

1 The Debtor thereafter filed the instant bankruptcy on May 18, 2012. Midfirst's
2 Claim # 2 was filed as a secured proof of claim in the amount of \$2,758,215.27. The
3 Debtor filed an objection to Midfirst's claim (Dkt #116) contending that Midfirst waived
4 its security interest when it filed the state court lawsuit to recover a money judgment on
5 the note rather than complete a trustee's sale. Specifically, the Debtor argues that A.R.S.
6 §§ 33-722 and 12-1566 require Midfirst to elect to either foreclose on the real property or
7 release its lien and sue on the promissory note (Dkt #123, 126). Midfirst Bank filed a
8 response to the Debtor's claim objection (Dkt #124) asserting that the Debtor is
9 collaterally estopped from re-litigating this issue, that the Debtor waived any right to
10 require Midfirst to elect its remedy pursuant to the terms of the promissory note, and that
11 the Debtor's objection should be overruled because it is contrary to Arizona law.

12 **II. Analysis**

13 A. A.R.S. § 33-722 Does Not Apply to Deeds of Trust

14 A.R.S. § 33-722 provides that "[i]f separate actions are brought on the debt and to
15 foreclose the mortgage given to secure it, the plaintiff shall elect which to prosecute and
16 the other shall be dismissed." The Debtor asserts that A.R.S. § 33-722 is an election of
17 remedies statute which requires Midfirst to elect to either foreclose on its deed of trust or
18 file suit on its promissory note and waive its security interest. However, in this case,
19 Midfirst is a holder of a deed of trust, not a mortgage. A.R.S. § 33-722 does not apply to
20 deeds of trust foreclosed by trustee's sale. *Valley Nat. Bank of Arizona v. Kohlhase*, 897
21 P.2d 738, 740 (Ariz. Ct. App. 1995). Thus, § 33-722 does not require Midfirst to elect its
22 remedy.

23 B. A.R.S. § 12-1566 Does Not Preclude Midfirst From Both Suing on the 24 Underlying Debt and Conducting a Trustee's Sale

25 The Debtor also contends that A.R.S. § 12-1566(F) requires Midfirst to release its
26 deed of trust lien because Midfirst elected to sue on the note rather than foreclose on the
27 property. The Court finds this argument unpersuasive, however, because § 12-1566(F) is
28 not an election of remedies statute.

1 Arizona’s legislature enacted A.R.S. § 12-1566 to protect debtors from excessive
2 deficiency judgments. *Wells Fargo Credit Corp. v. Tolliver*, 903 P.2d 1101, 1103 (Ariz.
3 Ct. App. 1995). The statute achieves this goal by allowing judgment debtors to apply to
4 the court for a determination of the fair market value of the property once a deed of trust
5 is foreclosed by a private foreclosure sale. Once the fair market value of the property is
6 ascertained by the Court, a credit shall be applied against the judgment in the amount of
7 either the foreclosure sales price or the fair market value, whichever is greater.

8 Importantly, § 12-1566(F) provides that the “section shall not abate, suspend or
9 bar the right of the holder of a debt secured by real property to abandon and release the
10 lien on the real property which secures the debt and proceed against any borrower or
11 guarantor. Abandonment and release shall be evidenced by a recorded release of the
12 lien.” The *Tolliver* court interpreted this section to “merely reassure[] lienholders that the
13 fair market value provisions *do not interfere with* their right to waive their liens and
14 proceed against the debtors personally.” *Tolliver*, 903 P.2d at 1104 (emphasis in original).
15 In other words, § 12-1566(F) does not mandate that the lienholder elect between suing on
16 a note and commencing a trustee’s sale. Instead, it allows creditors who do not want to be
17 subject to a limitation on their deficiency judgment to waive their security interest and
18 proceed against the debtor for the full amount of the debt. Thus, neither § 12-1566(F) nor
19 *Tolliver* precludes creditors, such as Midfirst, from suing on a note and then foreclosing
20 on a deed of trust which was posted as collateral for that note.

21 C. Collateral Estoppel and Waiver

22 Based on this Court’s finding that Arizona law does not preclude Midfirst from
23 suing on the note and then conducting a deed of trust sale on the lien securing that note,
24 this Court does not need to address Midfirst’s contentions that collateral estoppel
25 precludes the Debtor from re-litigating this issue or that the Debtor waived these
26 arguments when it signed the promissory note. Nevertheless, this Court notes that its
27 decision appears to be consistent with the State Court’s minute entry addressing
28 apparently identical issues raised by the Debtor before the State Court. Since the State

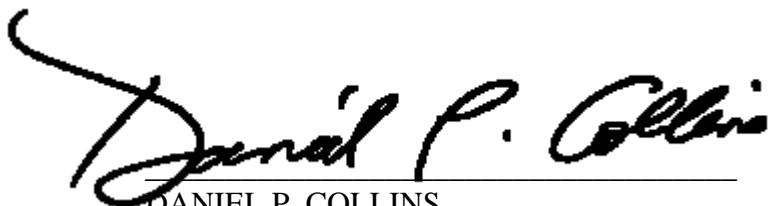
1 Court's minute entry was apparently not reduced to an order entered by the State Court,
2 this Court is concerned that collateral estoppel does not apply to the State Court minute
3 entry. This Court also has doubts concerning the enforceability of any provision in the
4 promissory note purporting to cause the Debtor to waive its statutory rights under A.R.S.
5 § 12-1566. However, because of its ruling above, this Court need not address this
6 argument raised by Midfirst.

7 **III. Conclusion**

8 Arizona law does not preclude Midfirst from suing on a note and then conducting
9 a private trustee's sale on the deed of trust securing that note. There is no election of
10 remedies statute applicable to deeds of trust in Arizona. Moreover, § 12-1566(F) is not an
11 election of remedies statute. Midfirst did not waive its security interest when it filed suit
12 on its promissory note nor do the Arizona statutes require Midfirst to release its deed of
13 trust simply because it sued on the note before it commenced its private deed of trust sale.
14 Accordingly, the Debtor's Objection to Midfirst's Claim #2 is overruled and Midfirst's
15 claim is allowed in the amount stated in Claim #2. If and when Midfirst completes its
16 private sale of the subject deed of trust, Midfirst's claim will, of course, need to be
17 reduced by the greater of the sale proceeds or the fair market value as determined by a
18 court with proper jurisdiction over that issue.

19
20 **So ordered.**

21 Dated: April 8, 2013



22
23 DANIEL P. COLLINS
24 UNITED STATES BANKRUPTCY JUDGE

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26
27 COPY of the foregoing mailed by the BNC and/or
28 sent by auto-generated mail to:

All interested parties