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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

KENNETH McLEOD and CAROL ANN McLEOD,
Plaintiffs/Appellees,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY,
as Trustee Under Pooling and Servicing Agreement
dated as of February 1, 2007 Securitized Asset Backed
Receivables LLC Trust 2007-NC2 Mortgage Pass-Through
Certificates, Series 2007-NC2,
Defendant/Appellant.

No. 1 CA-CV 15-0504
FILED 5-18-2017

Appeal from the Superior Court in Maricopa County
No. CV2008-092175
The Honorable David M. Talamante, Judge

REVERSED; REMANDED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Diane M. Johnsen delivered the decision of the Court, in which Judge Margaret H. Downie and Judge James P. Beene joined.

J O H N S E N, Judge:

¶1 Deutsche Bank National Trust Company, as Trustee Under Pooling and Servicing Agreement dated as of February 1, 2007 Securitized Asset Backed Receivables LLC Trust 2007-NC2 Mortgage Pass-Through Certificates, Series 2007-NC2, appeals the superior court's order denying its motion for relief from judgment. For the reasons that follow, we reverse and remand.

FACTS AND PROCEDURAL BACKGROUND

¶2 In October 2006, Kenneth and Carol Ann McLeod borrowed $771,000, securing the loan with a deed of trust on their Phoenix home. After paying off a tax debt and other loans, the McLeods netted $199,763.44 in cash.

¶3 The McLeods' deed of trust was among many trust deeds and mortgages eventually acquired by a trust created for the purpose of holding such security devices. Deutsche Bank National Trust Company is the trustee of the trust that holds the McLeods' deed of trust. As provided in that trust's Pooling and Servicing Agreement, the beneficial owners of the assets of the trust are the holders of certificates issued by the trust.

¶4 By February 2008, the McLeods were in default on the loan. Although the McLeods contend they attempted to cure the default, they did not do so, and on May 29, 2008, they were notified of a trustee's sale set for August 28 of the same year. After the McLeods sued to enjoin the sale, the sale was postponed indefinitely by agreement. In the meantime, as will be seen, the underlying litigation continued for several years.

¶5 The McLeods' complaint named ten defendants, and, among other things, asked the court to quiet title to the home in favor of the McLeods. The named defendants included "Deutsche Bank National Trust Company" and an entity identified as "Securitized Asset Backed Receivables LLC Trust 2007-NC2, a New York LLC. " (We will refer to the latter entity as the "SABR Trust.") Notably, however, the McLeods did not name or serve Deutsche Bank National Trust Company in its capacity as

trustee of any trust. Nor did the complaint assert that Deutsche Bank National Trust Company had committed or failed to commit any act as trustee of a trust.

¶6 Although Deutsche Bank National Trust Company timely answered the complaint, the SABR Trust did not. On September 18, 2008, the McLeods applied for entry of default against the SABR Trust pursuant to Arizona Rule of Civil Procedure 55(a). At a default hearing on November 24, 2008, and still without a response from the SABR Trust, the McLeods requested and the superior court ordered "title quieted in favor of [the McLeods]" as against the SABR Trust. The court's order stated:

> [The SABR Trust] is permanently enjoined and prohibited from recording any documents affecting or purporting to affect title of the subject property; and, any acts or recordings now or in the future by [the SABR Trust] relating to the subject property shall be of no force or effect.

¶7 As the litigation continued, Deutsche Bank National Trust Company eventually questioned "misnomers" in the McLeods' filings, arguing that its only relationship to the McLeods is as trustee of a trust that holds their deed of trust. Deutsche Bank National Trust Company further argued that the true name of the trust that holds the McLeod's deed is the "Securitized Asset Backed Receivables LLC Trust 2007-NC2 Mortgage Pass-Through Certificates, Series 2007-NC2." On November 22, 2013, over the McLeods' opposition, the superior court ordered the caption amended; thereafter, the defendant originally denominated as "Deutsche Bank National Trust Company" became denominated as "Deutsche Bank National Trust Company, as Trustee Under Pooling and Servicing Agreement Dated as of February 1, 2007 Securitized Asset Backed Receivables LLC Trust 2007-NC2 Mortgage Pass-Through Certificates, Series 2007-NC2." (We will refer to the newly denominated entity as "Deutsche Bank as Trustee.")

¶8 By March 2014, the only remaining defendant in the McLeods' lawsuit was Deutsche Bank as Trustee.[1] As the parties met for a trial management conference on March 14, 2014, almost six years after the McLeods filed suit and less than two weeks before a scheduled bench trial, the superior court ruled a trial was no longer necessary because the McLeods had received the relief they requested in their complaint. Without

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[1] Meanwhile, the McLeods' loan remained in default and the trustee's sale remained postponed indefinitely.

issuing an order expressly stating so, the court concluded that the 2008 default judgment permanently enjoined both Deutsche Bank as Trustee and the SABR Trust from foreclosing on the property. At the conference, although Deutsche Bank as Trustee disputed the court's interpretation of the 2008 default judgment, the court responded that "[Deutsche Bank as Trustee was] not going to persuade [the court] otherwise." Accordingly, the court vacated the scheduled bench trial.

¶9 On January 15, 2015, Deutsche Bank as Trustee filed a motion to vacate the 2008 default judgment and for other relief pursuant to Arizona Rules of Civil Procedure 59, 60 and 65(c). The superior court denied the motion and a subsequent motion for reconsideration. Deutsche Bank as Trustee timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1), (2) (2017).[2]

DISCUSSION

¶10 On appeal, Deutsche Bank as Trustee argues the superior court erred by declining to vacate the 2008 default judgment under Rule 60(c)(4) (void judgment) (current version at Ariz. R. Civ. P. 60(b)(4)). As relevant here, Deutsche Bank as Trustee makes two arguments. First, it contends the trust that holds the McLeods' deed of trust is not the trust originally named as a defendant in the complaint. Thus, it contends the McLeods sued (and obtained a default judgment against) the wrong trust. Second, Deutsche Bank as Trustee argues that the trust that actually does hold the McLeods' deed of trust is a common-law express trust organized under the laws of New York, incapable of suing or being sued in its own name. Deutsche Bank as Trustee contends that, in order to bring an action against that trust, the McLeods needed to name and serve Deutsche Bank as Trustee of the trust. Because the McLeods failed to do so, Deutsche Bank as Trustee argues the court did not have jurisdiction over the trust when it entered the November 2008 default judgment, rendering that judgment void as against the trust. We need not reach the first issue (the proper name of the trust that holds the McLeods' deed) because the second issue is dispositive.

¶11 "We view the facts in the light most favorable to upholding the trial court's ruling on a motion to set aside a default judgment." *Ezell v. Quon*, 224 Ariz. 532, 534, ¶ 2 (App. 2010) (citing *Goglia v. Bodnar*, 156 Ariz.

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[2] Absent material revision after the relevant date, we cite a statute's current version.

12, 20 (App. 1987)). Generally, "[t]he vacation of a default judgment lies within the sound discretion of the trial court and will not be disturbed on appeal unless a clear abuse of discretion can be shown." *Cockerham v. Zikratch*, 127 Ariz. 230, 233 (1980). But we review *de novo* the denial of a motion brought under Rule 60 to vacate a default judgment that is assertedly void. *Ezell*, 224 Ariz. at 536, ¶ 15.

¶12 As set forth in Rule 60, the court may relieve a party from a final judgment if "the judgment is void." "Void judgments are those rendered by a court which lacked jurisdiction, either of the subject matter or the parties." *Cockerham*, 127 Ariz. at 234. "Proper service of process is essential for the court to have jurisdiction over the defendant." *Koven v. Saberdyne Sys. Inc.*, 128 Ariz. 318, 321 (App. 1980) (citing *Schering Corp. v. Cotlow*, 94 Ariz. 365 (1963)). And "the law is clear that a judgment is void if the trial court did not have jurisdiction because of a lack of proper service." *Kadota v. Hosogai*, 125 Ariz. 131, 134 (App. 1980) (citing *Marquez v. Rapid Harvest Co.*, 99 Ariz. 363 (1965)).

¶13 The power of a trust to sue or be sued depends on the nature of the trust. Generally, a common-law trust is not considered a legal entity capable of suing or being sued; therefore, any suit involving the trust must be brought by or against its trustee. *E.g.*, *Millennium Square Residential Ass'n v. 2200 M St. LLC*, 952 F. Supp. 2d 234, 243 (D.C. Cir. 2013) (trust is not an entity distinct from its trustee and is not capable of legal action on its own behalf); *Presta v. Tepper*, 102 Cal. Rptr. 3d 12, 16 (App. 2009) ("[A] trust itself can neither sue nor be sued in its own name . . . . [T]he real party in interest in litigation involving a trust is always the trustee."); *Ray Malooly Trust v. Juhl*, 186 S.W.3d 568, 570 (Tex. 2006) ("The general rule in Texas (and elsewhere) has long been that suits against a trust must be brought against its legal representative, the trustee."); *see also* 76 Am. Jur. 2d *Trusts* § 601 (2017) ("In most jurisdictions, a trust is not an entity separate from its trustees, and cannot sue or be sued in its own name, and therefore, the trustee, rather than the trust, is the real party in interest in litigation involving trust property.").

¶14 By contrast to a common-law trust, some states allow a "business trust" to sue and be sued in its own name. *See*, *e.g.*, A.R.S. §§ 10-1871 (2017), -1879 (2017) ("business trust" created under Arizona law, like a corporation, may sue and be sued in its own name); *Boyd v. Boulevard Nat'l Bank*, 306 So. 2d 551 (Fla. App. 1975). The meaning and legal effect of a trust's governing instrument, here the "Pooling and Servicing Agreement," are determined by the local law of the state selected in the governing instrument. A.R.S. § 14-2703 (2017). According to the Pooling and

Servicing Agreement, the trust at issue here is an "express trust" established "pursuant to the further provisions of [the Pooling and Servicing Agreement] and the laws of the State of New York. . . ."

¶15 New York is among the states that distinguish between business trusts and traditional common-law trusts. N.Y. Gen. Ass'ns Law § 2 (McKinney 2017); *see, e.g.*, A.R.S. § 10-1871; Nev. Rev. Stat. § 88A.030 (2017); Va. Code Ann. § 13.1-1201(A)-(C) (2017); *see also* Herbert B. Chermside, Jr., *Modern Status of the Massachusetts or Business Trust*, 88 A.L.R.3d 704, § 1, § 3 (1978). New York defines a business trust as "any association operating a business under a written instrument or declaration of trust, the beneficial interest under which is divided into shares represented by certificates." N.Y. Gen. Ass'ns Law § 2(2).

¶16 Unlike a traditional common-law trust, a business trust generally engages in activities intended to generate profits, which it passes along to certificate holders. *See Denmark Cheese Ass'n v. Hazard Advert. Co.*, 298 N.Y.S.2d 98, 100 (Sup. Ct. 1969). Conversely, a traditional common-law trust is "a fiduciary relationship with respect to property . . . subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons." Restatement (Third) of Trusts § 2 (2003).

¶17 Under New York law, there are four essential elements of a valid trust of the traditional nature: (1) a designated beneficiary; (2) a designated trustee; (3) a fund or other property sufficiently designated or identified to enable title of the property to pass to the trustee; and (4) actual delivery of the fund or property, with the intention of vesting legal title in the trustee. *In re Doman*, 890 N.Y.S.2d 632, 634 (App. Div. 2009) (citing *Brown v. Spohr*, 180 N.Y. 201, 209 (1904)). Although a trustee of a common-law trust generally is required to make reasonable efforts to obtain suitable investment returns from trust assets, *see In re Hubbell's Will*, 302 N.Y. 246, 255 (1951), a trustee also generally has a duty to act prudently to protect and preserve trust property for the trust's beneficiaries, Restatement (Third) of Trusts § 76 cmt. d (2007).

¶18 Here, because the trust at issue did not operate a business, but simply held security instruments in trust for the benefit of the certificate holders, we agree with Deutsche Bank as Trustee that the trust is best characterized as a traditional common-law trust. According to the Pooling and Servicing Agreement, the assets of the trust originally consisted primarily of "Mortgage Loans and all interest and principal with respect thereto." The Pooling and Servicing Agreement, however, specified that

after February 1, 2007, the number of mortgage loans in the trust could not be increased. Further, the Pooling and Servicing Agreement specified and limited the duties of Deutsche Bank as Trustee; after accepting assignment of the security instruments, Deutsche Bank as Trustee was obligated to hold all trust assets in trust "for the exclusive use and benefit of all present and future Certificateholders."

¶19 By so limiting both the addition of additional assets to the trust corpus and the resulting powers of Deutsche Bank as Trustee, the Pooling and Servicing Agreement effectively mandated that the trust would not "operate a business" in the manner that New York law requires to be classified as a business trust. Although the beneficial owners of the trust are its certificate-holders, the distributions they receive from the trust's receipt of borrowers' loan payments are more akin to investment returns than the profits of a business.

¶20 Accordingly, without deciding whether a business trust created under New York law may be sued in its own name, we conclude the trust that holds the McLeods' deed is not a business trust, but instead is a traditional common-law trust that, under New York law, cannot be sued in its own name. *See* N.Y. U.C.C. Law § 9-102 cmt. 11 (McKinney 2017) (common-law trust must be sued in the name of its trustee); *France v. Thermo Funding Co.*, 989 F. Supp. 2d 287, 299 (S.D.N.Y. 2013).

¶21 Here, the McLeods sought to sue and serve the trust that held their deed of trust in the trust's own name, not through its trustee. As noted, Deutsche Bank as Trustee argues that the trust originally named in the complaint, the SABR Trust, is not the trust that holds the McLeods' deed. Regardless of the correct name of the trust that holds the deed, the McLeods did not properly effect service on that trust through Deutsche Bank as Trustee. For that reason, the superior court had not acquired personal jurisdiction over the trust that held the McLeods' deed at the time the 2008 default judgment was entered. Because the superior court lacked jurisdiction over the trust at the time the default judgment was entered against the trust, that judgment is void. *See Kadota*, 125 Ariz. at 134.

¶22 The McLeods argue that how they identified and served these defendants are mere technicalities, particularly given that Deutsche Bank National Trust Company knew of the application for default against the SABR Trust but failed to object, and later, "had motive and opportunity to request relief" from the default judgment, yet failed to request timely relief. The McLeods contend that Deutsche Bank as Trustee therefore ignored the default against the SABR Trust at its own risk. These arguments fail, for the

reasons stated above. A plaintiff's obligation to effect proper personal service is not a technicality. Even if, as the McLeods contend, the entity we refer to as the SABR Trust holds their deed of trust, they did not properly sue that entity because they failed to sue and serve its trustee. Moreover, not only did the McLeods fail to name and serve Deutsche Bank National Trust Company as the trustee of any trust, their complaint alleged no act or failure to act by Deutsche Bank National Trust Company *as trustee* that might give rise to any liability. Finally, their complaint incorrectly identified the SABR Trust as a New York limited liability company, not as a trust. Under these circumstances, the McLeods' failure to properly sue and serve the trust by way of its trustee cannot be disregarded as mere technicalities.

¶23 In any event, Deutsche Bank as Trustee was not aware the November 2008 default judgment might permanently enjoin it from foreclosing on the property until March 14, 2014, when the superior court announced at a pretrial conference that it believed the McLeods already had obtained (by way of the default judgment) the only relief they sought against Deutsche Bank as Trustee. Indeed, it seems the court itself only recently had come to that conclusion. Deutsche Bank National Trust Company (and then Deutsche Bank as Trustee) had remained a party to the matter, and continued to litigate the case actively, well beyond the 2008 default judgment without opposition from the McLeods or comment from the court. Even after Deutsche Bank as Trustee became the only defendant remaining in the matter in December 2012, it and the McLeods marched through a joint pretrial statement, numerous motions and status conferences toward trial. But then, at the March 14, 2014 conference, the court observed, "I don't think anybody knew it was over in 2008 when that order was issued because the case was cluttered with a bunch of other Defendants at that time who ultimately got dismissed out." In short, Deutsche Bank as Trustee had little reason to contest the 2008 default judgment until after the court told it the judgment foreclosed any defenses it might have.[3]

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[3] At oral argument, citing *Cockerham*, 127 Ariz. 230, the McLeods asserted the default judgment against the SABR Trust was not void because Deutsche Bank National Trust Company knew that service had been effected on the trust. *See* 127 Ariz. at 234 ("Defendants had notice of plaintiff's complaint and an opportunity to defend."). The issue in *Cockerham*, however, was whether proper service was effected even though the plaintiff had failed to file a required affidavit "showing the

¶24 The McLeods also argue the superior court's ruling should be upheld because Deutsche Bank as Trustee "agreed to the court's decision to vacate the trial in March 2014 and admitted it sought no further relief." This contention is unfounded.

¶25 At the March 2014 pretrial conference, after the court explained its impression of the effect of the 2008 default judgment, Deutsche Bank as Trustee responded that the court had "a wholesale failure to understand what's going on," explaining that the trust "was never the correct party or entity to serve." Only after the court made clear that Deutsche Bank as Trustee was not going to persuade the court otherwise did Deutsche Bank as Trustee agree to vacate the trial. Moreover, that Deutsche Bank as Trustee would agree to an interpretation of the default judgment that would prohibit it from doing the very thing that it fought the previous seven-plus years to do is nonsensical.

¶26 For the above reasons, we reverse the superior court's ruling denying the motion to vacate. Because the superior court lacked jurisdiction over the trust that holds the McLeods' mortgage at the time the judgment was entered, the judgment was void. Because we so conclude, we need not address Deutsche Bank as Trustee's argument that the superior court erred in denying it relief under Rule 65(c) (current version at Ariz. R. Civ. P. 65(a)(3)) or its argument that the superior court erred by refusing to clarify the scope of the default judgment.

¶27 Lastly, pursuant to A.R.S. § 12-349(A) (2017), the superior court awarded the McLeods attorney's fees in the amount of $5,887.50 "for having to respond to Defendant's Motion to Vacate Judgment." The superior court reasoned that "[f]or purposes of this motion and this litigation, the history of this case demonstrates the Defendant's arguments have no merit." Because we conclude otherwise, we vacate the award of attorney's fees in favor of the McLeods.

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circumstances warranting the use of out-of-state service." *Id.* at 233. The issue here – whether service was properly effected in the first place – is quite a different matter.

CONCLUSION

¶28 We reverse the superior court's order denying Deutsche Bank as Trustee's motion to vacate the 2008 default judgment pursuant to Rule 60 and remand this case for further proceedings consistent with this decision. We also vacate the superior court's order awarding attorney's fees to the McLeods.

AMY M. WOOD • Clerk of the Court
FILED: AA