DIVISION ONE
FILED: 04/24/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

THE BANK OF NEW YORK MELLON TRUST COMPANY, NA fka THE BANK OF NEW YORK TRUST COMPANY, N.A. as successor Trustee to JPMORGAN CHASE BANK, N.A., as Trustee, its successors and/or assigns, Plaintiff/Appellee, v. JACK SCOTT, Defendant/Appellant.	1 CA-CV 11-0271 DEPARTMENT E **MEMORANDUM DECISION** Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-030903

The Honorable Benjamin E. Vatz, Judge Pro Tempore

AFFIRMED

Pite Duncan, LLP — San Diego, CA
By Douglas A. Toleno
Attorneys for Plaintiff/Appellee

Jack Scott — Scottsdale
Defendant/Appellant, In Propria Persona

H A L L, Judge

¶1 Defendant/Appellant Jack Scott appeals the superior court's judgment for Plaintiff/Appellee The Bank of New York Mellon Trust Company, National Association (BNY) on its claim for forcible detainer. For the following reasons, we affirm.

BACKGROUND

¶2 On June 25, 2009, BNY purchased real property located in Scottsdale at a trustee's sale. Scott then filed an action in the superior court to quiet title in the property. That action was removed to federal court, and the parties stipulated to a preliminary injunction that prohibited BNY from attempting to secure possession of the property until the federal action was resolved. On August 13, 2010, the federal court granted summary judgment for BNY and dissolved the preliminary injunction.

¶3 On November 4, 2010, BNY demanded in writing that Scott vacate the premises. BNY then initiated this forcible detainer action against Scott, seeking to remove him from the premises. Scott moved to dismiss on the grounds of insufficient service of process, argued the action was barred by BNY's agreement not to pursue possession of the property until the federal action was finally resolved, and asserted that BNY's trustee's deed was invalid.[1] He requested a jury trial. The

[1] Scott also raised additional arguments not at issue in this appeal.

court denied Scott's request for a jury trial and set the matter for a hearing. Thereafter, it denied Scott's motion to dismiss for insufficient service of process and granted BNY's motion for judgment on the pleadings. After considering the parties' supplemental briefs regarding the amount of damages, the court entered judgment for BNY in the amount of $18,030.00 and awarded BNY attorneys' fees of $3900.00. Scott timely appealed.[2]

¶4 We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(A)(1) (Supp. 2011).

ISSUES

¶5 Scott contends the superior court erred in denying his motion to dismiss for insufficient service of process and his request for a jury trial. He also maintains the court showed bias and favor toward BNY.

DISCUSSION

¶6 A person is guilty of forcible detainer if he retains possession after receiving written demand for possession by the person entitled to possession of the premises. A.R.S. § 12-1171(3) (2003), -1173.01(A) (2003). In such a situation, the person entitled to possession may institute a summary forcible

[2] Thereafter, Scott filed a motion to set aside the judgment pursuant to Arizona Rules of Procedure for Eviction Actions (RPEA) 15(a). The court denied the motion.

detainer proceeding to have the premises immediately restored. A.R.S. §§ 12-1175 to -1176 (2003 & Supp. 2011). Because the purpose of the action is to afford a summary, speedy, and adequate remedy for obtaining possession of withheld premises, *United Effort Plan Trust v. Holm*, 209 Ariz. 347, 351, ¶ 21, 101 P.3d 641, 645 (App. 2004), "the only issue shall be the right of actual possession and the merits of title shall not be inquired into." A.R.S. § 12-1177 (2003). *See also Curtis v. Morris*, 186 Ariz. 534, 535, 925 P.2d 259, 260 (1996); *Holm*, 209 Ariz. at 351, ¶ 21, 101 P.3d at 645. A defendant may not assert counterclaims, offsets, or cross-complaints as a defense or for affirmative relief in a forcible-detainer action. *Curtis*, 186 Ariz. at 535, 925 P.2d at 260; *Holm*, 209 Ariz. at 351, ¶ 21, 101 P.3d at 645.

A. Insufficient Service of Process[3]

¶7 "Proper, effective service on a defendant is a prerequisite to a court's exercising personal jurisdiction over the defendant." *Barlage v. Valentine*, 210 Ariz. 270, 272, ¶ 4, 110 P.3d 371, 373 (App. 2005). We review de novo whether the trial court has personal jurisdiction over a party. *Bohreer v. Erie Ins. Exch.*, 216 Ariz. 208, 211, ¶ 7, 165 P.3d 186, 189 (App. 2007).

¶8 RPEA 5(f) requires that, for a forcible detainer action, service of the summons and complaint shall be accomplished as provided by Arizona Rule of Civil Procedure (Rule) 4.1 (or Rule 4.2 for out-of-state service). Rule 4.1(d) specifies that service upon an individual,

> shall be effected by delivering a copy of the summons and of the pleading to that individual personally or by leaving copies thereof at that individual's dwelling house or usual place of abode with some

[3] We assume without deciding that Scott did not waive his challenge to the sufficiency of service by filing an answer and appearing at the first hearing. *See Montano v. Scottsdale Baptist Hosp., Inc.*, 119 Ariz. 448, 452, 581 P.2d 682, 686 (1978) (stating, "a general appearance by a party who has not been properly served has exactly the same effect as a proper, timely and valid service of process."); *Kline v. Kline*, 221 Ariz. 564, 569, ¶ 18, 212 P.3d 902, 907 (App. 2009) ("A party has made a general appearance when he has taken any action, other than objecting to personal jurisdiction, that recognizes the case is pending in court."); *Ariz. Real Estate Inv., Inc. v. Schrader*, 226 Ariz. 128, 129-30, ¶ 7, 244 P.3d 565, 566-67 (App. 2010) (holding defendant in forcible detainer action who entered a special appearance and challenged only the issue of personal jurisdiction did not waive the issue of personal service).

> person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the pleading to an agent authorized by appointment or by law to receive service of process.

BNY filed a certificate of service showing Scott was personally served with the forcible detainer complaint and summons, and Scott does not challenge the sufficiency of that service.

¶9 Nevertheless, Scott argues the court erroneously denied his motion to dismiss for insufficient service of process because the record shows BNY did not properly serve its demand for possession of the property prior to commencement of its forcible-detainer action. A person who unlawfully retains possession of property may be removed through an action for forcible detainer "after he receive[s] written demand of possession." A.R.S. § 12-1173.01(A). BNY alleged, and Scott admitted, that it made the required demand for possession on November 4, 2010. Scott contends, however, that because BNY did not serve its demand in accordance with Rule 4.1, it was ineffective and the entire forcible detainer action invalid. Because the plain language of A.R.S. § 12-1173.01 does not require that a demand for possession be served in the same manner as a complaint, we reject this argument.

¶10 There is no dispute that BNY properly served Scott with the summons and complaint and there is no requirement that

it be served in the matter set forth under the Arizona Rules of Civil Procedure. We find no error.

B. Jury Trial

¶11 Scott next argues the court erred and violated his rights under the United States and Arizona constitutions by denying his request for a trial by jury because A.R.S. § 12-1176 mandates a jury trial be provided upon request in a forcible detainer action. *See* A.R.S. § 12-1176(B) ("If the plaintiff does not request a jury, the defendant may do so on appearing and the request shall be granted."). However, RPEA 11(d) requires the court to ascertain what factual issues are to be determined by the jury, and, if it decides "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 the [RPEA], as appropriate."

¶12 We reject Scott's argument that RPEA 11(d) is invalid. Although the language of A.R.S. § 12-1176(B) is at odds with the language of RPEA 11(d), the approach authorized by the rule is analogous to the summary disposition of civil cases authorized under Rule 56, notwithstanding a party's demand for a jury trial. *See Cagle v. Carlson*, 146 Ariz. 292, 298, 705 P.2d 1343, 1349 (App. 1985) (ruling, "the granting of summary judgment does not deprive a plaintiff of his constitutional rights to a jury

trial because, in such cases, there are simply no genuine issues of fact for a jury to consider."). For the purposes of this decision we will therefore assume that the court had discretion to determine whether a factual issue existed for a jury. RPEA 11(d).

¶13 Nevertheless, Scott contends the court erred by denying his request for a jury trial on his defense that BNY was not entitled to possession of the property because it had agreed Scott could retain possession until the conclusion of the federal action, which was ongoing in the appellate court. Scott asserted in his answer and at the initial forcible detainer hearing that the parties remained in litigation in the federal court and the Bank had agreed not to bring this action until the federal court action was resolved. Counsel for the Bank denied any knowledge of an agreement to forebear.

¶14 Our review of the record reveals that the only agreement in the record is a document entitled "Joint Request for Entry of Preliminary Injunction Order," which was adopted by the federal district court by the order, "Entry of Preliminary Injunction Order." However, that injunction was dissolved by the court and is no longer in effect. As a result, there is no factual issue to be tried regarding the scope of the now non-existent agreement. We therefore reject Scott's argument on appeal.

C. Judicial Bias

¶15 Finally, Scott argues the court abused its discretion and displayed bias against him by improperly pressing him to submit to the court's jurisdiction, denying his request for an extension of time to respond to BNY's motion for judgment on the pleadings, accepting BNY's late-filed supplemental brief regarding damages, and giving insufficient consideration to his response to the motion for judgment on the pleadings. The trial court has discretion over the control and management of trial. *Hales v. Pittman*, 118 Ariz. 305, 313, 576 P.2d 493, 501 (1978). "We will not interfere in matters within [the trial court's] discretion unless we are persuaded that the exercise of such discretion resulted in a miscarriage of justice or deprived one of the litigants of a fair trial." *Christy A. v. Ariz. Dept. of Econ. Sec.*, 217 Ariz. 299, 308, ¶ 31, 173 P.3d 463, 472 (App. 2007) (citation omitted).

¶16 The record reveals no suggestion of judicial impropriety concerning Scott's objection to the court's exercise of jurisdiction over him, and indicates the court gave adequate consideration to his response to the motion for judgment on the pleadings. In addition, we find no abuse of discretion in the court's denial of Scott's request for additional time to respond to BNY's motion for judgment on the pleadings and acceptance of BNY's late-filed supplemental brief regarding damages. Ariz. R.

Civ. P. 6(b) (allowing court, in its discretion, to enlarge the time for an act to be done at any time before the period has expired and after expiration of the period upon motion and where the failure to act was the result of excusable neglect); *Toy v. Katz*, 192 Ariz. 73, 83, 961 P.2d 1021, 1031 (App. 1997) (abuse of discretion occurs when a superior court's ruling has "exceeded the bounds of reason.").

¶17 Accordingly, we reject Scott's assignments of error.

CONCLUSION

¶18 For the foregoing reasons, we affirm.

_/s/_____
PHILIP HALL, Judge

CONCURRING:

_/s/_____
PATRICIA A. OROZCO, Presiding Judge

_/s/_____
JOHN C. GEMMILL, Judge