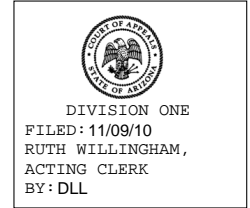


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



IMB REO, LLC,) 1 CA-CV 10-0040
)
Plaintiff/Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
CHRISTOPHER FROMKIN,) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
Defendant/Appellant.)
)
_____)

Appeal from the Superior Court in Yavapai County

Cause No. V1300CV200980677

The Honorable Michael R. Bluff, Judge

AFFIRMED

Tiffany & Bosco, PA Phoenix
By Mark S. Bosco
Leonard J. McDonald, Jr.
Kevin P. Nelson
Attorneys for Appellee

Rhoades & Associates, PLC Phoenix
By Douglas C. Rhoades
Attorneys for Appellant

H A L L, Judge

¶1 Defendant/appellant Christopher Fromkin appeals from the trial court's decision after a bench trial ruling in favor of plaintiff/appellee IMB REO, LLC (IMB REO) on its forcible detainer (FED) action. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Defendant/appellant Christopher Fromkin executed a deed of trust, dated February 1, 2005, for property in Sedona, Arizona. The deed of trust identified Fromkin as the borrower, IndyMac Bank, F.S.B. as the lender, Yavapai Title Agency, Inc. as the trustee, and Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary, acting as a nominee for the lender.

¶3 On November 12, 2009, IMB REO filed a Complaint for Forcible Detainer after Trustee's Sale against Fromkin. The complaint alleged that IMB REO had purchased the property at a trustee's sale and had been given a trustee's deed. The deed, which was attached to the complaint, listed the date of the sale as October 13, 2009, and the date of recording as November 4, 2009. The deed further listed Quality Loan Service Corporation as the trustee, identified the grantee as the foreclosing beneficiary, and conveyed the property to IMB REO. The deed also indicated that once it was recorded it was to be mailed to OneWest Bank.

¶14 Fromkin filed a Motion to Stay Pending Full Disclosure. Fromkin asserted that IMB REO had not disclosed the real parties in interest or established the chain of title to show that it had the right to maintain the action. Fromkin alleged that he had been in the process of a loan modification, and that no sale could proceed while the modification process was pending. He contended that MERS, which under the deed of trust held "only legal title to the interests granted by [Fromkin] in [the] Security Instrument," registered the note separate from the deed of trust such that the note was no longer secured by the deed of trust and there was no valid chain of title.

¶15 IMB REO responded that Fromkin was entitled only to basic disclosure and that he was improperly attempting to litigate title in a FED action.

¶16 After oral argument, the trial court denied Fromkin's Motion to Stay Proceedings Pending Full Disclosure. The court stated:

The Court does find that there is not a basis for the Court to order the type of disclosure requested in the Forcible Detainer Action. Defendant may have rights and remedies in a different proceeding.

¶17 At a trial to the court, IMB REO presented a process server who testified that he had served the notice of demand for possession of the property and later the summons and complaint for the FED action on Fromkin.

¶18 Fromkin testified as to how much he originally paid for his property, how much it was allegedly worth at refinancing, and the fact that he had obtained the mortgage from IndyMac and had never before heard of IMB REO. He also testified that OneWest Bank, whom he had never heard of, had turned down his request for modification of the loan on the grounds that the sale had already occurred.

¶19 Fromkin argued that the trustee's deed was invalid because IndyMac had not transferred its interest to IMB REO. Fromkin contended that IMB REO was not the grantee and beneficiary as listed on the trustee's deed. He asserted that IMB REO had no authority to foreclose because the mortgage had been separated from the deed of trust and the two had not been reunited. He argued that, under the circumstances, IMB REO was not entitled to the presumption of Arizona Revised Statutes (A.R.S.) section 33-811(B) (2007), which provides that a trustee's deed raises the presumption of compliance with the requirements of the deed of trust and the statutory requirements related to the exercise of the power of sale and the sale of the trust property. A.R.S. § 33-811(B).

¶10 IMB REO, in closing, argued that Fromkin had presented no evidence to rebut the presumption of A.R.S. § 33-811(B). It also argued that, because Fromkin had failed to obtain an injunction prior to the trustee's sale, he had waived any

defenses to the trustee's sale pursuant to A.R.S. § 33-811(C).
IMB REO asserted that Fromkin was improperly attempting to litigate issues of title in the FED action and that Fromkin was in the wrong forum to bring the claims he was attempting to bring.

¶11 The court ruled as follows:

The issue in this case is limited to who is entitled to immediate possession of the property as between the two parties before me.

Plaintiff has established through the evidence that they have been conveyed a presumptively valid trustee's deed for the property giving them the right of superior possession.

Defendant has challenged the validity of the trustee's deed by arguing that there is not a clear chain of title and that's how I interpret the evidence.

Title questions are inappropriate in a forcible detainer matter and I don't have any admissible evidence before me to support fraud.

So I find based on the evidence presented that the Defendant has not rebutted the presumption created by A.R.S. Section 33-811(B).

¶12 The court entered judgment accordingly, and Fromkin timely appealed.

DISCUSSION

¶13 We must affirm if any evidence supports the trial court's judgment; we review legal issues de novo. *Inch v. McPherson*, 176 Ariz. 132, 136, 859 P.2d 755, 759 (App. 1993).

¶14 An FED action is created by statute to provide a summary, speedy remedy in order to gain possession of a premise. *Mason v. Cansino*, 195 Ariz. 465, 466, ¶ 5, 990 P.2d 666, 667 (App. 1999). It is available to one who has purchased property at a trustee's sale under a deed of trust. A.R.S. § 12-1173.01(A)(2) (2003). After receiving payment from the purchaser, the trustee executes and delivers to the purchaser the trustee's deed. A.R.S. § 33-811(B).

The trustee's deed shall operate to convey to the purchaser the title, interest and claim of the trustee, the trustor, the beneficiary, their respective successors in interest and all persons claiming the trust property sold by or through them, including all interest or claim in the trust property acquired subsequent to the recording of the deed of trust and prior to delivery of the trustee's deed.

A.R.S. § 33-811(E).

The trustee's deed shall raise the presumption of compliance with the requirements of the deed of trust and [A.R.S. §§ 33-801 to 33-821, governing deeds of trust] relating to the exercise of the power of sale and the sale of the trust property, including recording, mailing, publishing and posting of notice of sale and the conduct of the sale. A trustee's deed shall constitute conclusive evidence of the

meeting of those requirements in favor of purchasers or encumbrancers for value and without actual notice.

A.R.S. § 33-811(B). All persons to whom the trustee sends notice of a sale under a trust deed "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. A.R.S. § 33-811(C).

¶15 The only issue properly litigated in a FED action is the right of actual possession; "the merits of title shall not be inquired into." A.R.S. § 12-1177(A) (2003); *Mason*, 195 Ariz. at 468, ¶ 8, 990 P.2d at 669. Where title is disputed, a defendant can seek relief in a separate action. *Mason*, 195 Ariz. at 468, ¶ 8, 990 P.2d at 669.

¶16 Fromkin asks this court to declare that the Arizona Rules of Procedure for Eviction Actions (RPEA) apply to this proceeding. The trial court made no determination that the rules did not apply, nor does IMB REO dispute their applicability. We therefore need not address Fromkin's argument.

¶17 Fromkin also argues that IMB REO has not complied with RPEA 4's obligation on parties and their counsel to exercise due diligence to ensure that the action is brought in good faith, and RPEA 5's obligation on plaintiff's counsel to verify that the assertions in the complaint are true. RPEA 4(a), (b); RPEA

5(b). Fromkin does not elaborate on how IMB REO failed to satisfy the requirements of the rules, nor does he point to any portion of the record to support his claim. His argument appears to be based on his contention that Quality Loan Service Corporation, the trustee that conducted the sale, lacked the authority to do so, and that MERS and IndyMac had not timely assigned their interest in the property to IMB REO so that IMB REO also lacked authority to order the sale. Fromkin apparently contends that, because he notified IMB REO's counsel of his concerns prior to the filing of the FED action,¹ IMB REO and its counsel violated the RPEA by proceeding with the FED action.

¶18 In the trial court, Fromkin argued that IMB REO had violated RPEA 5 because the complaint was not pleaded with sufficient specificity. He did not argue that the plaintiff had failed to verify the truth of the complaint allegations.²

¹ The record includes a letter from Fromkin's counsel to IndyMac Bank dated October 27, 2009, warning of "serious issues relating to the legality of [Fromkin's] loan that directly affect the enforce[ability] of the deed of trust, the validity of the alleged sale and any further legal process which require a good faith basis prior to filing." It referred to an October 22, 2009, e-mail also sent to IMB REO's counsel.

² The complaint alleged that IMB REO purchased the property at a trustee's sale and had received a trustee's deed for the property. It further alleged that Fromkin had received notice demanding possession of the property, but had refused to surrender the property and continued to reside there. It asserted a right to immediate possession of the property. The complaint was verified. Fromkin has not specified which allegations were not truthful or required further verification.

Fromkin did not allege any violation of RPEA 4. This court will not consider on appeal arguments not first presented to the trial court. *Scottsdale Princess P'ship v. Maricopa County*, 185 Ariz. 368, 378, 916 P.2d 1084, 1094 (App. 1995).

¶19 Fromkin also appears to assert that he should have been permitted to argue that IMB REO had no authority to conduct a sale of the property because the legal and beneficiary interests of the property were not properly assigned to IMB REO. Fromkin essentially argues that the chain of title leading to the sale was flawed.

¶20 IMB REO's FED action was based on a deed provided after the trustee's sale, which is entitled to a presumption of validity. See A.R.S. § 33-811(B). Fromkin could have but did not seek an injunction to stop the sale; such a failure constitutes a waiver of defenses and objections to the sale. See A.R.S. § 33-811(C). As noted by the trial court, Fromkin's claims may be appropriate for another proceeding, but disputes regarding title are not properly addressed in a FED action. A.R.S. § 12-1177(A); *Mason*, 195 Ariz. at 468, ¶ 8, 990 P.2d at 669. Here, the deed obtained through the sale established the fact of title in IMB REO, which permitted IMB REO to pursue the action. Fromkin's claims regarding the allegedly flawed title were properly excluded from this proceeding.

¶21 IMB REO requests an award of attorneys' fees pursuant to A.R.S. § 12-341.01 (2003) and Arizona Rules of Civil Appellate Procedure (ARCAP) 25. Because FED actions are statutory in nature, we cannot award attorneys' fees under A.R.S. § 12-341.01(A) as an action arising out of a contract. *RREEF Mgmt. Co. v. Camex Prods., Inc.*, 190 Ariz. 75, 80, 945 P.2d 386, 391 (App. 1997). The appeal, though non-meritorious, does not meet the qualifications of ARCAP 25. *Overson v. Cowley*, 136 Ariz. 60, 72-73, 664 P.2d 210, 222-23 (App. 1982). We therefore decline to award IMB REO attorneys' fees.

CONCLUSION

¶22 The trial court's decision is affirmed.

PHILIP HALL, Presiding Judge

CONCURRING:

SHELDON H. WEISBERG, Judge

PETER B. SWANN, Judge

