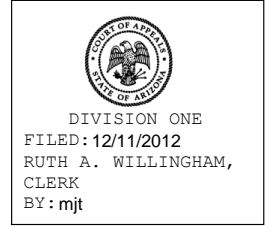


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);  
Ariz.R.Crim.P. 31.24



IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

FEDERAL HOME LOAN MORTGAGE ) No. 1 CA-CV 11-0517  
CORPORATION, )  
) DEPARTMENT D  
Plaintiff/Appellee, )  
) **MEMORANDUM DECISION**  
v. ) (Not for Publication -  
) Rule 28, Arizona Rules of  
DAVID R. MCNEW, an individual, ) Civil Appellate Procedure)  
)  
Defendant/Appellant. )  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-001188

The Honorable Michael L. Barth, Judge *Pro Tempore*

**AFFIRMED**

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by Kevin Hahn  
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Irvine, CA

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by Donald O. Loeb  
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**B R O W N**, Judge

¶1 David R. McNew appeals from the summary judgment entered in favor of Federal Home Loan Mortgage Corporation ("Freddie Mac") finding him guilty of forcible entry and

detainer ("FED") because he refused to vacate property sold at a trustee's sale and for which Freddie Mac held a trustee's deed. McNew contends that Mortgage Electronic Registration Systems, Inc. ("MERS"), which was named in the deed of trust as the beneficiary, was not the "true" beneficiary, that MERS' transfer of the beneficial interest in the deed of trust and appointment of a successor trustee were therefore unauthorized, and that the successor trustee consequently had no authority to conduct a trustee's sale. As a result, McNew argues, purchaser Freddie Mac did not have a right to the premises superior to that of McNew. Because McNew's arguments raise issues of title, we affirm.

#### **BACKGROUND**

¶2 On June 21, 2007, McNew executed a deed of trust on a parcel of property in Surprise, Arizona ("the Property") to secure a note for \$224,000. The deed of trust listed the lender as Wallick & Volk, Inc. and the trustee as Capital Title Agency. It identified MERS as "acting solely as a nominee for Lender" and as "the beneficiary under this Security Instrument." The deed of trust also explained that MERS, as nominee for the lender, "has the right . . . to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this

Security Instrument." It further provided that the "Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower."

¶13 On March 24, 2009, MERS executed a notice of substitution of Trustee, appointing First American Title Insurance Company ("First American") successor trustee under the deed of trust. The notice listed as beneficiary, Wells Fargo Home Mortgage. On April 23, 2009, MERS executed an assignment of the deed of trust to Wells Fargo Bank, N.A.

¶14 A notice of trustee sale was issued on December 8, 2010. The notice listed MERS "c/o Wells Fargo Home Mortgage" as the beneficiary and First American as the trustee. A trustee's sale was held and Freddie Mac purchased the property by a credit bid. On March 14, 2011, the trustee transferred ownership to Freddie Mac by a trustee's deed upon sale. McNew was given notice to vacate the Property and did not do so. Freddie Mac then filed a verified FED complaint against McNew, asserting entitlement to possession of the premises, based on the trustee's deed upon sale.

¶15 In his answer to the FED complaint, McNew denied that Freddie Mac was the owner of the Property, contending that the true beneficiary never requested the trustee to conduct the sale, that the trustee that conducted the sale was not lawfully

appointed, and that Freddie Mac was not the beneficiary and thus had no right to purchase the Property with a credit bid. McNew further alleged that Freddie Mac was not entitled to the conclusive evidentiary presumption of Arizona Revised Statute ("A.R.S.") section 33-811(B) (2007). Based on these contentions, McNew filed a motion to dismiss.

¶16 Freddie Mac then moved for summary judgment, asserting it had followed all the appropriate procedures and met all the requirements under Arizona law to acquire ownership of the property and the right to immediate possession. In response to McNew's motion to dismiss, Freddie Mac asserted McNew was raising issues pertaining to title, which could not be raised in an FED action.

¶17 In response, McNew argued Freddie Mac was not a purchaser for value without notice because it was a "[large] government sponsored housing authority" and "one of the most sophisticated and knowledgeable participants in the residential mortgage lending industry." McNew contended Freddie Mac was therefore not entitled to the presumption of compliance with the requirements of the deed of trust and the law under A.R.S. § 33-811(B). Additionally, McNew argued Freddie Mac failed to show that it was the beneficiary under the deed of trust, that it paid consideration for the property, and that First American was the successor trustee lawfully appointed by the beneficiary.

McNew argued MERS was never the holder of the note or the beneficiary and could not foreclose and could not appoint First American as the successor trustee, making First American's conduct of the sale invalid.

¶18 The court granted Freddie Mac's motion for summary judgment. McNew timely appealed.

#### DISCUSSION

¶19 Summary judgment may be granted when "there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c). We determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). We view the facts and the inferences to be drawn from those facts in the light most favorable to the party against whom judgment was entered. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996).

¶10 One who acquires title to property through a trustee's sale may employ an FED action to remove anyone remaining in possession of the property after receiving a written demand for possession. A.R.S. § 12-1173.01(A)(1) (2003). The purpose of an FED action is to provide rightful owners with a summary, speedy, and adequate means to obtain possession. *Andreola v.*

*Arizona Bank*, 26 Ariz. App. 556, 557, 550 P.2d 110, 111 (1976). Thus, the only issue in an FED action is the right to possession; the court may not inquire into the merits of title. A.R.S. § 12-1177(A) (2003); *Curtis v. Morris*, 186 Ariz. 534, 534, 925 P.2d 259, 259 (1996). Any dispute over the merits of title may be brought in a separate proceeding. *Mason v. Cansino*, 195 Ariz. 465, 468, ¶ 8, 990 P.2d 666, 669 (App. 1999). The fact of title is admissible in an FED action and can be considered as incidental to proof of ownership, but no further inquiry is permitted. *Taylor v. Stanford*, 100 Ariz. 346, 349-50, 414 P.2d 727, 730 (1966). A deed presents prima facie evidence of ownership. *Id.* at 350, 414 P.2d at 730.

¶11 When ownership is acquired through a deed of trust sale, the trustee's deed raises a presumption of compliance with the requirements of the deed of trust and the statutes related to the exercise of the power of sale and the conduct of the sale. Further, the deed is conclusive evidence of such compliance in favor of purchasers or encumbrancers for value without notice. A.R.S. § 33-811(B). Moreover, the trustor waives all defenses and objections to the sale not raised in an action resulting in injunctive relief granted prior to the trustee's sale. A.R.S. § 33-811(C) .

¶12 On appeal, McNew argues that MERS was not the "true beneficiary" and so did not have the authority to appoint First

American as the successor trustee, and therefore First American did not have the authority to conduct the sale that resulted in Freddie Mac acquiring the Property. Consequently, according to McNew, Freddie Mac's purchase at the sale was invalid and Freddie Mac did not have a right of possession superior to that of McNew. McNew also argues that MERS did not have the authority to transfer the beneficial interest in the deed of trust to Wells Fargo and therefore the note and deed of trust have been "split," preventing First American from foreclosing on the deed of trust, thereby invalidating Freddie Mac's purchase at the sale.<sup>1</sup>

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<sup>1</sup> Apparently for these reasons, McNew asserts that Freddie Mac's trustee's deed is not entitled to the conclusive presumption of A.R.S. § 33-811(B). In the trial court, McNew argued Freddie Mac was not entitled to the conclusive presumption on the grounds that it was not a purchaser "for value and without actual notice" by virtue of its status as a "sophisticated and knowledgeable" participant in the residential mortgage lending industry. On appeal, McNew has not renewed this argument. Instead, McNew states his position that Freddie Mac is not entitled to the presumption in a section heading, but then argues that MERS was not the beneficiary with the authority to appoint the trustee or to transfer the note.

To the extent McNew is claiming that this is a basis for finding that the presumption does not apply, we reject the argument. Deed of trust sales are based on a contract theory. *In re Krohn*, 203 Ariz. 205, 208, ¶ 8, 52 P.3d 774, 777 (2002). McNew's assertion that MERS was not the beneficiary under the deed of trust is refuted by the language of the document. The deed of trust, signed by McNew, expressly states in the "Definitions" section, in bold letters, that "MERS is the beneficiary under this Security Instrument." In a section titled, "Transfer of Rights in the Property," it states "The beneficiary of this Security Instrument is MERS," and provides

¶13 These arguments can be viewed as raising issues challenging Freddie Mac's title to the property or as claims of noncompliance with statutory requirements or impropriety in the conduct of the sale. In either case, these arguments are not properly raised in an FED action.

¶14 Matters of title are statutorily precluded from review in an FED action. A.R.S. § 12-1177(A). To the extent McNew may be claiming the sale was not properly conducted, McNew as trustor has waived "all defenses and objections to the sale" by not having raised them prior to the sale in an action for injunctive relief. A.R.S. § 33-811(C); *BT Capital, LLC v. TD Serv. Co. of Arizona*, 229 Ariz. 299, 301, ¶ 11, 275 P.3d 598, 600 (2012); *Madison v. Groseth*, 230 Ariz. 8, 13, ¶ 15, 279 P.3d 633, 638 (App. 2012).

¶15 McNew contends issues of fact exist as to the "fact of title," precluding entry of summary judgment. He argues Freddie Mac was required to allege in its complaint not only that it had obtained a trustee's deed upon sale, but that it had also at some time been in possession of the Property. This argument lacks merit. Freddie Mac brought its FED action pursuant to A.R.S. § 12-1173.01(A), which authorizes one that obtains title to property through a trustee's sale to employ a forcible

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that MERS had the right to exercise the interests of the lender. McNew agreed to these contractual terms.



detainer action to remove a party who retains possession of the property after receiving written demand for possession. The plain language of the statute does not require the showing asserted by McNew and to impose such a requirement would be illogical.

¶16 McNew further argues Freddie Mac had the burden to prove and the trial court should have required it to prove that First American had authority from the "true beneficiary" or actual lender, to conduct the sale. McNew argues Freddie Mac produced no proof that First American or its principal ordering the sale was the holder of the note with the right to enforce it. We disagree.

¶17 First, McNew is essentially asserting the "show-me-the-note" theory. Our supreme court has rejected that argument. See *Hogan v. Washington Mut. Bank, N.A.*, \_\_\_ Ariz. \_\_\_, \_\_\_, ¶ 6, 277 P.3d 781, 783 (2012) (finding Arizona statutes do not require beneficiary under deed of trust to prove rights or to prove ownership of note prior to conducting non-judicial foreclosure). Second, to require proof of chain of title would violate the prohibition against inquiring into title in an FED action. See A.R.S. § 12-1177(A).

¶18 Freddie Mac acquired title at a trustee's sale and attached the trustee's deed upon sale to its FED complaint, demonstrating fact of title. The deed raises the presumption of

compliance with the terms of the deed of trust and the statutory requirements regarding the sale of the Property. A.R.S. § 33-811(B). It conveyed to Freddie Mac the "title, interest and claim of the trustee, the trustor, the beneficiary, their respective successors in interest and all persons claiming the trust property sold by or through them[.]" A.R.S. § 33-811(E). If McNew had evidence of any improprieties in the conduct of the sale with respect to the beneficiary or the trustee such as the defenses raised in this action, he could have sought an injunction prior to the sale. Having failed to do so, he has waived any defenses and objections to the sale. A.R.S. § 33-811(C).

**CONCLUSION**

¶19 For the foregoing reasons, we affirm the trial court's judgment.

/S/

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MICHAEL J. BROWN, PRESIDING JUDGE,

CONCURRING:

/S/

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ANDREW W. GOULD, JUDGE

/S/

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DONN KESSLER, JUDGE