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Monroe McDonough Goldschmidt & Molla
Attorneys at Law

SOUTHERN ARIZONA'S REAL ESTATE LAW FIRM

MONROE McDONOUGH GOLDSCHMIDT & MOLLA

Welcome to the MMGM Newsletter

Paraprosdokian Sentences

Why do Americans choose from just two people to run for President and 50 for Miss America?

National Back to School Month

Halleluiah—it's that time of year again – nearing the end of summer with the promise of fall, and a new school year begins.

TIMESHARES AND THE ANTI-DEFICIENCY STATUTE, *By Karl MacOmber, Esq.*

In *Independent Mortgage Co. v. Alaburda*, the Court of Appeals in Phoenix ruled that a 10% interest in a time share was subject to the protection of Arizona's anti-deficiency statutes. The lender had foreclosed via a Trustee's Sale of the timeshare interest and then sought to obtain a deficiency judgment against the borrower. The Court of Appeals rejected the lender's argument that because the borrower had limited rights of occupancy in the unit, that the unit did not qualify as a "dwelling", which is what is required to receive the protection of the anti-deficiency statute. The Court of Appeals also disagreed with the lender's argument that the 10% interest of the borrower also disqualified them from protection from the deficiency judgment, analogizing the timeshare interest to the limited interest of a condo owner in the common areas. Finally, the Court also disagreed with the lender that the transient use of the property for vacations disqualified the borrower, the Court noting that the anti-deficiency statute does not limit its protection only to dwellings used as full time residences.

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MORTGAGE DEBT FOREGIVENESS

By Michael J. Monroe, Esq.

Homeowners who are concerned about their ability to continue to make their mortgage payments are usually familiar with the Mortgage Debt Forgiveness Act – a federal law. This legislation, due to expire on December 31, 2012, (unless renewed by the U.S. Congress), provides a tax break if there is cancellation of mortgage debt arising from debt forgiveness on one's primary residence. But, most homeowners are not familiar with the fact that the IRS Code Section 108 offers a similar protection in many situations. This is important since there is still no indication whether Congress will renew the Mortgage Debt Forgiveness Act.

A person should understand that if (s)he does a deed-in-lieu of foreclosure, a short sale or a foreclosure where a portion of one's debt is 'forgiven' or 'cancelled', then that amount of loan 'forgiveness' must be reported as ordinary income on that year's 1040 income tax. If this debt forgiveness arises from one's primary residence, the Mortgage Debt Forgiveness Act exempts the amount of debt forgiveness from being taxed as ordinary income. That is a substantial tax benefit.

The rationale behind taxing the amount of debt forgiveness is that the borrower received money (the loan) and did not pay any income tax upon the receipt of the loan funds. The assumption was that the loaned money would be repaid. Then, the loan funds were used to purchase a residence. However, later the loan is not only not paid back, but the debt is cancelled or forgiven. IRS views this as the borrower having now received money with no obligation to pay the funds back. Therefore, as of the time of the debt forgiveness or cancellation, IRS treats the debt forgiveness as taxable income to the borrower. This is sometimes referred to as phantom income. IRS would not want the borrower to have enjoyed the benefit of receiving money, not paying it back and not paying a tax on those funds. Naturally, the taxation of such moneys can be a substantial hardship to the borrower who is already in a position of not having been able to make the loan payments to the lender. In fact that is usually the reason the debt was 'forgiven' in the first place.

Section 108 of the IRS Code also deals with the subject of debt forgiveness. It too exempts the amount of debt forgiveness arising from the sale of one's real property. One exemption involves debt forgiveness where the loan is a "non-recourse" loan. That term "non-recourse loan" is usually defined as a secured loan which prohibits the lender from suing the borrower to obtain other assets of the borrower if the value of the security falls below the amount required to repay the loan. This now leads us to a discussion about the Arizona anti-deficiency law.

In Arizona, due to the anti-deficiency law, lenders are prevented from recovering any deficiency (difference between the amount of the lender's loan balance and the sale price of the home in a short sale or foreclosure) where a purchase money loan is involved. Therefore, in certain cases there is no debt that the lender can pursue in such a case where the anti-deficiency law applies. It has the effect of making the loan a non-recourse loan. The anti-deficiency applies only to loans used to purchase single one-family dwelling or a single–family dwelling on two and a half acres or less. In short, if the anti-deficiency law is in play then the lender may only look to the collateral, (the property) and cannot sue the borrower for any deficiency. This makes the loan what is called a "non-recourse" loan.

Why is it important for the loan to be non-recourse? The reason is that if the loan is a non-recourse loan (due to the anti-deficiency law in Arizona) then it does not result in "cancellation" or "forgiveness" of debt since there was not a true debt to begin with since the borrower is not liable for the deficiency if the value of the security fall below what is necessary to pay off the balance of the loan. Thus, if the loan in Arizona is a qualified purchase money loan and the borrower cannot be sued by the lender for any deficiency then the borrower does not experience a true forgiveness of debt and does not have to worry about the applicability of the Mortgage Debt Forgiveness Act that is due to expire at the end of 2012 if it is not extended by the U.S. Congress. But – for tax purposes, the IRS will look at the remaining balance of the loan just prior to the short sale or the foreclosure and treat that as the "sales price". From the "sales price", the borrower subtracts the basis (less any accumulated depreciation) in the property. The borrower will be liable for the tax on the difference between the "sales price" and the adjusted basis of the property, if any.

The moral of this story is that in most (but not all) situations involving a primary residence with a purchase money mortgage, the property owner does not have to be concerned about the expiration of the Mortgage Debt Forgiveness Act on December 31, 2012.

Yes, anytime you get into tax law the discussion gets not only boring but complex and difficult to understand. I would highly recommend consulting a certified public accountant who has experience in this area. Even the most qualified accountants consider this a difficult area to wade through since the IRS has not given a significant amount of clarification in their regulations to assist in the interpretation of the law.

SELLING A HOME IN A HOMEOWNERS ASSOCIATION

By Carolyn B. Goldschmidt, Esq.

There are close to 1400 homeowners associations (HOAs) in Pima County; therefore, Realtors cannot avoid intersecting with HOA administration during a sales transaction. In my role as attorney for many HOAs and an instructor on various aspects of HOA law, I have seen evidence of ongoing tension between Realtors and HOA administrators (managers and Board members). This article highlights some of the areas of difficulty that often arise in a real estate transaction involving a home in an HOA with suggestions on how to improve relations for all concerned.

1. Communication Blocks. The reality of real estate transactions is time pressures to assemble information and to get the buyer and seller to the closing table. HOA managers and self-managed Boards often are frustrated by last-minute demands for documents and information. A law passed in 2011 allows HOAs to charge a "rush fee" of up to $100 over the transfer/disclosure fee if HOA information is required within 72 hours after the request. Community management companies typically are able to comply with disclosure requirements. However, a self-managed Board manned by volunteers with full-time lives often cannot. It is important that a Realtor assures that a client about to join an HOA has full information on association rules and restrictions and makes a timely request for needed documents that reveal the culture of the HOA.

2. Evaluating an HOA. Most buyers are focused on the home they are buying and not the HOA they are joining. Arizona's Planned Communities and Condominium Acts require an HOA with 50 or more dwelling units to provide information and documentation to a prospective buyer. The information includes governing documents, contact information, annual budget and amount of assessments (dues), amount of money held in reserves for capital repairs and maintenance, pending litigation, and violations shown in the Association's records for the subject property. A buyer should be guided by his agent to assure that needs for vehicle parking, pets, business use of home, and other anticipated uses or modifications that are detectable from outside the home, are not prohibited or limited in the HOA. When people buy in an HOA without understanding the rules, trouble comes quickly. For example, a new owner might have a work truck with the name and contact information for his company painted on the side. The truck is too large for the garage so he parks it in the driveway. His first welcome to the neighborhood will be a notice of violation of the restriction against commercial vehicles parked in open view. (In Arizona, certain commercial vehicles are exempt from such restrictions.)

3. Rentals. There is mutual frustration between HOA administrators and Realtors over rentals. In some condominium and townhome governing documents, there are restrictions on rentals. These restrictions can limit the number of rental units in the community or, in some cases, prohibit all rentals. Other restrictions might impose a minimum rental term (e.g., six months). Still other restrictions require a landlord owner to provide the HOA with information on his tenants. Rental restrictions are enforceable but must be in the Declaration of Covenants, Conditions and Restrictions ("CC&Rs"). In communities that allow rentals, tenants need to be made aware of the rules and restrictions that apply to the community. Many CC&Rs require that all rentals be made by a written lease that includes a requirement of adherence to community rules. It is helpful to landlords if the HOA has produced a pamphlet of these rules that can be given to tenants, since few tenants will plow through CC&Rs to find pertinent information. If there isn't summary information available, then it is the landlord's duty to assure that his tenants are aware of the rules. HOA managers and residential property managers often are at cross purposes in dealing with rental properties in HOAs. For example, if there is a violation on the rental property, the time limit for correction imposed by the HOA may not be realistic for a property manager who needs to give proper notice and an opportunity to cure to the tenant. Many times the HOA manager only has contact information for the owner. A coalition of local members of two organizations, National Association of Real Property Managers (NARPM) and Community Associations Institute (CAI) worked together to enhance understanding of their respective roles and expediting the flow of information between them. The result is a set of forms and procedures for authorizing the residential property manager to act on behalf of the owner, for getting needed information about the HOA to the property manager and for assuring that the HOA has contact information for the rental property. The forms will be available on a website shortly and the next issue of this newsletter will give you that link.

The challenges of today's real estate market highlight the importance of a good working relationship between HOA administrators and Realtors. Many associations are burdened with vacant, foreclosed homes and owners who can't pay assessments; therefore, there is lots of motivation for extending a helping hand to agents to bring more informed neighbors into the community.

MMGM IN THE COMMUNITY

By Susan Smith, Bookkeeper/Receptionist

MMGM EMPLOYEES HAVE TALENT

Susan Smith, our Bookkeeper/ Receptionist has been with us for 18 years. She has a remarkable talent of masterfully creating homemade greeting cards for all of our employees as well as family and friends. The sample here was a card and envelope she made for her granddaughter. Each card is personalized for that particular person with their name, favorite colors and symbols. The flamingo is a collectible item her granddaughter likes and the 29 blue candles represent her age. Our employees look forward to receiving one of Susan's cards for their birthday, anniversary, etc. Homemade cards mean a great deal knowing someone took the time to create it just for you.

We all have talents to share.

MARK YOUR CALENDAR—Tucson August Events

1-31—The Gaslight Theatre

2-30—Movies Under the Stars

3-31—Friday Night Live Jazz Concert Series

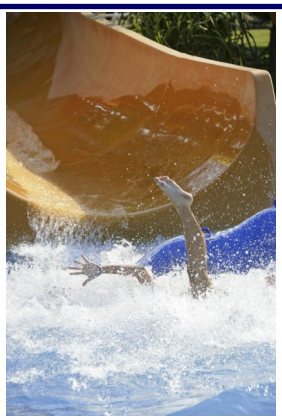
4 & 5—Harvest Fest at Sonoita Vineyards

6—Mobile Kitchens, Art & Music

5-26—Science Sundays at Children's Museum

8, 15, 19 & 29—Primavera Cooks Dining Event

10-12—USA BMX Southwest Nationals



10-12—64th Annual Vigilante Days

11—2nd Saturdays Downtown

15—*Ottmar Liebert and Luna Negra*

15-19—Tucson Bird & Wildlife Festival

20—Tucson's Birthday Flag Raising Ceremony

25—Southern Arizona Salsa & Tequila Challenge

31—HoCoFest Music Festival

31—The Further Adventures of Hedda Gabler

BEING DECLARED A VEXATIOUS LITIGANT

By Karl MacOmber, Esq.

In Madison v. Groseth, Ms. Madison borrowed money to buy a home and after she fell behind in her payments, she started filing lawsuits. A trustee's sale was scheduled and she filed a lawsuit in which the relief she sought included an injunction against the trustee's sale. However, she did not actually obtain a preliminary injunction against the trustee's sale and it took place. Thereafter, Ms. Madison sued the lender and the buyer who purchased her home at the trustee's sale. In that lawsuit she complained of the handling of the trustee's sale notice including that she was not notified of the sale date. That lawsuit was dismissed and Ms. Madison appealed. The new owners even filed an eviction to remove Ms. Madison, who filed bankruptcy. But that did not delay anything, because she was the one who appealed. The Court of Appeals ruled that ARS 33-811(c) provided no help to Ms. Madison because she had filed suit to enjoin the trustee's sale in advance of the sale itself. Therefore, her failure to obtain an injunction barred her complaint about any inadequacies in the trustee's sale procedures. However, the Court of Appeals did reverse the finding of the superior court that Ms. Madison was a "vexatious litigant" and barring her from filing further lawsuits, on the grounds that the superior court had also not found that the previous lawsuits were frivolous. No word yet on whether Ms. Madison has filed another suit after the lifting of her title as vexatious litigant.

ARIZONA FASCINATING FACTS

Oraibi, (Navajo County) Arizona was founded sometime before the year 1100 AD, making it one of the oldest continuously inhabited settlements within the United States. Archeologists speculate that a series of severe droughts in the late 13th century forced the Hopi to abandon several smaller villages in the region and consolidate within a few population centers. As Oraibi was one of these surviving settlements its population grew considerably, and became populous and the most influential of the Hopi settlements. By 1890 the village was estimated to have a population of 905, almost half of the 1,824 estimated to be living in all of the Hopi settlements at the time.

In spite of the "friendly" ("New Hopi") outcome of the Oraibi Split, Old Oraibi has since maintained a more traditional Hopi way of life and has resisted the adoption of the more modern culture visible in Kykotsmovi. While visitors to the pueblo are welcomed (a short road connects to Arizona State Route 264), the residents tend to be very private and do not allow photographs to be taken in the town, and thus there are no known reliable photographs of the settlement as it exists in the modern day.

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EXPERIENCE THE DIFFERENCE

MMGM is a real estate and business law firm. The attorneys and staff at Monroe McDonough Goldschmidt & Molla believe that each client must experience the difference that genuine care and concern can make. We strive to achieve the client's objectives while delivering unwavering personal service in an honest, aggressive and comprehensive manner. We refer to this as our Clients for Life program. MMGM provides outstanding counsel and unparalleled representation in the following areas of the law:

Real Estate Law - Personal Injury
Appeals - Arbitration and Mediation Services
Business Law and Entity Formation
Civil and Commercial Litigation - Construction Defect
Contracts - Estate Planning—Probate Law
Homeowner Association (HOA) Law
Motor Vehicle Warranty Defense
Product Liability - Transactional Law

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