IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

WELLS FARGO BANK NA, *Plaintiff/Appellee*,

v.

SARAH V. WALTNER, *Defendant/Appellant*.

No. 1 CA-CV 16-0213
FILED 4-11-2017

Appeal from the Superior Court in Maricopa County
No. CV2015-014027
The Honorable James R. Morrow, Commissioner, *Retired*

AFFIRMED

COUNSEL

McCarthy & Holthus LLP, San Diego, CA
By Melissa Robbins Coutts
Counsel for Plaintiff/Appellee

Sarah V. Waltner, Scottsdale
Defendant/Appellant

MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Kent E. Cattani joined.

K E S S L E R, Judge:

¶1 Appellant Sarah Waltner ("Waltner")[1] appeals from a forcible entry and detainer action filed against her by Wells Fargo Bank, N.A., as Trustee for WaMu Mortgage Pass-Through Certificates, Series 2005-PR4 Trust ("Wells Fargo"). For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Wells Fargo purchased a residential property in Avondale, Arizona (the "Property") at a trustee's sale in September 2015. Waltner was given notice to vacate the Property by December 14 via a notice posted on the door of the Property and via certified mail. On December 22, Wells Fargo filed a summary action for forcible entry and detainer seeking to evict Waltner from the Property. Between December 24 and 26, Wells Fargo attempted to personally serve Waltner three times. The superior court granted Wells Fargo's motion for alternative service, and a copy of the summons and complaint was posted on the Property and sent via certified mail.

¶3 Waltner appeared specially at the first hearing and contested service and jurisdiction. The court granted Waltner a continuance to allow her time to file a written objection. The hearing was rescheduled to February 18, 2016 at 9:00 AM. Waltner did not appear at the second hearing, which concluded at 9:35 AM. The court found Waltner guilty of forcible detainer and ordered her to vacate the Property by February 24. Waltner filed a motion to dismiss on February 18 at 10:52 AM, followed by a motion to vacate judgment filed at 4:24 PM. The court denied both motions. Waltner's motion to reconsider was also denied, and she subsequently vacated the Property.

[1] Waltner's husband Steven is not a party to this appeal for the reasons discussed *infra*, ¶ 6.

¶4 Waltner timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (2016).[2]

DISCUSSION

¶5 "Forcible detainer is a summary and speedy remedy for obtaining possession, and the only issue to be determined in the action is the right to actual possession." *Andreola v. Ariz. Bank*, 26 Ariz. App. 556, 557 (1976) (citations omitted). "[T]he only issue shall be the right of actual possession and the merits of title shall not be inquired into." A.R.S. § 12-1177(A) (2016). Although the merits of title may not be litigated, the fact of title may be shown as a matter incidental to demonstrating right of possession by an owner. *Taylor v. Stanford*, 100 Ariz. 346, 349-50 (1966) (citations omitted). In an appeal from a trial to the court, we view the facts in the light most favorable to sustaining the superior court's judgment and defer to the court's factual findings. *Pueblo Santa Fe Townhomes Owners' Ass'n v. Transcon. Ins. Co.*, 218 Ariz. 13, 18, ¶ 19 (App. 2008) (citations and quotations omitted).

¶6 As a preliminary matter, we lack jurisdiction over any appeal purportedly brought by or on behalf of Waltner's husband, Steven Waltner. Steven neither signed the notice of appeal nor filed an opening brief in this matter. Accordingly, to the extent Waltner seeks to reverse the judgment against her husband, we dismiss the appeal. *State v. One Single Family Residence at 1810 E. Second Ave., Flagstaff, Ariz.*, 193 Ariz. 1, 2 n.1 (App. 1997) (finding that where only the husband signed the notice of appeal, and he was not an attorney, he could not represent his wife in court and the notice of appeal was invalid as to her); *Haberkorn v. Sears, Roebuck & Co.*, 5 Ariz. App. 397, 399 (1967) (holding that a person who is not a member of the bar may not represent his or her spouse in a court of law).

¶7 On appeal, Waltner asserts two primary arguments: (1) the judgment is void because the foreclosure sale was conducted after the statute of limitations had expired; and (2) the superior court abused its

[2] We cite to the current version of statutes unless changes material to this decision have since occurred.

discretion in denying the motion to dismiss and motion to vacate judgment.[3] These arguments fail.

¶8 Waltner's assertion that Wells Fargo's claim to the Property is void because the trustee's sale at which Wells Fargo purchased the Property was beyond the statute of limitations is unavailing. "[T]he only issue shall be the right of actual possession and the merits of title shall not be inquired into." A.R.S. § 12-1177(A). Wells Fargo presented evidence that it had purchased title to the Property, and thus had right of possession. If Waltner wished to challenge the trustee's sale as being barred by the statute of limitations, the time for that claim was at the time of sale. *See* A.R.S. § 33-811(C) (2014) ("The trustor . . . shall waive all defenses and objections to the sale not raised in an action that results in the issuance of a court order granting relief . . . before the scheduled date of the sale."); *BT Capital, LLC v. TD Serv. Co. of Ariz.*, 229 Ariz. 299, 301, ¶ 10 (2012) (citation omitted) ("[A] person who has defenses or objections to a properly noticed trustee's sale has one avenue for challenging the sale: filing for injunctive relief.").

¶9 Waltner's second claim regarding the denial of the motion to dismiss and the motion to vacate judgment is, in effect, a single argument that the superior court should have set aside the judgment under Arizona Rule of Civil Procedure 60(b)(1). Waltner asserts that her untimely motion to dismiss should have been considered and her nonappearance at the second hearing excused because they were the result of excusable neglect. Waltner claims she reasonably relied on the statements of the court and believed both that she had until close of business on February 18 to file her written objections and that she did not have to appear. However, these assertions are not supported by the record.

¶10 The minute entry states that the hearing was continued to February 18 at 9:00 AM and that "[a]ny written objection is to be filed with the Court on or before the above set continued hearing date." The court also informed Waltner that the motion needed to be filed "within the week."

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[3] Because Waltner's default was not the result of excusable neglect, we decline to address her arguments regarding service of process and personal jurisdiction. To the extent that Waltner claims the court should have held an evidentiary hearing, the court did not err in denying such request. *Cf. Weaver v. Synthes, Ltd. (USA)*, 162 Ariz. 442, 445 (App. 1989) (citations omitted) (noting that where written record is clear, an evidentiary hearing is not necessary). Waltner's arguments and alleged facts as to her failure to appear do not establish excusable neglect, and as we explain in this decision, her statute of limitations argument has been waived.

The court "continued the matter to let Judge Morrow address it again next week. *And in the interim* [Waltner would] have the choice to file a motion to dismiss based upon improper service." (emphasis added). The court explained to Waltner that she needed to file a motion so that "the Court will then be able to look at what's filed in writing and determine whether or not there is a need for an additional evidentiary hearing." Neglect is excusable when it is compared to the actions of a reasonably prudent person in the same circumstances. *Ulibarri v. Gerstenberger*, 178 Ariz. 151, 163 (App. 1993) (citation omitted). A reasonably prudent person would have understood that the "date" referenced in the minute entry included the time of the hearing, as the stated purpose of the briefing was to allow the court to read Waltner's claims in preparation for the hearing. A reasonably prudent person would also have attended the hearing.

¶11 Waltner's assertion that the court never told her to appear at the February 18 hearing is without merit. At the first hearing, the court did not order Waltner to appear, but made it clear that she was expected to appear:

> The Court: Judge Morrow will see you next week.
>
> Waltner: Okay. Thank you.

A reasonable person would have understood that her presence was expected at the next hearing if she wanted to present her arguments. "Carelessness does not equate with excusable neglect." *Id.*

CONCLUSION

¶12 For the reasons stated above, we affirm the superior court's judgment.

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