

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



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FILED: 02/04/2010
PHILIP G. URRY, CLERK
BY: GH

DEUTSCHE BANK NATIONAL TRUST) 1 CA-CV 09-0019
COMPANY, as Trustee for Southview)
Home Loan Trust Asset-Backed) DEPARTMENT B
Certificates, Series 2006-2,)
) **MEMORANDUM DECISION**
Plaintiff/Appellee,)
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
YVETTE CLINKSCALE,)
)
Defendant/Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-023392

The Honorable Barbara A. Hamner, Commissioner

AFFIRMED

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and Leonard J. McDonald, Jr.
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N O R R I S, Judge

¶1 Defendant-appellant Yvette Clinkscale appeals the superior court's decision finding her guilty of forcible detainer. She principally argues the court should have considered evidence concerning a fraud she alleged in another case pending in a different division of the superior court ("the other case"), and in any event, dismissed this case because plaintiff-appellee Deutsche Bank National Trust Company failed to present any evidence she had received a written demand for possession under Arizona Revised Statutes ("A.R.S.") section 12-1173.01(A) (2003). We disagree with both arguments and affirm the decision of the superior court.

FACTS AND PROCEDURAL HISTORY

¶2 On September 4, 2008, Deutsche Bank purchased a parcel of real property located in Scottsdale, Arizona, at a trustee's sale conducted pursuant to a deed of trust executed by Clifford Bagnall dated October 14, 2005. The trustee then issued and delivered a trustee's deed for the property to Deutsche Bank.

¶3 On September 24, 2008, Deutsche Bank filed a forcible detainer action under A.R.S. § 12-1173.01 against Bagnall and "JOHN DOE OCCUPANT 1-5 AND JANE DOE OCCUPANT 1-5." Deutsche Bank attached to the complaint copies of the trustee's deed and a written notice demanding possession of the property, addressed to "Clifford Bagnall AND/OR OCCUPANTS."

¶14 Clinkscale answered the complaint as the occupant of the property and alleged "[p]laintiff deed was obtained through a fraud" by Bagnall "which is currently be [sic] litigated" in the other case. Clinkscale also alleged she had not received the written notice demanding possession of the property pursuant to A.R.S. § 12-1173.01.

¶15 At the beginning of the forcible detainer trial, the court rejected Clinkscale's assertion it should consider her fraud claim in the other case in deciding possession. Indeed, it noted the court in the other case had entered a judgment in favor of Deutsche Bank that had dismissed all of Clinkscale's claims against it.¹

¶16 The court then discussed with counsel Clinkscale's assertion she had not received a written demand for possession. After a brief recess, the parties agreed to proceed by avowals; thus neither side called any witnesses. Deutsche Bank's counsel avowed his process server attempted to personally serve the "demand letter" at the property address, no one had answered the door, and the server consequently taped the demand letter to a

¹We take judicial notice the judgment in favor of Deutsche Bank in the other case also stated the trustee's deed "constitutes a valid and binding deed of trust." See *In re Sabino R.*, 198 Ariz. 424, 425, ¶ 4, 10 P.3d 1211, 1212 (App. 2000) ("[i]t is proper for a court to take judicial notice of its own records or those of another action tried in the same court," and appellate court may "take judicial notice of anything of which the trial court could take notice, even if the trial court was never asked to take notice").

vertical window next to the front door. Deutsche Bank's counsel further avowed the demand for possession letter "would have been mailed to the property address by my firm as well." Clinkscale's counsel avowed Clinkscale "did not receive the written notice that was posted on the door," she "has had problems with the mail delivering stuff to her at that address," and "[s]he has not received the demand letter for possession at all." "Based on the evidence presented," the court found Clinkscale guilty of forcible detainer and entered judgment for Deutsche Bank.

¶17 Clinkscale timely appealed. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. § 12-2101(B) (2003).

DISCUSSION

I. Exclusion of Evidence

¶18 Clinkscale argues the court wrongly refused to consider certain evidence. Although she does not identify with specificity the evidence she argues the court should have considered, she appears to contend the court should have considered evidence regarding her fraud claim in the other case. She seems to suggest this evidence would have invalidated the trustee's sale and Deutsche Bank's purchase of the property.

¶19 We review the superior court's decision on the admission of evidence for an abuse of discretion. *John C.*

Lincoln Hosp. & Health Corp. v. Maricopa County, 208 Ariz. 532, 543, ¶ 33, 96 P.3d 530, 541 (App. 2004). We review issues of law de novo. *Inch v. McPherson*, 176 Ariz. 132, 136, 859 P.2d 755, 759 (App. 1992).

¶10 The only action before the court was a forcible detainer action. A forcible entry and detainer action is intended to provide a summary, speedy, and adequate means for someone entitled to actual possession of property to obtain possession. *Colonial Tri-City Ltd. v. Ben Franklin Stores, Inc.*, 179 Ariz. 428, 433, 880 P.2d 648, 653 (App. 1993). In such a proceeding, the only issue before the court is the right of actual 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). Fact of title may be shown to demonstrate right of possession by the owner. *Andreola v. Ariz. Bank*, 26 Ariz. App. 556, 557, 550 P.2d 110, 111 (1976).

¶11 At the forcible entry trial, Deutsche Bank introduced a copy of the trustee's deed into evidence. A trustee's deed raises the presumption of compliance with the requirements of the sale and is conclusive evidence of compliance in favor of purchasers or encumbrancers for value and without actual notice. A.R.S. § 33-811(B) (2007). Because the only issue before the court was Deutsche Bank's right to possession, the court did not

abuse its discretion in declining to admit evidence concerning Clinkscale's fraud claim in the other case.²

II. Receipt of Written Demand for Possession

¶12 Clinkscale next argues the superior court did not "receive any evidence" she had received a written demand for possession of the property before Deutsche Bank filed its forcible detainer action and therefore Deutsch Bank had failed to comply with A.R.S. § 12-1173.01. Accordingly, she argues the court should not have found her guilty of forcible detainer.

¶13 Section 12-1173.01(A) states if property has been sold pursuant to a deed of trust, "a person . . . who retains possession of any land, tenements or other real property *after he received written demand of possession* may be removed through an action for forcible detainer." (Emphasis added.)

¶14 Here, contrary to Clinkscale's argument, the court received evidence she had received the written demand for possession. As discussed above, the parties agreed to proceed

²Clinkscale also argues the superior court violated her due process rights because it did not determine whether Deutsche Bank had standing to bring this action. As holder of the trustee's deed, however, Deutsche Bank clearly had standing to bring this forcible detainer action. In addition, the record does not reflect Clinkscale asserted lack of standing in the superior court. Therefore, this issue is not properly before us. See ARCAP 13(a)(6); *Scottsdale Princess P'ship v. Maricopa County*, 185 Ariz. 368, 378, 916 P.2d 1084, 1094 (App. 1995) (appellate court will not consider arguments not first presented in superior court); *State Farm Mut. Auto. Ins. v. Novak*, 167 Ariz. 363, 370, 807 P.2d 531, 538 (App. 1990).

by avowals. *See supra* ¶ 6. Avowals amount to nothing more than an attorney's declaration of what a witness would say and proceeding by avowals "does not permit the creation of an appellate record suitable for . . . a challenge to the sufficiency of the evidence." *Pearson v. Pearson*, 190 Ariz. 231, 234, 946 P.2d 1291, 1294 (App. 1997). But when the parties agree to rely on avowals as evidence, they may not argue on appeal the evidence fails to support the factual findings of the superior court. *See id.* Through an avowal, Deutsche Bank presented evidence Clinkscale had received the written demand for possession. Therefore, the court did not abuse its discretion in finding Clinkscale guilty of forcible detainer. *See Charles I. Friedman, P.C. v. Microsoft Corp.*, 213 Ariz. 344, 350, ¶ 17, 141 P.3d 824, 830 (App. 2006) ("[t]o find an abuse of discretion, there must either be no evidence to support the superior court's conclusion or the reasons given by the court must be 'clearly untenable, legally incorrect, or amount to a denial of justice'" (citation omitted)).

CONCLUSION

¶15 The judgment of the superior court is affirmed.

/s/

PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/

DANIEL A. BARKER, Judge

/s/

PETER B. SWANN, Judge