

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-000707

04/03/2018

HONORABLE DAWN M. BERGIN

CLERK OF THE COURT
S. Ortega
Deputy

MARKHAM CONTRACTING CO INC

KAREN A PALECEK
THOMAS L HUDSON

v.

PINNACLE POINT DEVELOPERS L L C, et al.

RICHARD Q NYE
FRANK S TOMKINS

UNDER ADVISEMENT RULINGS

The Court has considered the following:¹

- FDIC's Motion for Summary Judgment on Markham's Right to Foreclose Against FDIC's Interest in the Property filed on October 2, 2017
 - Markham's Response filed on November 6, 2017
 - FDIC's Reply filed on November 20, 2017
- Defendants FDIC and PrimeAZ's (collectively "Defendants") Joint Motion for Summary Judgment Re: Rights of Parties with Respect to Real Property and FDIC's and PrimeAZ's Right to Interest on Equitable Subrogation Amount filed on October 2, 2017
 - Markham's Response filed on November 6, 2017

¹ The Court denied PrimeAZ and FDIC's November 6, 2017 Joint Cross-Application for Attorneys' Fees, Costs and Expenses by minute entry dated December 7, 2017.

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- Defendants' Joint Reply filed on November 20, 2017
- All related Statements of Fact

- Markham's Supplemental Brief Re FDIC Immunity filed on February 2, 2018

- FDIC's Supplemental Brief on the Issue of the FDIC's Immunity With Respect to Attorneys' Fees, Prejudgment Issue and Foreclosure of Markham's Mechanic's Lien filed on February 2, 2018

- Markham's Application for Attorneys' Fees, Costs and Sanctions filed on September 1, 2017
 - Defendants' Response filed on October 2, 2017
 - Markham's Reply filed on November 6, 2017
 - Markham's Notice of Errata Re: Affidavit of Karen Palecek filed on November 30, 2017

- Markham's Supplemental Application for Attorneys' Fees, Costs and Expenses filed on December 21, 2017
 - Defendants' Response filed on January 12, 2018
 - Markham's Reply filed on February 2, 2018

- Markham's Motion for Entry of Judgment filed on September 1, 2017
 - Defendants' Response filed on October 2, 2017
 - Markham's Reply filed on November 6, 2017
 - Markham's Notice of Errata Re: Affidavit of Karen Palecek filed on November 30, 2017

- PrimeAZ and FDIC's Proposed Form of Judgment filed on November 21, 2017
 - Markham's Objection filed on December 5, 2017

- The arguments of counsel presented at the December 7, 2017 and December 11, 2017 hearings

The Court now makes the following findings and orders

Factual and Procedural History

On April 7, 2006, First Arizona Savings and Loan Association ("FAS") loaned Troon Canyon Ventures ("Troon") \$4.1 million (the "2006 Loan") to purchase property (the "Property") for the development of a golf course. The Loan was secured by a deed of trust on

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the Property (the “2006 DOT”). Troon then hired Pinnacle Point Developers, LLC (“Pinnacle”) as the general contractor. Plaintiff Markham Contracting Co., Inc. (“Markham”) served as a subcontractor for Pinnacle and began grading, paving and water utility work on June 10, 2008.

In 2008, FAS and PrimeAZ/Libra (“PAZL”) loaned Troon an additional \$4.8 million to fund development of the golf course (the “2008 Loan”). Troon used \$2.9 million of the 2008 Loan to pay off the 2006 Loan. As part of the transaction, the 2006 DOT was released so that the Property could be used to secure the 2008 Loan (the “2008 DOT”).

In late August 2009, PAZL and FAS declared a default on the 2008 Loan and demanded full payment by September 25, 2009. On September 2, 2009, Markham recorded its mechanic’s lien. On November 19, 2009, PAZL and FAS recorded a notice of trustee’s sale of the Property.

Markham filed the Complaint in this case on January 6, 2010 seeking foreclosure of its lien, a declaration of the validity of the lien, and an order that the lien be paid from the proceeds of the sale of the Property. It also filed a *lis pendens* on the Property.

The trustee’s sale took place in late February 2010. PAZL and FAS purchased the Property through a credit bid of \$3.175 million. On or about October 22, 2010, FAS was closed by the Office of Thrift Supervision, and FDIC-R (“FDIC”) was appointed as the Receiver.² Markham filed a First Amended Complaint (“FAC”) on June 15, 2012 naming FDIC as a Defendant.

On April 23, 2014, Judge Maria Verdin issued the following rulings on motions and cross-motions for summary judgment:

1. Markham held a valid lien for \$341,700;
2. The 2008 DOT was equitably subrogated to the 2006 DOT to the extent the 2008 Loan was used to satisfy the 2006 Loan; and
3. The trustee’s sale extinguished Markham’s lien

A final judgment was entered on October 13, 2014.

Markham appealed the judgment, and on August 9, 2016, the Court of Appeals issued a memorandum decision reversing Judge Verdin’s ruling that Markham’s lien was extinguished by the trustee’s sale and affirming her ruling that the 2008 DOT was equitably subrogated to the

² FDIC did not move to substitute in as the real party in interest for FAS until April 2018. The Court granted the Motion on June 8, 2012.

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2006 DOT to the extent that proceeds from the 2008 Loan were used to pay off the 2006 Loan. Consequently, Defendants' first priority lien was for the subrogation amount of \$2.9 million, not the amount of the credit bid, and was extinguished by the trustee's sale, leaving Markham's lien in first position. Defendants still hold a lien for the difference between the credit bid and the subrogated amount, but it is now junior to Markham's lien.

Defendants filed a petition for review with the Arizona Supreme Court, which was denied. The Court of Appeals and the Supreme Court awarded Markham fees and costs.

LEGAL ANALYSIS

A. Markham's Requests for Foreclosure, Attorneys' Fees, Pre-Judgment Interest and Rule 68 Sanctions

The FDIC largely relies upon the doctrine of sovereign immunity and certain provisions of the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") in opposing Markham's request for foreclosure and an award of attorneys' fees, sanctions and prejudgment interest. The FDIC acknowledges that Congress waived sovereign immunity for FDIC to sue and be sued under 12 U.S.C. §1819(a). However, according to the FDIC, this waiver does not extend to foreclosure of any property in which it holds an interest, or imposition of attorneys' fees, prejudgment interest and sanctions.

1. Foreclosure

The FDIC argues that 12 U.S.C. §§1821(d)(13)(C) and 1825(b)(2) (the "Lien Statutes") bar Markham from foreclosing on its lien. The first provision, 12 U.S.C. §1821(d)(13)(C), states that "[n]o attachment or execution may issue by any court upon assets in the possession of the receiver." Section 1825(b)(2) provides that "[n]o property of the [receiver] shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the [receiver], nor shall any involuntary lien attach to the property of the [receiver]."

Markham contends that the FDIC waived the Lien Statutes as a defense due to late disclosure. As the Court views the waiver issue, the question is whether the FDIC waived the consent provision in §1825(b)(2) by failing to assert it earlier.

1. Sovereign Immunity and Subject Matter Jurisdiction

The FDIC seeks to avoid waiver by invoking the doctrine of sovereign immunity and asserting that the court lacks subject matter jurisdiction over any determination of the foreclosure issue. As to sovereign immunity, it contends that §1825(b) "represents the decision of Congress

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to reinstate the sovereign immunity of the United States for the limited purpose of prohibiting foreclosure against property owned by the [FDIC] (during the period of [FDIC's] ownership) . . . the protection afforded to the [FDIC] is not subject to being waived and can be asserted at any time and at any stage of the judicial proceedings.” Reply on Mot. Summ. J. at 2.

The Court agrees with Markham, however, that the existence of these statutes cannot reasonably be construed as a “reinstatement of sovereign immunity” as to foreclosure. First, as Markham points out, there is no case law or language in the federal statutes suggesting that these defenses somehow narrowed the scope of Congress’s waiver of sovereign immunity, and the FDIC has provided no authority to support this proposition. Second, adopting the FDIC’s position would give it *carte blanche* to disregard, even in bad faith, the disclosure and discovery rules of the courts where Congress has determined it may be sued, thereby allowing it to gain an unfair and inequitable advantage over parties who contract with a failed financial institution for which FDIC serves as the receiver.

The FDIC next argues that even if §1825(b) does not constitute a reinstatement of sovereign immunity, it sufficiently demonstrates Congress’ intent to preclude courts from interfering with FDIC’s protection of its property to divest the court of jurisdiction over the issue. But Markham persuasively argues that to divest a court of jurisdiction, the legislative intent to do so must be clearly stated. The FDIC points to no such statement in the statutes or case law. Rather, it cites a case involving a garnishment action to recover proceeds in the possession of the FDIC, where the Court stated in *dicta* that even though the parties had not raised the issue below, it “appeared” to the Court that §1825(b)(2) would “place a limitation on the power of the court to grant relief in this case.” *GWN Petroleum Corp. v. OK-TEX Oil & Gas, Inc.*, 998 F.2d 853, 857 (10th Cir. 1993). This speculation by the *GWN* Court is hardly convincing authority that Congress intended to divest state courts of jurisdiction over foreclosure issues under §1825(b).

2. Waiver

Given the Court’s rejection of the FDIC’s sovereign immunity and subject matter jurisdiction arguments, it turns to the merits of Markham’s waiver argument. Markham points out that despite the explicit request in the Complaint that the court “allow and order the Sheriff of Maricopa County to have a sale of the real property . . .,” the FDIC did not assert the Lien Statutes as a defense in its Answer, nor did it include them in any disclosure statements or any of the multiple motions filed with the trial court. It also did not raise them before the Court of Appeals or the Supreme Court.

A failure to assert an affirmative defense in an Answer “results in a waiver of that defense and an exclusion of the issue from the case.” *Hegel v. O’Malley Ins. Co., Inc.* 122 Ariz.

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52, 56 (1979). “An affirmative defense is a legal defense to a claim, as opposed to a factual dispute as to an essential element of the claim.” 61A Am. Jur. 2d. Pleading §271. The Lien Statutes are affirmative defenses because they do not dispute the facts as alleged by Markham in the Amended Complaint—*i.e.*, that it held a junior lien on the Property—but rather create a legal defense that any foreclosure by Markham is barred because the FDIC owns the Property.

Not only did the FDIC fail to plead the Lien Statutes as an affirmative defense, but it violated Rule 26.1(a)(2) of the Arizona Rules of Civil Procedure, which requires each side to disclose “the legal theory on which each of the disclosing party's claims or defenses is based, including--if necessary for a reasonable understanding of the claim or defense--citations to relevant legal authorities.” Clearly, the FDIC was required to disclose in a *foreclosure action* its defense that federal law precluded Markham from initiating any foreclosure. When a party fails to make timely disclosures required by Rule 26.1, that party may not use that information at a hearing or at trial or with respect to a motion, unless the failure to disclose was harmless—*i.e.*, there was no prejudice to the other party. Rule 37(c)(1).

Markham argues that it was prejudiced by the late disclosure because, had the Court of Appeals been aware of the Lien Statute defenses, it may have crafted a more favorable remedy for Markham. The Court agrees with the FDIC that this alleged prejudice is simply too speculative. The issues before the Court of Appeals included: (1) whether the FDIC was entitled to equitable subrogation, and if so, in what amount; and (2) whether Markham’s lien was extinguished by the trustee’s sale. The Court was not requested to and did not reach the issue of Markham’s entitlement to foreclose.

As to the failure to assert the Lien Statutes as an affirmative defense in the Answer, the Court notes that the FDIC could cure that defect by amending the Answer to add the defenses. In determining whether to grant a motion to amend, the primary question is whether amendment would result in prejudice to the non-moving party or cause undue delay. The “prejudice” to be considered in determining whether to grant leave to amend “is not that occasioned by defeat on the merits, but rather the inconvenience and delay suffered when the amendment raises new issues or inserts new parties into the litigation.” *Romo v. Reyes*, 26 Ariz. App. 374, 376 (1976). Further, a finding of undue delay “requires more than a party merely seeking to amend late in the proceedings.” *Carranza v. Madrigal*, 237 Ariz. 512, 515 (2015).

The application of the Lien Statutes to the undisputed facts of this case presents a pure question of law. Thus, adding them as affirmative defenses will not occasion the need for any additional briefing or discovery. Rather, simply allowing the amendment would resolve the entire issue—Markham would, as a matter of law, be precluded from foreclosing its lien while the FDIC owns the Property.

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Given that the parties have fully briefed whether Markham has suffered prejudice as a result of the FDIC's late disclosure of the Lien Statutes as a defense, the Court will treat the FDIC's briefing on its Motion for Summary Judgment on Markham's Right to Foreclose Against FDIC's Interest in the Property as a Motion to Amend the Answer to include the Lien Statutes as affirmative defenses. And, for the reasons stated above, the Court hereby grants the Motion. The FDIC shall file the Amended Answer within 5 business days of the date this minute entry is filed.

The FDIC owns a 65% undivided interest in the Property, while PAZL owns a 35% undivided interest. Importantly, PAZL has no immunity or other viable defense to Markham's right to foreclose on PAZL's interest in the Property. Although the Court and counsel had some theoretical discussions about how such a foreclosure would work, no concrete determinations were made. Now that the Court has ruled on whether Markham is entitled to foreclose, it will order Markham to file a revised proposed form of judgment accounting for the Court's rulings.

2. Prejudgment Interest

The FDIC contends that sovereign immunity protects it from any award of prejudgment interest because the "sue-and-be-sued" waiver of immunity in 12 U.S.C. §1819(a) does not extend to prejudgment interest. The general rule is that the United States is immune from interest on claims against it unless it has waived immunity or is operating as a private commercial enterprise. An example of the latter is *Loeffler v. Frank*, 486 U.S. 549 (1988), where the Court ruled that Congress waived sovereign immunity for the Postal Service by "launching [it] into the commercial world, and including a sue-and-be-sued clause in its charter."

The FDIC acts in two capacities—corporate and receiver. In its corporate capacity, it acts to ensure the return of deposits to bank customers. As a receiver, it steps into the shoes of the failed institution and assumes responsibility for running the operations as well as pursuing the bank's claims and defending against the claims of others.

Defendants are correct that several courts have held that sovereign immunity extends to claims for prejudgment interest against the FDIC, even when it acts as a receiver. However, the analysis in many of those cases is superficial—that is, unless Congress has "launched the agency into the commercial world" like it did with the Postal Service, the courts simply find that the agency is not a commercial enterprise, without looking at whether in the particular action, the FDIC was *acting like* a private commercial enterprise.

For example, in *In Far West Federal Bank, S.B. v. Office of Thrift Supervision Director*, 119 F.3d 1358 (9th Cir. 1997), the court held that sovereign immunity precluded an award of prejudgment interest against the FDIC, which was acting in its corporate capacity. It then made

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general pronouncements such as “[u]nlike the Postal Service, FDIC operates as a governmental, regulatory entity, not as a private commercial enterprise.” *Id.* at 1366. In *Battista v. FDIC*, 195 F.3d 1113 (9th Cir. 1999), the FDIC was acting in its receiver capacity. The court nonetheless held that it was immune from prejudgment interest and in response to appellants argument that sovereign immunity should not apply when the FDIC is acting as a receiver because when it does so, its actions “take on more of the character of a private enterprise,” the court simply hearkened back to *In Far West*’s pronouncement that as a “governmental, regulatory entity . . . not a profit-making enterprise,” the FDIC is “not a commercial entity.” *Id.* at 1120.

Markham argues that whether the FDIC is entitled to immunity from prejudgment interest should turn on whether it was acting in its corporate or receiver capacity as to the dispute giving rise to the claim for prejudgment interest. It cites *Federal Deposit Ins. Corp. v. Hickey*, 757 F. Supp.2d 194, 197-98 (E.D.N.Y. 2010) to support the argument. The *Hickey* Court adopted a straightforward and sound approach to the question, finding that invocation of sovereign immunity to protect the FDIC against awards of prejudgment interest simply does not make sense where the FDIC is stepping into the shoes of the failed institution. *See also Northern Bank v. Federal Deposit Ins. Corp.*, 496 N.W.2d 459 (Neb. 1993).

The FDIC emphasizes that more courts have held that the FDIC is entitled to immunity from prejudgment interest than not. While that may be true, the Court notes that the Fifth Circuit appears to be moving in the direction of the Eastern District of New York. In *Spawn v. Western Bank – Westheimer*, 989 F.2d 830 (5th Cir. 1993), a case cited by the FDIC, the Court very specifically limited its ruling barring a prejudgment interest award against the FDIC to circumstances where it acts in its corporate capacity in making deposit insurance determinations:

[W]e conclude that the district court erred in awarding prejudgment interest under the “commercial enterprise” exception to the no interest rule. The FDIC’s sue-and-be-sued clause, although constituting a broad waiver of the agency’s immunity from suit, does not dispose of the question whether *Spawn* may recover interest. The more important considerations are whether the FDIC as insurer of deposits is engaging in a commercial operation, and, ultimately, whether Congress intended the FDIC to be liable for prejudgment interest in the context of erroneous deposit insurance determinations. In our view, the FDIC is not engaged in a commercial enterprise when it acts as insurer of deposits, but rather as a protector of the banking system and the general welfare.

Id. at 838. A footnote was included at the end of this passage stating that: “[w]e express no opinion whether the FDIC, when acting in other capacities and in other contexts, is immune from prejudgment interest awards,” and citing *Northern Bank, supra*, as an

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example of a court that has drawn the distinction between the FDIC acting in its corporate and receiver capacities. *Id.* n. 12.

Further, in *Federal Deposit Ins. Corp. v. Maxxam, Inc.*, 523 F.3d 566, 597 (5th Cir. 2008), the Fifth Circuit implied in *dicta* that if presented with the question of whether the FDIC is immune to awards of prejudgment interest when it is operating in a receiver capacity, it would likely find that it is *not*:

Even if we were to label the costs as “prejudgment interest” and to address the question of the extent to which the FDIC waived sovereign immunity, if FDIC were acting in its capacity as a receiver, it would not likely be immune from an assessment of prejudgment interest. Since we address the costs of delay awarded as part of sanctions, rather than traditional prejudgment interest, we leave that issue for another day.

Recognition of the distinction between the corporate and receiver capacities of the FDIC is not a novel concept. Indeed, a determination as to whether a party who prevails against the FDIC is entitled to attorneys’ fees under the Equal Access to Justice Act, 28 U.S.C. §2412 (“EAJA”), turns on this very distinction:

In light of the FDIC's purpose and its organizational framework, it becomes apparent that *when the FDIC is acting as a receiver it is performing a function normally accomplished by a private entity rather than a federal agency*. As a receiver, the FDIC does not act on behalf of the United States government, and it does not perform any function unique to the federal government. Instead, it acts on behalf of the failed bank in the interest of that bank's creditors.

Schock v. FDIC, 118 F. Supp. 2d 165, 169-170 (D. R.I. 2000) (emphasis added).

The Court agrees with Markham and the *Hickey* and *Northern Bank* Courts that sovereign immunity does not protect the FDIC from prejudgment interest when it acts in its receiver capacity, and it is not necessary for Congress to “launch an agency into the commercial world” to meet the commercial enterprise exception. This litigation effectively demonstrates why this should be the case. First, the FDIC and its co-lender, a *solvent* bank, have acted in lock-step with one another since the issuance of the 2008 Loan and throughout the eight years of litigation. Second, adopting the FDIC’s position would give it an undeserved windfall as a result of conduct which the Court of Appeals described as “contrary to law and calculated to lead to inequity.” That is, making its unlawful credit bid, Markham has suffered years of delay, which the FDIC claims it should not have to compensate Markham for because it is in the business of protecting the public and the industry.

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3. Attorneys' Fees

By minute entry dated December 7, 2017, the Court found that Markham was the successful party and entitled to reasonable attorneys' fees pursuant to A.R.S. §33-998(B). The remaining questions include: (1) whether the FDIC is immune from attorneys' fees awards; and (2) if not, the amount of fees that should be awarded.³

a. Immunity

While the FDIC was able to cite several cases to support its argument that sovereign immunity protects it from pre-judgment interest, it cited only one, *Interfirst Bank Abilene, N.A. v. FDIC*, 777 F.2d 1092, 1097 (5th Cir. 1985), to support its claim that it is also immune from awards of attorneys' fees. For all of the reasons set forth on page 18 of Markham's Supplemental Brief Re FDIC Immunity, the Court finds *Interfirst* inapposite.⁴ Thus, for the same reasons that the FDIC is not entitled to immunity from prejudgment interest, it is also not immune from fee awards.

b. Amount

Markham seeks \$450,965 in attorneys' fees. Defendants first request a substantial reduction in fees because Defendants prevailed on their equitable subrogation claim and obtained summary judgment on Markham's claims for unjust enrichment, promissory estoppel and misdistribution of the sales proceeds.⁵ But, "where a party has accomplished the result sought in the litigation, fees should be awarded for time spent even on unsuccessful legal theories." *Schweiger v. China Doll Restaurant*, 138 Ariz. 183, 189 (App. 1983). The Court declines Defendants' request because the claims were all interrelated, and as the Court explained at the hearing on December 7, 2017, Markham accomplished the result it sought—survival of its lien.

³ Markham points out that the FDIC never challenged the fee awards made by the Court of Appeals and the Supreme Court. While the FDIC was unable to explain why the Court of Appeals and the Supreme Court could award fees while this Court is precluded from doing so, the Court cannot find that it waived the immunity argument with respect to Markham's request for fees in this Court.

⁴Several courts have supported their finding that the FDIC is immune from prejudgment interest by noting that Congress anticipated delays in payments on claims for insurance proceeds without providing for prejudgment interest. *See, e.g., Spawn*, 989 F.2d at 838.

⁵ Defendants ask the Court to use the factors set forth in *Associated Indemnity Co. v. Warner*, 143 Ariz. 567, 570 (1985) to determine the appropriate fee award here. But the *Warner* factors are used to determine *whether* fees should be awarded under A.R.S. §12-341.01(A). The Court has already determined that Markham is entitled to a fee award.

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Defendants also request a reduction of approximately \$75,000 for various tasks, which are identified on page 10 on their Response to Markham's Supplemental Application for Fees. Having considered the factors set forth in *Schweiger v. China Doll Restaurant*, 138 Ariz. 183, 187-88, the Court agrees that the following deductions should be made:

Tasks related to different case	\$10,521
Clerical work billed by attorney	7,383
Tasks related to other Defendants	<u>1,786</u>
Total Deduction	\$19,690

The Court rejects Defendants' other arguments. Consequently, the Court finds that Markham is entitled to reasonable attorneys' fees in the amount of \$431,275. Defendants have not challenged the amount of Markham's requested costs, \$4,493.93, and the Court finds that they were necessary and reasonable.

4. Rule 68 Sanctions

Markham seeks sanctions under Rule 68 based on an offer of judgment it made for the principal amount of its lien, \$341,777.25, which Defendants did not accept. It argues that it is entitled to Rule 68 sanctions because Defendants "did not beat the offer." The Court, however, finds that Rule 68 is inapplicable here because while the offer of judgment was in monetary terms, the relief requested and obtained is largely declaratory in nature.

B. Lien Priority and Interest on the Equitable Subrogation Amount

Defendants contend that the Court must address lien priority because the Court of Appeals did not "offer any guidance as to how the Lenders' and Markham's competing priority interests were to be reconciled." Mot. at 4. The Court disagrees. The Court of Appeals decision clearly leaves Markham's lien in the senior position, with Defendants' remaining lien (credit bid amount less subrogation amount) in a junior position.

Defendants argue, however, that court intervention is necessary because Defendants' lien interest has technically been extinguished as a result of the foreclosure sale and failing to take some corrective action would lead to Markham "obtaining an unwarranted advancement in priority." They ask the court to essentially resurrect their senior lien for the equitable subrogation amount and allow interest to accrue on it until they obtain title free and clear of Markham's lien. Defendants characterize this as the "simple right to be compensated for the inability to use or sell the Property during the pendency of the litigation." But Defendants have *not* suffered an inability to use or sell the Property during the litigation. Rather, they gained title and the full

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right to possess and use the Property after the trustee's sale. Although they complain that a sale of the Property or the development of it is hampered by Markham's lien and the *lis pendens*, properties encumbered by liens are sold on a regular basis. Further, had they paid Markham what it was due when the trustee's sale was held, they would not be facing this problem.

The Court finds Defendants' requests, which would require the exercise of the Court's equitable powers, remarkable. One need only read the Court of Appeals decision to conclude that Defendants come to the table with unclean hands and are not entitled to any equitable relief:

[T]he manner in which [Defendants] purported to use a credit bid to extinguish Markham's lien was contrary to law and *calculated to lead to inequity.*"
(Emphasis added).

[T]he unlawful "credit bid" allowed the lenders to take the Property free of Markham's lien without having to actually pay for anything other than the costs and expenses of the sale . . . The superior court's ruling gave the lenders an undeserved windfall at the expense of Markham's legitimate expectations. Equity cannot condone that result.

Markham Contracting Co., Inc. v. Federal Dep. Ins. Co., 240 Ariz. 360, 365-66 (App. 2016)

For the reasons set forth above,

IT IS ORDERED granting FDIC's Motion for Summary Judgment on Markham's Right to Foreclose Against FDIC's Interest in the Property, and finding that Markham may not foreclose on the Property during FDIC's ownership of it without the FDIC's consent.

IT IS FURTHER ORDERED that the FDIC shall file an Amended Answer to the Amended Complaint adding 12 U.S.C. §§1821(d)(13)(C) and 1825(b)(2) as affirmative defenses within **5 business days of the date this minute entry is filed.**

IT IS FURTHER ORDERED granting Markham's Application for Attorneys' Fees and finding that it is entitled to a fee award in the amount of \$431,275.

IT IS FURTHER ORDERED denying any requests for leave to file supplemental fee applications.

IT IS FURTHER ORDERED granting Markham's Application for Costs and finding that it is entitled to costs in the amount of \$4,493.93.

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IT IS FURTHER ORDERED denying Markham's request for sanctions under Rule 68 of the Arizona Rules of Civil Procedure.

IT IS FURTHER ORDERED granting Markham's request for prejudgment interest, with interest to accrue at the annual rate of 10% on the lien amount of 341,777.25 from September 2, 2009 through the date judgment is entered.

IT IS FURTHER ORDERED denying Defendants' Joint Motion for Summary Judgment Re: Rights of Parties with Respect to Real Property and FDIC's and PrimeAZ's Right to Interest on Equitable Subrogation Amount.

IT IS FURTHER ORDERED that Markham shall file a revised proposed form of judgment incorporating the rulings above by **April 16, 2018**. Defendants shall file their response to the revised proposed form of judgment by **May 1, 2018**, and Markham shall file its Reply by **May 10, 2018**.