict or even eliminate those loans. Such a restriction would have a devastating effect on Arizona's residential real estate market, which has just recently began to recover from the national real estate market crisis.

This Court should therefore clarify that the anti-deficiency protections afforded to homeowner consumers under A.R.S. § 33-814(G) do not also apply to guarantors or other commercial entities who are in the real estate development business as in any commercial venture, with potential profits comes potential risk.

II. ISSUES TO BE PRESENTED FOR REVIEW BY THIS COURT

1. Whether A.R.S. § 33-814(G), which was intended to protect homeowners, extends to guarantors of residential development loans who has made the business decision to accept the risks associated with residential developments.

2. If A.R.S. § 33-814(G) does extend to a guarantor of a residential development loans, whether a guarantor may expressly waive the protections under A.R.S. § 33-814(G).

III. LEGAL ARGUMENT

A. Arizona's Anti-Deficiency Statute Does Not Apply to Guarantors.

It is indisputable that the legislative intent behind the anti-deficiency statute is to protect a consumer who purchases a home for the purpose of living in it. *See, e.g., M & I Marshall & Ilsley Bank v. Mueller*, 228 Ariz. 478, 480, ¶ 9, 268 P.3d 1135, 1137 (App. 2011) (“The primary purpose of the Arizona anti-deficiency statutes is to protect “homeowners” from deficiency judgments—not to afford protection to commercial homebuilders.”).

However, Arizona has a long history of recognizing the separate interests and rights of the consumer versus the guarantor. In *Long v. Corbet*, 181 Ariz. 153, 159, 888 P.2d 1340, 1346 (App. 1994), this Court held that anti-deficiency statutes were not intended to protect the assets of a guarantor who did not own the residence given as security for a business loan and who did not have any other type

of interest in the property. *Id.* at 159, 888 P.2d at 1346. (affirming the argument that Arizona’s anti-deficiency statutes are “intended to protect home purchasers, not guarantors of loans made for business ventures”).

Indeed, in *Security Savings and Loan Ass’n v. Milton*, 171 Ariz. 75, 77, 828 P.2d 1216, 1218 (App. 1991), this Court demonstrated that the anti-deficiency statutes are broadly construed in favor of holding guarantors liable under the terms of the guaranties they voluntarily executed. In that case, the Court held that the anti-deficiency statute did not prohibit the lender from recovering attorneys’ fees from the guarantor, as provided in the guaranty, note, and deed of trust, in a deficiency action, even though attorneys’ fees are not among the items enumerated in the statute that the deficiency judgment may include. *Id.*

In fact, as this Court and other Arizona courts have long recognized, a legislative intent of A.R.S. § 33-814 is to *protect* lenders by allowing for the enforcement of guaranties in residential loans. The legislative history of the statute confirms this intent:

Testimony before the House Commerce Committee suggests that the purpose of the 1988 bill was to allow ‘for the enforcement of guarantees.’ . . . The 1988 legislature intended to deny all anti-deficiency protection to guarantors because the previous law did not effectively enforce guarantor obligations. Because lawmakers wanted to make guarantors specifically liable for their obligations without protection from the trustee’s sale anti-deficiency statute, a literal construction of the 1988 amendment would seem to fulfill legislative intent.

Kurt A. Johnson, *Guarantor Deficiency Judgment Liability Under Arizona Revised Statutes Annotated Section 33-814*, 22 ARIZ. ST. L.J. 797 (1990).

A.R.S. § 33–814(G) is and must continue to be expressly construed to exclude guarantors from its protections. If the statute is construed to include guarantors, banks providing residential development loans, such as Arizona Bank & Trust, will be forced to drastically decrease residential development loans, in light of the fact that the banks would now bear the total loss of deficiencies following trustee’s sales.

B. Any Statutory Protection that May Be Available to a Guarantor May Be Expressly Waived.

In its Minute Entry, the trial court stated, “The Court finds nothing that flatly prohibits the guarantors (as opposed to the principal) from waiving any protection the anti-deficiency statute provided.” [RA] To the extent guarantors are afforded any protections under A.R.S. § 33-814(G), which they are not, the trial court reached the correct conclusion that any protection afforded to them may be waived.

Nevertheless, in their reply brief, Guarantors rely heavily on this Court’s recent decision, *Parkway Bank & Trust Co. v. Zivkovic*, -- P.3d ---, 1 CA-CV 12-0612, 2013 WL 2710015 (App. June 13, 2013) for the proposition that any protections afforded by Arizona’s anti-deficiency statute cannot be waived. In that case, the Court held that public policy considerations prohibit a *homeowner* from

waiving protections under A.R.S. § 33-814(G). *Id.* at *3-4. However, the Court expressly stated it was not addressing the issue of whether a guarantor “could contractually waive anti-deficiency protections.” *Id.* at *6 n.5.

Guarantors “may alter their rights and liabilities by express contract,” and they “may expressly agree to terms that are not unlawful, even if the contract waives defenses normally available.” *See Johnson, supra*, at 801; *see also LaSalle Bank Nat. Ass’n v. Sleutel*, 289 F.3d 837, 841 (5th Cir. 2002) (holding a guarantor may waive protections afforded by a state anti-deficiency statute); *Founders Bank and Trust Co. v. Upsher*, 830 P.2d 1355, 1363–64 (Okla. 1992) (guarantors may waive any right of offset provided by statute); *Valley Bank v. Larson*, 104 Idaho 772, 663 P.2d 653, 655 (1983) (“A guarantor may legally contract to waive a defense provided by anti-deficiency judgment statute[s].”).

Arizona banks have made countless residential development loans in reliance on guaranties of those loans. Many of the guaranties contain waivers related to Arizona’s anti-deficiency statute. If those guaranties and waivers are now deemed non-recourse and unenforceable, Arizona banks’ exposure to potential losses from ordinary defaults as well as “strategic defaults” may be significant. Such a result would not only be inequitable, it would have devastating results on Arizona’s residential real estate market.

IV. CONCLUSION

Guarantors knowingly accept the risk associated with the non-payment of loans of residential development loans. They knowingly and voluntarily contract for that risk, and receive valuable consideration for doing so. Arizona's anti-deficiency statutes were not intended to shield guarantors from the consequences of their business decisions. Arizona banks have made these types of residential loans due to their recourse nature and the reliance on guaranties.

Thus, this Court should clarify that A.R.S. § 33-814(G) cannot be used as a shield by guarantors to avoid their contractual obligations. This Court should also confirm that to the extent the statute does offer guarantors any protections, such protections may be validly waived.

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RYLEY CARLOCK & APPLEWHITE

By: /s/

William Scott Jenkins Jr., #021841
Charitie L. Hartsig, #025524
Naomi E. Thurston, #029863
One North Central Ave., Suite 1200
Phoenix, Arizona 85004
Attorneys for Amicus Curiae
sjenkins@rcalaw.com
chartsig@rcalaw.com
nthurston@rcalaw.com