IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 10/25/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

2525 S. MCCLINTOCK, LLC, an Arizona limited liability company, Plaintiff/Appellee, v. NEVILLE W. JAMES, and JANE DOE JAMES, husband and wife; HARVARD JAMES and JANE DOE JAMES; NEVILLE W. JAMES, Trustee of the James Family Trust dated May 30, 1996; PLEASANTVIEW, LLC, Defendants/Appellants.	No. 1 CA-CV 11-0801 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-056306

The Honorable John R. Doody, Judge *Pro Tempore*

AFFIRMED

Hymson Goldstein & Pantiliat, PLLC Scottsdale
By Eddie A. Pantiliat and John L. Lohr, Jr.
Attorneys for Plaintiff/Appellee

Rhoads & Associates, PLC Phoenix
By Douglas C. Rhoads
Attorney for Defendants/Appellants

B R O W N, Judge

¶1 This is a forcible entry and detainer ("FED") action filed by 2525 S. McClintock, LLC, ("2525") against Harvard James, Neville W. James (individually and as trustee of the James Family Trust), and Pleasantview, LLC (collectively "Appellants"). Appellants challenge the trial court's judgment terminating their right to possession of the property at issue ("the property"). For the following reasons, we affirm.

BACKGROUND

¶2 After Appellants defaulted on a commercial loan secured by a deed of trust on the property, the lender conducted a non-judicial foreclosure. Alon Shnitzer purchased the property at a trustee's sale conducted on October 12, 2011, and thus acquired title by trustee's deed and bill of sale ("trustee's deed"). Shnitzer formed a limited liability company, 2525, to "hold and manage" the property. He then transferred title to 2525 by special warranty deed.

¶3 2525 served Appellants with a five-day written demand to vacate and deliver possession of the property. Appellants failed to comply and 2525 filed a verified FED complaint on November 3, alleging it owned the property and was entitled to sole and exclusive possession. Copies of the five-day demand, the trustee's deed, and the special warranty deed were attached to the complaint.

¶4 On November 8, both parties appeared at a return hearing and were represented by counsel. The trial court inadvertently failed to start the recording device at the beginning of the hearing; however, the court noticed the problem while the parties were still present and promptly advised them. The court summarized what had previously transpired and gave everyone the opportunity to clarify their positions and make additional arguments. Appellants asserted the trustee sale was invalid, they had entered leases between themselves as individuals and their trust, and 2525 was acting in bad faith. Appellants requested a jury trial and additional time to respond to the complaint. They also asserted a temporary restraining order ("TRO") had been issued and was still in effect.[1] Appellants further objected that the affidavits of service were invalid because they were not signed or notarized.

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[1] Appellants had previously filed an action seeking to quiet title to the property. On November 2, they sought a TRO without notice, which was assigned to Judge Ditsworth. After granting the TRO, Judge Ditsworth learned of a companion quiet title case involving the same property that was pending before Judge Foster. Judge Ditsworth discovered that Appellants had been denied injunctive relief in Judge Foster's case. Based on an expedited motion to consolidate, the judges discussed the cases. The two quiet title action cases were then consolidated under cause number CV2010-026702. The TRO was summarily vacated via email to the parties on November 3 and filed on November 4. The superior court judges "strongly admonish[ed] [Mr. Rhoads, Appellants' attorney,] for a lack of candor to the Court" because he knew, or should have known, of the prior rulings in Judge Foster's court and failed to advise Judge Ditsworth of those rulings.

¶5 The trial court found that the affidavits were valid, and regardless, Appellants waived the argument because they appeared at the hearing. The court also rejected Appellants' other arguments, concluding there were no valid legal issues to be tried and the TRO had been properly vacated. 2525 withdrew its request for attorneys' fees, and the court entered judgment in its favor. Appellants timely appealed.[2]

DISCUSSION[3]

¶6 As best we can tell, Appellants assert three basic arguments on appeal. First, they argue numerous alleged procedural defects, including the trial court's failure to

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[2] 2525 filed a motion to supplement the appellate record pursuant to Arizona Rules of Civil Appellate Procedure ("ARCAP") 11(e) asking us to consider a judgment in related litigation involving the property. Because that litigation dealt with title issues, we deny the motion to supplement the record. *See Curtis v. Morris*, 186 Ariz. 534, 534, 925 P.2d 259, 259 (1996) (stating that courts cannot inquire into the merits of title in FED actions).

[3] As an initial matter, 2525 requests we dismiss the case for Appellants' failure to make appropriate references to the record in his brief as required by ARCAP 13(a)(4). We agree with 2525 that Appellants' opening brief, as well as the reply brief, fail to meet the essential requirements of ARCAP 13 because there are virtually no citations to the record and many of the arguments are without legal authority. Furthermore, Appellants include numerous extraneous references to items not in the record. Nevertheless, we decline 2525's request to dismiss the appeal on that basis and decide the case on the record before us. *See Clemens v. Clark*, 101 Ariz. 413, 414, 420 P.2d 284, 285 (1966). However, we do consider Appellants' lack of compliance as a factor in evaluating whether counsel should be sanctioned. *See infra* ¶ 27.

record the entire return hearing, 2525's failure to properly serve them, and the denial of an opportunity to be heard, present evidence, and have a jury trial. Second, they assert the trustee's deed is groundless and invalid and therefore, judgment based solely on the complaint was inappropriate. Finally, they argue that allowing 2525 to rely on the trustee's deed at the hearing constituted inappropriate "merits of title" evidence and hearsay.[4] We consider each argument in turn.

A. Alleged Procedural Defects

1. Recording the Hearing

¶7 Appellants assert that the hearing conducted by the trial court was not recorded, which constitutes a violation of

[4] Appellants assert numerous other arguments as well, including the TRO was vacated without notice or an opportunity to be heard, the TRO was in effect and was violated and set aside without a hearing based on ex parte communications with the judges, there was a lease, and the "execution of a Writ of Restitution with an appeal pending and a motion to stay pending appeal is a violation of due process that cannot be condoned." However, Appellants cite no relevant legal authority to support these arguments nor do they cite any factual support in the record. They are merely "bald assertion[s]" and therefore we will not consider them. *See In re U.S. Currency in Amount of $26,980.*00, 199 Ariz. 291, 299, ¶ 28, 18 P.3d 85, 93 (App. 2000). Moreover, most of these alleged errors arose largely due to Mr. Rhoads' lack of candor with the trial court. Had he been candid with the court about the nature of the companion proceedings, these alleged errors would likely not have occurred. We therefore summarily reject the arguments raised by Appellants that are not supported by competent authority, and in particular, those assertions that flow from Rhoads' lack of candor with the superior court judges. *See* Ariz. Supreme Court Rule 41(c), 42 E.R. 3.3, 8.4(c) and (d) (requiring attorneys to exercise candor with the court); *see also Hmielewski v. Maricopa County*, 192 Ariz. 1, 5, ¶ 21, 960 P.2d 47, 51 (App. 1997).

Arizona Rules of Procedure for Eviction Actions ("RPEA") Rule 11. They argue the purpose of this rule is to meet the "due process rights to have a record to appeal." In pertinent part, Rule 11 states: "All proceedings in eviction actions shall be recorded[.]" RPEA Rule 11(a). The rule then explains the basic requirements of an eviction hearing. Specifically, the court must call the case, identify the parties, state or summarize the material allegations contained in the complaint, and ask the defendant whether any allegations in the complaint are contested. RPEA Rule 11(a)(1)-(3).

¶8 Without question, the trial court was required to record the entire hearing. However, we reject Appellants' suggestion that they were denied due process. During the hearing, the trial court advised the parties of the problem with the recorder and then carefully summarized the legal defenses Appellants had previously raised to make sure they were restated on the record. The judge repeatedly asked Appellants whether they had any other defenses to raise. Appellants did not raise any objection relating to the problem with the recording device and have thus waived their right to complain on appeal. *Englert v. Carondelet Health Network*, 199 Ariz. 21, 26, ¶ 13, 13 P.3d 763, 768 (App. 2000). Regardless, we find the trial court acted appropriately to remedy the situation. Appellants were not denied due process. *See Cook v. Losnegard*, 228 Ariz. 202, 206,

¶ 18, 265 P.3d 384, 388 (App. 2011) ("Due process entitles a party to notice and an opportunity to be heard at a meaningful time and in a meaningful manner." (citation omitted)).

2. Personal Service

¶9 Appellants argue the affidavits used to prove service were invalid because they were not notarized or signed. Additionally, they assert service itself was not proper.

¶10 In an FED action, "service of summons and complaint shall be accomplished . . . as provided by Rule 4.1 or 4.2 of the Arizona Rules of Civil Procedure" and "[r]eturn of service and proof thereof shall be made by affidavit." RPEA 5(f). Accordingly, Arizona Rule of Civil Procedure 4.1(d) authorizes service

> [B]y delivering a copy of the summons and of the pleading to that individual personally or by leaving copies thereof at that individual's dwelling house . . . with some person of suitable age and discretion . . .

¶11 The essence of Appellants' argument appears to be that because the affidavits and proof of service were filed electronically, they are invalid. They seem to imply that because a handwritten signature or a physical notary stamp is not present on the documents, except for in electronic form, they are invalid. This argument is without merit. Depending on local rules, parties are required to electronically file documents with the court and verify those documents through

electronic signatures and notaries. In fact, several rules require/allow for the filing of electronic documents and signatures with the court, including notaries. *See, e.g.*, Arizona Supreme Court Administrative Order 2011-87 (allowing e-filed documents to the court); Ariz. Rev. Stat. ("A.R.S.") §§ 41-352, and 41-354 (2012) (allowing electronic notaries).[5]

3. Opportunity to be Heard

¶12 Appellants claim that because they contested all the facts in the complaint, requested an opportunity to file a written answer and have a "hearing," the judge erred in denying those requests. Specifically, Appellants assert that under RPEA 11(b) they were entitled to a hearing and an opportunity to file a written response, directing us to the following: "If the defendant appears and contests any of the factual or legal allegations in the complaint or desires to offer an explanation, the judge should determine whether there is any basis for a legal defense to the complaint either by reviewing a written answer filed pursuant to Rule 7 or by questioning the defendant in open court." RPEA Rule 11(b)(1).

¶13 Appellants, however, ignore the last clause of that provision, which gives the trial court the option of

[5] Appellants also appear to argue that because the trial court only stated that "some of them are notarized," it did not sufficiently find proper service. After reviewing the record, we find they were all properly notarized, whether by handwritten or electronic means.

"questioning the defendant in open court." The plain language of the rule gives the court discretion to either allow a defendant to file a written answer or to simply question a defendant in open court regarding any legal defense. *See* RPEA Rule 11(b). Here, the court properly questioned Appellants as to their legal defenses. Thus, the court acted within its discretion in denying Appellants' request to file a written answer.

4. Jury Trial

¶14 Appellants also contend they made a proper jury demand under A.R.S. § 12-1176(B) (2012) but that it was not properly recorded. Further, they assert there were issues of fact for a jury to decide. As stated above, after the trial judge realized he was not on the record, he promptly notified the parties and revisited the essential issues left off the record. At that moment, Appellants were under the obligation to voice their objection to not receiving a jury trial and ensure the objection was recorded. *See Spillios v. Green*, 137 Ariz. 443, 446, 671 P.2d 421, 424 (App. 1983) ("If lawyers want to preserve the record for appellate review, they must make sure that their arguments to the trial judge are being transcribed by the court reporter" or are being recorded.). Because their objection did not appear on the record, we will not consider it for the first time on appeal. *K.B. v. State Farm Fire and Cas. Co.*, 189 Ariz.

263, 267-68, 941 P.2d 1288, 1292-93 (App. 1997) (stating that even constitutional issues like jury trial demands will not be considered for the first time on appeal). Regardless, Appellants were entitled to a jury trial only if any of the alleged defenses had a legal basis for contesting the FED complaint. Because the trial court properly determined there were no issues warranting a hearing on the merits, Appellants' request for a jury trial was moot. *See infra* ¶ 20.

B. No Viable Defenses

¶15 To defeat a plaintiff's motion for judgment on the pleadings under the RPEA a defendant must deny the truth of a material allegation in the complaint or assert a viable defense on the issue of possession. We review the trial court's conclusions of law de novo. *Motel 6 Operating Ltd. Partnership v. City of Flagstaff*, 195 Ariz. 569, 571, ¶ 7, 991 P.2d 272, 274 (App. 1999).

¶16 An FED action is created by statute to provide a summary, speedy remedy in order to gain possession of a premise.[6] *Mason v. Cansino*, 195 Ariz. 465, 466, ¶ 5, 990 P.2d 666, 667 (App. 1999). To achieve this end, an FED action is limited in its scope and is not the proper vehicle to decide issues outside

[6] FED actions are also available to one who has purchased property at a trustee's sale under a deed of trust. Ariz. Rev. Stat. ("A.R.S.") § 12-1173.01(A)(2) (2012); *Curtis v. Morris*, 186 Ariz. 534, 535, 925 P.2d 259, 260 (1996).

of possession. *See United Effort Plan Trust v. Holm*, 209 Ariz. 347, 350-51, ¶ 21, 101 P.3d 641, 644-45 (App. 2004). For example, "[a]lthough the fact of title may be admitted if incidental to proving a right of possession [in an FED action], the merits of title cannot be litigated." *Id*. at 351, ¶ 21, 101 P.3d at 645. Instead, actual possession is the only issue to be decided in an FED action and "the only appropriate judgment is the dismissal of the complaint or the grant of possession to the plaintiff." *Id*. If the validity of title is disputed, a defendant still has alternative channels to seek relief, but an FED action is not the forum to raise those issues. *See Mason*, 195 Ariz. at 468, ¶ 8, 990 P.2d at 669.

¶17 As evidence of its right of actual possession, 2525 relied on its verified complaint, the executed and acknowledged trustee's deed, the special warranty deed, and the five-day demand to vacate the property. The complaint alleged Appellants failed to vacate the property and were therefore guilty of forcible detainer. Under A.R.S. § 33-811(B) (2012), a trustee's deed raises the presumption of compliance with the requirements of the deed of trust "relating to the exercise of the power of sale and the sale of the trust property" and is also "conclusive evidence" of meeting those requirements. Furthermore, the "issuance of the trustee's deed to the [purchasers] is conclusive evidence that the statutory requirements were

satisfied." *Triano v. First American Title Ins. Co. of Arizona*, 131 Ariz. 581, 583, 643 P.2d 26, 28 (App. 1982). Thus, when 2525 received the trustee's deed, it had conclusive evidence of compliance with all the requirements of the trustee's deed.

¶18 As we understand their argument, Appellants assert 2525 cannot now enjoy the right to this presumption of good title because it was aware of title defects before the FED action, including a lis pendens filed against the property and thus, was not a bona fide purchaser. Further, Appellants stress that they made all their payments so there was never a material default. They also argue there was "no legal or contractual relationship with 2525, but with Valley Mortgage, and that the sale did not occur as alleged[.]" They assert further that the trustee did not have the right to exercise the power of sale and that the trustee's deed contained material misstatements, false claims, and was otherwise invalid. They therefore conclude that the conclusive presumption of § 33-811(B) does not apply and the court erred in deciding the case on the pleadings.[7] Appellants'

[7] Appellants urge us to apply the presumption of A.R.S. § 33-420(D), which states: "A document purporting to create an interest in . . . real property not authorized by statute, judgment or other specific legal authority is presumed to be groundless and invalid." In support, they allege the trustee's deed contained false claims and misstatements, that these allegations should have been accepted as true at the return hearing, and that 2525's trustee's deed should have therefore been presumed groundless and invalid instead of conclusively valid. Again, Appellants ignore the fact that the trustee's

assertions are merely conclusory and are therefore insufficient as a matter of law. Regardless, even if Appellants had evidence to support their those assertions, it would be to no avail because the issues they raise concern matters of title and therefore are not reviewable in an FED action.

¶19 Furthermore, these arguments relate only to the trustee's right and ability to declare a default and compel a trustee's sale. It is undisputed that Appellants did not obtain an injunction prior to the trustee's sale of the property. Thus, Appellants have waived these assertions, including the lis pendens and lack of bona fide purchaser status assertions. *See BT Capital, LLC v. TD Service Co. of Ariz.*, 229 Ariz. 299, ___, ¶ 14, 275 P.3d 598, 600 (2012) (stating a lis pendens does not negate the waiver provision of A.R.S. § 33-811(C)); *Madison v. Groseth*, 230 Ariz. 8, ___, ¶¶ 13-15, 279 P.3d 633, 638 (App. 2012) ("[W]e need not decide whether the Groseths are bona fide purchasers. The plain language of [A.R.S.] § 33-811(C) does not condition the applicability of the waiver provision on the existence of a bona fide purchaser."); A.R.S. § 33-811(C) (stating that "all persons to whom the trustee mails a notice of

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deed creates a *conclusive* presumption regarding the regularity of the process. *See* A.R.S. § 33-811(B) (emphasis added). Moreover, Appellants misunderstand the standard applicable in the context of a FED proceeding—they were required to deny the truth of a material allegation in the complaint or provide a valid legal defense. They simply did not do so.

a sale under a trustee deed . . . shall waive *all* defenses and objections to the sale not raised in an action that results in the issuance of" injunctive relief pursuant to Arizona Rules of Civil Procedure 65.)

¶20 In sum, the trial court properly entered judgment on 2525's FED complaint. *See* RPEA Rule 11(b) (providing that "the judge should determine whether there is any basis for a legal defense to the complaint").

C. Admissibility of Trustee's Deed

¶21 As a related argument, Appellants assert the trustee's deed "should not have been admitted because it was presented to show 2525's claimed 'merits of title' in violation of A.R.S. § 12-1177(A)." In the alternative, they assert, their "own evidence of superior right to possession should also have been admitted to contest the Trustee's Deed." We disagree.

¶22 To the extent the trial court relied on the trustee's deed, as opposed to the special warranty deed, reliance on those exhibits at the hearing did not go to the "merits of title" as Appellants contend; rather, this "evidentiary fact" of title is admissible because it is merely incidental to 2525's proof of right of possession by reason of ownership. *See Andreola v. Ariz. Bank*, 26 Ariz. App. 556, 557, 550 P.2d 110, 111 (1976); *Taylor v. Stanford*, 100 Ariz. 346, 349-50, 414 P.2d 727, 730 (1966); *Merrifield v. Merrifield*, 95 Ariz. 152, 153-54, 388 P.2d

153, 154 (1963). Thus, 2525's trustee's deed does not relate to the merits of title in violation of A.R.S. § 12-1177(A).[8] However, further inquiry into title after a preliminary showing of right of possession is still prohibited. *Taylor*, 100 Ariz. at 350, 414 P.2d at 730. Because the lower court did not inquire into any more details regarding the trustee's deed, it did not err in using it as proof of right of possession.[9]

¶23 Appellants appear to recognize that FED actions only involve disputes over actual possession and that merits of title cannot be inquired into. However, they make a final attempt to contest title in this FED action, asserting it is proper when "title is incidental to possession, [or] where title evidence is inextricably intertwined with the right to possession, or where

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[8] Appellants also assert the trustee's deed should be excluded as inadmissible hearsay evidence. To the extent the trustee's deed is even relevant in light of the fact that 2525 obtained the right to possession by virtue of the special warranty deed, the trustee's deed was not used to show the merits of title, but rather possession. Thus, it was admissible because it was not introduced to prove the truth of the matter asserted. *See Taylor*, 100 Ariz. at 350, 414 P.2d at 730. Furthermore, both deeds would presumably have been admissible under Arizona Rule of Evidence 803(14), which provides an exception to the hearsay rule for records of documents that affect an interest in property. Thus, the lower court did not err in reviewing the trustee's deed.

[9] Appellants also assert the deed contained "material misstatements, false claims, and [is] otherwise invalid." As best we understand Appellants' assertion, it revolves around 2525's claimed title to the property and thus cannot be raised in a FED action. *See* A.R.S. § 12-1177(A); *Mason v. Cansino*, 195 Ariz. 465, 468, ¶ 8, 990 P.2d 666, 669 (App. 1999).

there is a prerequisite issue that must be determined." Appellants summarily assert this case falls within this rare exception to FED actions, arguing 2525's right of possession depends on whether it can claim any rights under documents containing false statements, whether it paid the trustee the money within 24 hours of the sale, and whether there was a material default. Appellants, however, cite nothing in the record or any legal authority to support their contention that this case falls into an exception to FED actions. We therefore decline to consider these arguments further. *See* ARCAP 13(a)(6); *see also Nationwide Res. Corp. v. Massabni*, 134 Ariz. 557, 565, 658 P.2d 210, 218 (App. 1982) (stating that it is not incumbent upon the appellate court to legally develop a party's argument).

D. Attorneys' Fees and Sanctions

¶24 2525 requests attorneys' fees and costs pursuant to A.R.S. § 12-1178(A) (2012) (providing for mandatory award of attorneys' fees and other costs to plaintiff when defendant is found guilty of forcible detainer). Therefore, we hereby award 2525 its costs and reasonable attorneys' fees incurred on appeal, upon compliance with ARCAP 21.

¶25 Additionally, 2525 asks that we impose sanctions against Mr. Rhoads pursuant to ARCAP 25, which provides,

> Where the appeal is frivolous or taken solely for the purpose of delay, or where a motion is frivolous or filed solely for the purpose of delay, or where any party has been guilty of an unreasonable infraction of these rules, the appellate court may impose upon the offending attorneys or parties such reasonable penalties or damages (including contempt, withholding or imposing of costs, or imposing of attorneys' fees) as the circumstances of the case and the discouragement of like conduct in the future may require.

2525 asserts that Mr. Rhoads "knows that he should not be arguing title issues in FED actions but he does not seem to be learning his lesson." 2525 contends that Rhoads' disregard for the appellate rules and the fact that he has made similar frivolous arguments in other appeals justify ordering him to pay 2525's attorneys' fees incurred on appeal, "at the very least." We agree.

¶26 Because Rhoads failed to cite to the record, failed to cite to proper authorities or provide meaningful analysis of the issues he raised, and because he relied on arguments that relate to matters of title in an FED action, we conclude that the appeal was frivolous and that he unreasonably violated the rules of appellate procedure. Given that this court has previously warned Rhoads (and sanctioned him at least once) for similar conduct, we find that sanctions are necessary. In our discretion, we direct that Rhoads shall bear the burden of

paying the attorneys' fees and costs ultimately awarded to 2525 by this court in connection with this appeal.

CONCLUSION

¶27 For the foregoing reasons, we affirm the judgment of the trial court.

/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