

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: 12/07/10
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DEUTSCHE BANK NATIONAL TRUST) No. 1 CA-CV 10-0140
COMPANY, AS TRUSTEE UNDER)
NOVASTAR MORTGAGE FUNDING TRUST) DEPARTMENT B
SERIES 2006-5, its successors)
and/or assigns,) **MEMORANDUM DECISION**
)
Plaintiff/Appellee,) (Not for Publication -
) Rule 28, Arizona Rules of
v.) Civil Appellate Procedure)
)
VELVIDA HINES,)
)
Defendant/Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2009-027833

The Honorable Barbara Hamner, Judge *Pro Tempore*

AFFIRMED

Pite Duncan, LLP Phoenix
By Christina M. Harper
Attorneys for Appellee

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

J O H N S E N, Judge

¶1 Velvida Hines appeals from the judgment entered in favor of Deutsche Bank National Trust Company ("Deutsche Bank") in a forcible entry and detainer ("FED") action. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 2006 Hines executed a promissory note secured by a deed of trust on her home. After she defaulted, Deutsche Bank purchased the home at a trustee's sale. When Hines refused to move from the home, Deutsche Bank filed an FED action against her.

¶3 The superior court granted Deutsche Bank's motion for judgment on the pleadings, rejecting Hines's argument that the note and/or deed of trust was not properly assigned prior to the trustee's sale. Hines timely appealed. This court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") section 12-120.21(A)(1) (2003).

DISCUSSION

A. Standard of Review.

¶4 In reviewing a "judgment on the pleadings, we treat the allegations of the complaint as true" but review issues of law *de novo*. *Giles v. Hill Lewis Marce*, 195 Ariz. 358, 359, ¶ 2, 988 P.2d 143, 144 (App. 1999).

B. Issues Concerning Process or Procedure.

1. Personal service.

¶15 Hines first asserts the superior court erred in finding service was proper pursuant to Arizona Rule of Procedure for Eviction Actions 5(f) and Arizona Rule of Civil Procedure 4.1(d).¹

¶16 Rule 4.1(d) requires a plaintiff to "deliver[] a copy of the summons and of the pleading . . . by leaving copies thereof at [the defendant's] dwelling house . . . with some person of suitable age and discretion then residing therein." According to the process server's original affidavit, dated September 2, 2009, copies of the complaint and summons were delivered to Hines's adult son at their home. The affidavit states that attempts were made to serve Hines twice on the evening of August 31, and that Hines ultimately was served on "1 August 2009."

¶17 Hines argued to the superior court that the apparent discrepancy in the dates proved the affidavit was fraudulent. The court found the discrepancy to be a clerical error and directed Deutsche Bank to file an amended affidavit stating the

¹ In an FED action, Arizona Rule of Procedure for Eviction Actions 5(f) requires service "as provided by" Arizona Rule of Civil Procedure 4.1 or 4.2. (The latter provision is not relevant because it concerns extraterritorial service of process.)

correct date of service, September 1, 2009, which it did. On appeal, Hines does not explain why the superior court erred.² We conclude the court did not abuse its discretion in finding service of process to be proper.

2. Alleged violations of Arizona Rules of Procedure for Eviction Actions 5(d)(2) and 13(a).

¶18 Hines argues that because Deutsche Bank's complaint did not comply with Arizona Rule of Procedure for Eviction Actions 5(d)(2),³ the court violated Rule 13(a) in granting judgment against her. Rule 5(d)(2) sets out minimum pleading requirements that apply to an FED complaint. It requires the complaint to state "the reason for the termination of the tenancy with specific facts, including the date, place and circumstances of the reason for termination, so the tenant has an opportunity to prepare a defense." Ariz. R.P. Evic. Act.

² Hines's briefs utterly fail to comply with Arizona Rule of Civil Appellate Procedure 13(a)(6), which requires a party's briefs to include citations to the record. Moreover, her briefs for the most part consist only of broadly stated generalities that appear to have little relationship to arguments she made in the superior court.

³ Hines incorrectly cites Rule 5(b)(2), which requires an FED complaint to "[i]nclude the business name, if any, and address of the property." We can only assume she intends to rely instead on Rule 5(d)(2). Remarkably, Hines failed to correct the error in her reply brief even after Deutsche Bank pointed out the mistake in its answering brief.

5(d)(2). Rule 13(a) outlines the determinations a court must make before it may enter judgment.⁴

¶9 Hines's briefs contain no explanation of her contention that the complaint did not contain "the reason for the termination of the tenancy" or any of the other elements required by Rule 5(d)(2). To the contrary, the complaint included "the date, place, and circumstances of the reason for termination" of the tenancy as the rule requires. *Id.* We therefore reject Hines's contention that the superior court erred by failing to dismiss the complaint pursuant to Rule 13(a).

3. Right to jury trial.

¶10 Hines also argues the superior court improperly denied her a jury trial pursuant to A.R.S. § 12-1176(B) (2007). That provision states that if the plaintiff in an FED proceeding "does not request a jury, the defendant may do so on appearing and the request shall be granted." On appeal, Deutsche Bank argues that when there are no disputed issues of fact, Arizona

⁴ Rule 13(a) requires a court to "[d]etermine whether the service of the summons and complaint was proper and timely . . . whether the tenant . . . received proper termination notice . . . and was afforded any applicable opportunity to cure. . . whether the facts alleged, if proven, would be sufficient to determine that [the] plaintiff has a right of superior possession . . . [and whether the] landlord has accepted a partial payment."

Rule of Procedure for Eviction Actions 11(d) provides that trial shall be to the court.⁵

¶11 Because Hines failed to raise this argument in the superior court, we will not address it on appeal. *Englert v. Carondelet Health Network*, 199 Ariz. 21, 26, ¶ 13, 13 P.3d 763, 768 (App. 2000). We also note that not only did Hines fail to ask the superior court for a jury trial, she responded to Deutsch Bank's motion for judgment on the pleadings with a cross-motion for judgment on the pleadings in which she asked the court to rule for her as a matter of law.

C. Title Issues Are Outside the Scope of a Forcible Entry and Detainer Action.

¶12 Finally, as best as we can discern from Hines's briefs, she argues the superior court erred by entering judgment without addressing her contention that Deutsche Bank did not have title to the property.

¶13 The purpose of an FED action is to provide rightful landowners a summary, speedy and adequate means by which to

⁵ Rule 11(d) provides, in relevant part:

At the initial appearance, if a jury trial has been demanded, the court shall inquire and determine the factual issues to be determined by the jury. If no factual issues exist for the jury to determine, the matter shall proceed to a trial by the judge alone regarding any legal issues or may [be] disposed of by motion or in accordance with these rules, as appropriate.

obtain possession. *Andreola v. Ariz. Bank*, 26 Ariz. App. 556, 557, 550 P.2d 110, 111 (1976). Accordingly, the validity of the plaintiff's claim to title may not be tried in an FED action; the only issue to be determined is the right of possession. A.R.S. § 12-1177(A) (2003) ("On the trial of an action of forcible entry or forcible detainer, the only issue shall be the right of actual possession and the merits of title shall not be inquired into.").

¶14 In *Curtis v. Morris*, 186 Ariz. 534, 925 P.2d 259 (1996), our supreme court held § 12-1177(A) applies to an FED action brought by a party that purchased a home at a trustee's sale. In such a circumstance, the court held, "the prohibition against inquiring into the merits of title under § 12-1177(A) in a forcible detainer action is alive and well." *Curtis*, 186 Ariz. at 534, 925 P.2d at 259. In reaching that conclusion, the court explained that "convert[ing] a forcible detainer action into a quiet title action [would] defeat its purpose as a summary remedy." *Id.* at 535, 925 P.2d at 260.

¶15 *Andreola* is in accord. In that case, as here, a party that had purchased a home at a trustee's sale filed an FED action against the borrowers-trustors who had refused to vacate the home after the sale. 26 Ariz. App. at 557, 550 P.2d at 111. The borrowers argued the summary nature of an FED action was inappropriate because it did not allow them to "raise defenses

going to the underlying validity of the deed of trust itself.”
Id. This court approved the use of an FED action in such a
circumstance, noting that the borrowers could raise any
challenge to title by filing a separate action. *Id.* at 559, 550
P.2d at 113.

¶16 Hines argues *United Effort Plan Trust v. Holm*, 209
Ariz. 347, 101 P.3d 641 (App. 2004), supports her contention
that the superior court in this case should have considered her
attack on Deutsche Bank’s claim to title. At issue in *Holm* was
an FED action filed by a church that asserted it owned a home in
which two church members lived. *Id.* at 349, ¶ 15, 101 P.3d at
643. After the justice court transferred the matter to superior
court, and apparently without objection by the plaintiff, the
parties tried a host of issues to the court, including the
church’s right to title, the defendants’ claim to a life estate
and defenses of unjust enrichment and collateral estoppel. *Id.*
at 350, ¶¶ 17, 18, 101 P.3d at 644. The superior court
dismissed the FED complaint and entered orders resolving
ownership of the home. *Id.* at 350, ¶¶ 18, 19, 101 P.3d at 644.
On appeal, this court affirmed the dismissal of the complaint
and concluded the superior court erred by addressing the
defendants’ defenses concerning title because “[a] genuine
dispute exists that can only be resolved beyond the limitations

of a summary forcible-detainer action and in the context of a conventional civil action." *Id.* at 351, ¶ 24, 101 P.3d at 645.

¶17 We do not understand *Holm* to support Hines's contention that the superior court in this case should have addressed issues of title. As the court in *Holm* held, title issues may be addressed in a separate action, not in the context of an FED action.

CONCLUSION

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

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Judge

/s/
JOHN C. GEMMILL, Judge