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

DIVISION ONE
FILED: 09/16/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FEDERAL NATIONAL MORTGAGE ASSOCIATION, Plaintiff/Appellee, v. LINDA MENA, Defendant/Appellant.	1 CA-CV 09-0491 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)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. CV 2009-015913

The Honorable Richard L. Nothwehr, Commissioner

AFFIRMED

Tiffany & Bosco, PA — Phoenix
By Leonard J. McDonald, Jr.
and Mark S. Bosco
Attorneys for Plaintiff/Appellee

Campana Vieh & Loeb, PLC — Scottsdale
By Donald O. Loeb
Attorneys for Defendant/Appellant

N O R R I S, Judge

¶1 Defendant-appellant Linda Mena timely appeals the superior court's judgment against her in a forcible entry and detainer ("FED") action in which plaintiff-appellee Federal

National Mortgage Association ("FNMA") sought possession of real property it had purchased at a trustee's sale. On appeal, she raises several issues all of which essentially attack the validity of FNMA's title to the property. Because these issues are not cognizable in an FED action, we affirm the superior court's judgment in favor of FNMA.

FACTS AND PROCEDURAL BACKGROUND

¶2 On November 4, 2005, Mena executed a note secured by a deed of trust on property in Maricopa County, Arizona. On April 13, 2009, FNMA purchased the property at a trustee's sale and received a trustee's deed for the property. The trustee's deed was recorded in the Office of the Maricopa County Recorder three days later.

¶3 On April 20, 2009, in a written notice to Mena, FNMA demanded possession of the property. Mena failed to vacate the property, and on May 19, 2009, FNMA sought possession of the property by suing Mena for forcible detainer after the trustee's sale. *See generally* Ariz. Rev. Stat. ("A.R.S.") § 12-1173.01 (2003). Mena entered a not guilty plea.

¶4 FNMA subsequently moved for judgment on the pleadings (the "judgment motion"), arguing it was entitled to possession of the property as a matter of law because its trustee's deed constituted "conclusive evidence that all statutory requirements

pertaining to the Trustee's Sale [had been] met." Although Mena admitted the trustee's deed had been "executed and delivered" to FNMA, she raised several defenses to FNMA's claim. Finding Mena was objecting to the trustee's sale process and not FNMA's right to possession, the superior court found Mena guilty of forcible detainer and granted judgment to FNMA.

DISCUSSION

¶5 Plaintiff is entitled to judgment on the pleadings if allegations in the complaint set forth a claim for relief and the answer fails to assert a legally sufficient defense. *Cf. Pac. Fire Rating Bureau v. Ins. Co. of N. Am.*, 83 Ariz. 369, 376, 321 P.2d 1030, 1035 (1958) (civil appeal). We consider as true such allegations of the complaint as are admitted by the answer, *id.*, and review the superior court's conclusions of law de novo. *Mobile Cmty. Council for Progress, Inc. v. Brock*, 211 Ariz. 196, 198, ¶ 5, 119 P.3d 463, 465 (App. 2005) (citing *Colonial Life & Accident Ins. v. State*, 184 Ariz. 533, 535, 911 P.2d 539, 541 (App. 1995)).

¶6 As a preliminary matter, Mena relies on the promissory note, deed of trust, and notice of trustee's sale to make various assertions related to the original lender, Loancity, and the beneficiary, MERS.[1] These documents are included in Mena's

---

[1]Mortgage Electronic Registration Systems, Inc.

appendix to her opening brief but are not part of the record on appeal.[2] We therefore disregard them and review the actual record on appeal to determine whether Mena raised a legally sufficient defense in her answer and response to the judgment motion. *See GM Dev. Corp. v. Cmty. Am. Mortgage Corp.*, 165 Ariz. 1, 4-5, 795 P.2d 827, 830-31 (App. 1990) (appellate review limited to record before the trial court).

I. Authority of Successor Trustee

¶7 As we understand her briefing on appeal, Mena argues the superior court should not have granted judgment to FNMA because questions of fact existed as to whether an entity entitled to exercise the power of sale in the deed of trust authorized the successor trustee to conduct the trustee's sale. She therefore argues the superior court should have allowed her to present evidence the successor trustee lacked authority to

---

[2]Mena also cites unpublished memorandum decisions to support her MERS arguments. In general, memorandum decisions are not to "be regarded as precedent nor cited in *any* court." ARCAP 28(c); Ariz. R. Supreme Court 111(c) (emphasis added). Even if we were to reach Mena's MERS arguments, we would not consider the memorandum decisions she cites for legal authority. *See Walden Books Co. v. Dep't of Revenue*, 198 Ariz. 584, 589, ¶¶ 20-23, 12 P.3d 809, 814 (App. 2000).

conduct the trustee's sale and convey title to the property to FNMA.[3] We reject these arguments.

¶8 "Forcible entry and detainer is a statutory proceeding" 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 (Curtis II)*, 186 Ariz. 534, 534, 925 P.2d 259, 259 (1996) (citing statute). Fact of title is, however, relevant if proved as a matter incidental to demonstrate right of possession by the owner. *Curtis II*, 186 Ariz. at 535, 925 P.2d at 260 (quoting *Andreola v. Ariz. Bank*, 26 Ariz. App. 556, 557, 550 P.2d 110, 111 (1976)).

¶9 As evidence of its fact of title and right to possession, FNMA provided the superior court with a copy of the

---

[3]Mena's affirmative defenses in the superior court also included claims under the Real Estate Settlement Procedures Act of 1974. *See* 12 U.S.C.A. §§ 1831b, 2601 to 2610, 2614 to 2617 (West 2001 & Supp. 2007). Mena did not argue these claims on appeal and we deem them abandoned for purposes of appeal. Even if not abandoned, these claims still amount to an attack on the merits of FNMA's title and would not change our disposition of Mena's appeal.

trustee's deed from the official records of the Maricopa County Recorder and a copy of its letter demanding possession. As FNMA points out, under A.R.S. § 33-811(B) (2007), 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."[4]

¶10 In her answer and response to the judgment motion, Mena presented no evidence FNMA had not acquired a trustee's deed. Mena argued in the superior court, as she argues on appeal, the successor trustee lacked authority to conduct the trustee's sale "or to pass good title," yet in her answer Mena implicitly admitted she executed a promissory note secured by a deed of trust[5] and explicitly admitted a trustee's deed was executed. Through her own words, Mena squarely attacked the validity of FNMA's title based on her argument the successor trustee lacked authority to conduct the trustee's sale. But that attack is beyond the scope of an FED action. *Curtis v.*

---

[4]FNMA also argues a trustee's deed constitutes "conclusive evidence" these requirements were satisfied. That is true, but only if the purchaser buys "for value and without actual notice." A.R.S. § 33-811(B). The record contains no evidence whether FNMA was a purchaser "without actual notice."

[5]Mena also implicitly admitted in her answer the trustee's sale occurred on April 13, 2009, as she alleged the trustee conducting the sale failed to "present or make [various] documents available to prospective purchasers at the sale."

Morris (Curtis I), 184 Ariz. 393, 398, 909 P.2d 460, 465 (App. 1995), *aff'd*, *Curtis II*, 186 Ariz. 534, 925 P.2d 259. Therefore, the superior court properly granted judgment on the pleadings[6] because (1) FNMA demonstrated it was entitled to possession of the property as the purchaser of the trustee's deed and (2) the record fails to substantiate Mena's assertion on appeal she presented evidence raising a legally sufficient defense to FNMA's FED complaint.[7] *See* A.R.S. § 12-1177(A); *Curtis II*, 186 Ariz. at 535, 925 P.2d at 260.

II. Dismissal of the FED Action

¶11 Mena also argues on appeal, as best we can discern, the superior court should have dismissed the FED action because the "question of title is so intertwined with the issue of possession" and must be "determin[ed]" before possession is "adjudicated" in an FED action. Mena did not raise this argument in the superior court, and we deem it waived. *See Odom*

---

[6]We note a judgment in an FED action does not necessarily bar a subsequent proceeding in a quiet title suit. *Olds Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 205, 167 P.2d 394, 398 (1946).

[7]We also note the record does not reflect Mena raised her objections to the trustee's sale on the grounds she asserts here in "an action that results in the issuance of a court order granting relief pursuant to rule 65, Arizona rules of civil procedure, entered before 5:00 p. m. Mountain standard time on the last business day before the scheduled date of the sale." A.R.S. § 33-811(C). Section 33-811(C) states the failure to raise such objections "shall" constitute a waiver.

v. Farmers Ins. Co. of Ariz., 216 Ariz. 530, 535, ¶ 18, 169 P.3d 120, 125 (App. 2007) (arguments raised for first time on appeal are untimely and generally deemed waived). Even if not waived, although Arizona courts have recognized FED actions should be dismissed when there is a genuine dispute over "an issue whose resolution is a *prerequisite* to determining which party is entitled to possession," *Colonial Tri-City*, 179 Ariz. at 433, 880 P.2d at 653, the record fails to support Mena's contention she presented such an issue. *See also RREEF Mgmt. Co. v. Camex Prods., Inc.*, 190 Ariz. 75, 79, 945 P.2d 386, 390 (App. 1997).

¶12 The nature of the issue that must be resolved before determining the right to possession concerns situations when, for example, the parties dispute the validity of a contract that arguably creates a possessory right to property or the existence of the type of relationship that can support an FED action. *Taylor v. Stanford* illustrates this point. 100 Ariz. 346, 414 P.2d 727 (1966). In *Taylor*, the plaintiffs filed an FED action alleging defendants had agreed to deliver possession of property by a certain date and had failed to do so. *Id.* at 347, 414 P.2d at 728. In response, the defendants asserted the plaintiffs had fraudulently induced them to enter into the agreement and, further, had failed to perform a "specific condition precedent" to their obligation to transfer possession of the property. *Id.*

Our supreme court held the trial court should have dismissed the plaintiffs' FED action because to prove they had a right to possession the plaintiffs "would have to try the issue of the validity of the contract as well as that of defendants' affirmative defenses" and that would result in "a full-blown trial for specific performance" which would focus on the "state of the title," an issue prohibited in an FED action. *Id.* at 348, 414 P.2d at 729. Subsequent cases are consistent with *Taylor*. *See United Effort Plan Trust v. Holm*, 209 Ariz. 347, 351, ¶ 24, 101 P.3d 641, 645 (App. 2004) (legal relationship of parties, disputed existence of life estate, and affirmative defenses can only be resolved beyond limitations of an FED action); *Colonial Tri-City*, 179 Ariz. at 433, 880 P.2d at 653 (whether plaintiff and defendant had valid lease is not question incidental to right of possession).

¶13 Here, Mena did not dispute she executed a promissory note and its attendant deed of trust and did not attack the validity of those documents, *see supra* ¶ 10; furthermore, the relationship of FNMA and Mena to the property falls within the constraints of an FED action. *See* A.R.S. §§ 12-1173, -1173.01, -1177. Thus, on the record before us, Mena presented no evidence supporting an issue that would have required the superior court to dismiss FNMA's FED action.

¶14 Mena also argues the superior court should have dismissed the FED action because FNMA never had a landlord-tenant relationship with her. By challenging the existence of a landlord-tenant relationship, Mena again attempts to place the dispute outside the scope of an FED action, thus warranting dismissal. *See United Effort Plan*, 209 Ariz. at 350-51, ¶ 21, 101 P.3d at 644-45. Mena did not raise this argument in the superior court, and we deem it waived. *See Odom*, 216 Ariz. at 535, ¶ 18, 169 P.3d at 125.

¶15 Even if not waived, this argument is also without merit because Mena became a tenant at sufferance by failing to surrender possession upon foreclosure of her interest in the deed of trust. *See Curtis II*, 186 Ariz. at 535, 925 P.2d at 260 ("[o]ne who remains in possession of property after termination of his interest under a deed of trust is a tenant at will or sufferance" (quoting *Andreola*, 26 Ariz. App. at 558, 550 P.2d at 112 (1976))). Additionally, A.R.S. § 12-1173.01(A) "expanded the scope of the remedy [of forcible detainer] to include transactions in which one holds over in possession after the property has been sold through . . . trustee's sale." *Curtis II*, 136 Ariz. at 535, 925 P.2d at 260.

III. Other Issues

¶16 Finally, Mena asserts she was entitled to a trial on the merits because (1) the "fact of [FNMA's] title" should have been determined following a jury trial and (2) the superior court's judgment on the pleadings violated Arizona Rule of Procedure for Eviction Actions 11(b)(1) requiring a trial on the merits if it determines, "either by reviewing a written answer . . . or by questioning the defendant in open court . . . that a defense or proper counterclaim may exist" to the factual and legal allegations raised in FNMA's complaint. *See* Ariz. R.P. Eviction Actions 11(b)(1). We disagree.

¶17 Because FNMA proffered sufficient evidence of its right to possession and Mena's defenses improperly challenged the merits of FNMA's title, *see supra* Part I, the superior court correctly concluded no "defense or proper counterclaim" existed. Thus, under the plain text of Rule 11(b)(1), the superior court was not required to order a trial on the merits.

IV. Attorneys' Fees and Costs on Appeal

¶18 Mena requests attorneys' fees and costs on appeal. Because the superior court correctly found Mena guilty of forcible detainer, she is not entitled to fees and costs under A.R.S. § 12-1178(B) (Supp. 2009).

CONCLUSION

¶19 For the foregoing reasons, we affirm the superior court’s judgment in favor of FNMA.

/s/

PATRICIA K. NORRIS, Judge

CONCURRING:

/s/

LAWRENCE F. WINTHROP, Presiding Judge

/s/

PATRICK IRVINE, Judge