

Spring 2018

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SOUTHERN ARIZONA REAL ESTATE LAW FIRM

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Springtime in Tucson!



Photos courtesy of Shoshanna Holzer



The Finality of Trustee's Sales

By: *Heidi Rib Brent*

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An Arizona Supreme Court's ruling in January 2018 upheld a decision affirming the finality of trustee's sales. *Zubia v. Shapiro et al.*, CV-16-0255-PR (2018). A primary purpose of a deed of trust, instead of a mortgage, is to expedite the lender's recovery when the borrower defaults. Under the statutes for deeds of trust (A.R.S. §33-801 et seq.), rather than litigation for the borrower's failure to make timely mortgage payments, the lender can take possession of the real property without going to court. When the borrower is in default, notice of a sale of the property is recorded at least 90 days prior to the sale and notice is provided to the borrower and anyone else with a recorded lien on the property. If the borrower or junior lienholders do not reinstate the loan by paying past due payments plus allowable interest and fees, the property is sold at auction on the date and time set for the trustee's sale. The statutes provide that, if the borrower does not obtain an injunction to prevent the trustee's sale, the defenses are waived and the sale is final. A.R.S. §33-811(C). Only claims relating to the distribution of the trustee's sales proceeds remain. The exceptions to this finality of trustee's sales are intentionally limited to such rarities as the failure to notify the borrower that a promised continuation of trustee sale was not going to take place. *Snyder v. HSBC Bank, USA, N.A.*, 913 F. Supp. 2d 755, 776 (D. Ariz. 2012).

In *Zubia*, the plaintiff claims she did not know of the note and deed of trust until receiving notice that it was in default. She claimed her then-husband forged her name. Representing herself, she sought to prevent the trustee's sale, but it was dismissed for lack of prosecution. The trustee's sale took place, and then Zubia sued for damages for forgery and for title to the property in her name, claiming the security interest in the property wasn't valid against her. The courts held that her failure to obtain an injunction prior to the trustee's sale was fatal to her damage claims against the trustee or lender. "This result is consistent with the purpose of §33-811(C) and other statutes governing trustee's sales – namely, to provide for expeditious foreclosures." (*Zubia* ¶28). However, Zubia may still sue the purported forger for damages arising from the forgery.

While the tidal wave of trustee's sales from the housing bubble has passed, there will continue to be people in financial crises who face trustee's sales. Be aware that preventative action must be taken **before** the trustee's sale!





New Ruling Regarding Attorney Fees in Homeowner Association Cases

By: Anne Terry Morales
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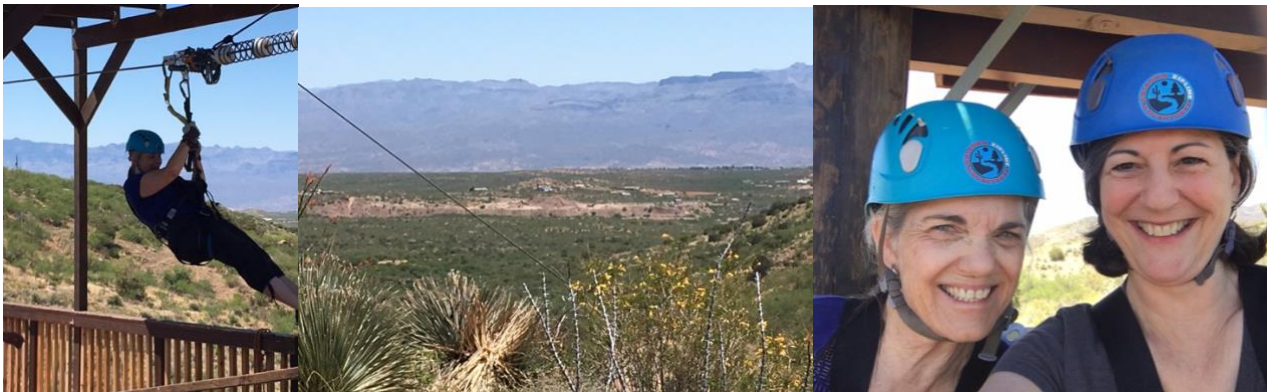
In the case of Bocchino v. Fountain Shadows (No. 1 CA-CV 16-0710, March 3, 2018) the Arizona Court of Appeals ruled that Fountain Shadows Homeowners Association (the “Association”) had to return \$3,887.28 it had assessed directly against former homeowner Patricia Bocchino. Several alleged incidences of harassment by Ms. Bocchino against Board members and a Board meeting where Ms. Bocchino was walked out by a security officer in an “escort hold” due to her repeated refusals to peaceably leave the meeting, caused the Association to take legal action. The Association and several of its leaders sought and received an injunction against workplace harassment against Ms. Bocchino. The injunction was issued after an *ex parte* hearing without notice to Ms. Bocchino. Thereafter, the Association assessed Ms. Bocchino \$3,887.28 (the amount of attorney fees incurred by the Association in the injunction action) and placed a corresponding lien on her property. The Association relied on provisions in its Declaration which (a) prohibit any activity that could, would or does become an annoyance or nuisance to the neighborhood or interferes with the quiet enjoyment of each of the other owners, and (b) requires the applicable owner to pay all attorney fees incurred by the Association if the Association prevails in an enforcement action. The amount was paid to the Association upon the closing of the sale of Ms. Bocchino’s residence. In response, Ms. Bocchino sued the Association for breach of contract. The superior court ruled that Ms. Bocchino was entitled to damages of \$3,887.28. On appeal, the Arizona Court of Appeals agreed with the superior court. Their ruling was due to the fact that: (1) the Association did not ask for attorney fees in its request for an injunction and therefore waived its claim for such fees, and (2) the Declaration does not directly give the Association the authority to assess a homeowner for attorney fees incurred in a court proceeding that does not contain a specific order for or award of such fees. The lesson of this case for homeowner associations is that, no matter what your Declaration provides (a) always include a request for attorney fees in any action against a homeowner and (b) get a court order before you directly assess a homeowner for attorney fees and/or costs.



Evicting Adult Children – A Growing Problem

By: Anne Terry Morales
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The highly-publicized, recent New York case involving the eviction of 30-year-old Michael Rotondo by his parents made Mr. Rotondo a viral sensation and a graphic illustration of an increasing trend across the country – adult children who overstay their welcomes. As reported by National Public Radio, a 2016 Pew research study showed that for the first time in 130 years more Americans aged 18 to 34 are living with their parents than in any other living arrangement. Unfortunately, for many families the question then becomes, “how can you throw the bum out?” In the Rotondo case it took several months and legal action. After a six-month period in which they repeatedly notified their son in writing and orally of their request for him to vacate their home, Christina and Mark Rotondo were forced to file a formal eviction proceeding in New York court. While the judge sided with Mr. and Mrs. Rotondo, the process was long and expensive. Unlike New York, Arizona does not have any eviction laws that deal specifically with family members or children. Given the refusal of most local law enforcement agencies to take any action without a court order, the most prudent course of action for parents in Arizona is to treat the recalcitrant offspring as a “squatter.” Consequently, the necessary steps to have them legally evicted must be taken as more specifically set forth in the linked article: “Squatter on the Premises – What Now?” that first appeared in our Summer 2015 Newsletter. <http://tucsonazrealestateattorneys.com/wp-content/uploads/2011/06/MMBM-Newsletter-Summer.pdf>



Arizona Zipline Adventures - <https://www.ziparizona.com>

Agreements to Compensate Real Estate Agents Must Be in Writing – Really!

By: Heidi Rib Brent
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Once again, Arizona courts have required strict compliance with Arizona statutes for real estate compensation: they *must* be in writing, signed by the parties and set forth the date of expiration. A.R.S. §32-2151.02(A). In January, the Arizona Court of Appeals decided *D/AQ Corp. v. Intravest 2851 Kathleen, LLC*, 1 CA-CV 16-0620 (App. 2018). To push a sale to contract, the real estate broker offered to the Buyer in the first transaction to reduce the real estate commission by .5% (\$95,000!). In exchange, the real estate broker was to receive an exclusive listing to later sell the property in a subsequent transaction, with the purported promise to “make up” the reduced commission from the first sale in the subsequent transaction. The client responded with an email stating “Confirmed.” The first sale closed in September 2012 and a re-sale closed in August 2014, with the same real estate broker representing the then-Seller. However, the Seller refused to authorize the additional .5% commission to “make up” from the prior transaction, so the broker sued. Although the trial court held for the broker, the Arizona Court of Appeals reversed, finding that the agreement for the .5% “make up” commission did not comply with Arizona’s strict statutory requirements, and, therefore, was unenforceable. While the result is harsh, “real estate brokers are presumed to know the law.” (*D/AQ Corp.* ¶19.) For an in-depth review of Arizona cases on this statute, see our Spring 2017 newsletter, *Real Estate Agents: The Essentials of a Written Contract for Compensation*,

<http://tucsonazrealestateattorneys.com/MMBM-Newsletter-Spring-2017.pdf>



New Requirements Regarding Residential Security Deposits

By: Anne Terry Morales
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On May 16, 2018, Arizona Governor Doug Ducey signed into law House Bill 2651 limiting the amount of time a tenant has to dispute any amounts being deducted from the tenant's security deposit upon move-out. Under existing provisions of the Arizona Residential Landlord and Tenant Act the landlord must send the tenant an itemized list of all deductions and any amounts due and payable to the tenant from the security deposit within 14 business days of termination of the tenancy. The new provision requires that the tenant must dispute those deductions within 60 days after the date the itemized list is mailed or be deemed to have waived their rights to any further claims regarding the security deposit. The new law gives the landlord a date certain after which the landlord can use those funds without fear of subsequent claims from the tenant.

GOOD TO KNOW!

By: Heidi Rib Brent

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Last Will Gone to Waste: If you marry after you have gone through the formalities of executing a Last Will and Testament, the new spouse still will be entitled to the share of your estate that he or she would have received if you had not executed a Will. A.R.S. §14-2301. This is true unless the Will was prepared in contemplation of an impending marriage, the Will states that it was intended to be effective regardless of the marriage and that you provided for the spouse-to-be outside of the Will. So a pre-nuptial agreement, which states that each party makes no claim on each other's estate should be supplemented by a codicil to the Will to comply with the statutory requirements.

Cell Phone Law Update: Effective February 2018, the Tucson City Council amended its code on distracted driving so that cellphone use while driving is now a primary offense. This means that you can be stopped and cited for no other reason than the use of your cell phone while driving. This ordinance includes prohibition of the use of any mobile communication device or portable electronic device (e.g. iPad or computer). A first offense carries a fine of \$50, but fines for subsequent violations will increase to \$100 and more. If an accident is involved, even a first offense carries a fine of \$250. Ordinance No. 11520, Chapter 20, Article V, Section 20-160. The Town of Oro Valley has had a similar ordinance, effective January 2017. Ordinance No. (O)16-15, Chapter 10, Article 10-14 and so does Pima County, Pima County Ordinances, Chapter 10.34. For more information about the Tucson and Pima County ordinances, see our Summer 2017 Newsletter, <http://tucsonazrealestateattorneys.com/SummerNewsletter2017.pdf> . If you have not already enabled your vehicle with Bluetooth, stay off of your phone while driving!

Zestimates Are Simply Estimates. This May a Chicago-area federal judge dismissed a lawsuit against Zillow, which included claims that the Zestimates were unlicensed appraisals of property and an invasion of privacy. The Court held that the Zestimates are solely estimates, as clearly indicated on Zillow's website. For more information about that case, see our Summer 2017 Newsletter, <http://tucsonazrealestateattorneys.com/SummerNewsletter2017.pdf>

Huge Penalties for Violating Do Not Call Listers. As a result of a lawsuit by the Arizona Attorney General's office, in March 2018, Adobe Carpet Cleaning has agreed to pay \$1 million in civil penalties for illegal telemarketing calls to consumers on the federal Do Not Call Registry and has been banned from telemarketing for six years. This month, another consent judgment with Desert Valley Arie, Inc. resulted in civil fines of \$340,000 and a ban from telemarketing for five years. Real estate agents should be vigilant in complying with the Do Not Call Registry to avoid such prosecution. And, to avoid unwanted telemarketing, register at <https://www.donotcall.gov/>.



What's Happening Around Tucson!



The Tucson 23 Mexican Food Festival, June 16, 2018, 6:00 pm - 8:30 pm, JW Marriott Tucson Starr Pass
<https://www.saaca.org/tucson23.html>

The Art of Howard Post at the Tucson Museum of Art, March – June 24, 2018
<https://tucsonmuseumofart.org/exhibition/the-west-observed-the-art-of-howard-post/>

Destination Mars, Flandrau Planetarium, June 2018 – February 2019
<https://flandrau.org/exhibits/destination-mars>

“Sonoran Scenery” and “Monsoon Mirage” Miniatures, Desert Artisan’s Gallery, June - August 5, 2018
<http://desertartisangallery.com/events-calendar/>

Dog Days of Summer at the Tucson Botanical Gardens, June - September 28, 2018
<https://tucsonbotanical.org/event/dog-days-of-summer/>

Arizona OtherWordly Exhibition , Tohono Chul, June - August 12, 2018
<https://tohonochulpark.org/galleries/upcoming-events/>

Cox Summer Movies in the Park – free @ Reid Park, Movies begin at dusk (~7:45pm)
June 22 – Jumanji, July 6 - Wonder Woman, July 20 - Star Wars - The Last Jedi
<https://www.visittucson.org/event/cox-movies-park-reid-park>

Gnat Man @ Gaslight Theatre, June 7- August 26, 2018
<https://thegaslighttheatre.com/current-show/>

Summer Safari Nights @ The Reid Park Zoo, Friday evenings June – August 3, 2018 6-8pm
<https://reidparkzoo.org/event/summer-safari-friday-nights-2018/>

Fourth of July Fireworks, Choices around the Tucson Metro:
<https://www.visittucson.org/events/categories/events?location=All&keys=&date%5Bmin%5D%5Bdate%5D=&date%5Bmax%5D%5Bdate%5D=&page=9>



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