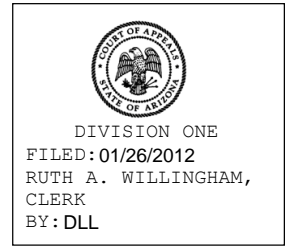


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



FEDERAL NATIONAL MORTGAGE ASSOCIATION,)	1 CA-CV 11-0286
)	
)	DEPARTMENT B
Plaintiff/Appellee,)	
)	
v.)	MEMORANDUM DECISION
)	(Not for Publication -
TERESA and REED COLLINGWOOD,)	Rule 28, Arizona Rules
)	of Civil Appellate
Defendants/Appellants.)	Procedure)
)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-031973

The Honorable Benjamin E. Vatz, Judge *Pro Tempore*

AFFIRMED

Tiffany & Bosco, P.A.	Phoenix
By Mark S. Bosco	
and Leonard J. McDonald	
and Paul D. Cardon	
Attorneys for Appellee	

McCauley Law Offices, P.C.	Cave Creek
By Daniel J. McCauley, III	
Attorneys for Appellants	

K E S S L E R, Judge

¶1 Teresa and Reed Collingwood (the "Collingwoods") appeal from the trial court's entry of judgment finding them

guilty of forcible detainer after a trustee's sale. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 In August 2008, the Collingwoods executed a deed of trust and promissory note in connection with their purchase of real property (the "Property") in Scottsdale, Arizona. The Collingwoods later defaulted on the loan and the Property was sold at a trustee's sale. At that sale, Federal National Mortgage Association ("Fannie Mae") purchased the Property and obtained title through a Trustee's Deed Upon Sale ("Trustee's Deed"). Fannie Mae then served a written demand on the Collingwoods to vacate and surrender possession of the Property, but they refused to do so.

¶3 Fannie Mae filed a forcible entry and detainer ("FED") complaint against the Collingwoods, attached to which was a copy of the Trustee's Deed. The Collingwoods moved to dismiss the complaint, or in the alternative, demanded disclosure, discovery, and a jury trial. Fannie Mae responded and also moved for judgment on the pleadings, arguing there were no material issues of fact for a jury to decide. The trial court granted Fannie Mae's motion and found the Collingwoods guilty of forcible detainer.

¶4 The Collingwoods timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.")

sections 12-120.21(A) (1) (2003) and 12-2101(A) (1) (Supp. 2011).

ISSUES AND STANDARD OF REVIEW

¶5 The Collingwoods raise four general overlapping issues in contending that the trial court erred in granting Fannie Mae's motion for judgment on the pleadings and denying their motion to dismiss. These issues can be summarized as follows: (1) The trustee's sale was invalid and Fannie Mae lacked standing to bring this action because of alleged irregularities both in declaring and proceeding with the default and alleged violations of the Home Affordable Modification Program ("HAMP")¹ by the lender or the entity servicing the note; and (2) Fannie Mae was not entitled to the evidentiary presumption of A.R.S. § 33-811(B) (2007). Because of these asserted defects, the Collingwoods argue the FED action should have been dismissed or, alternatively, they were deprived of due process and a right to a jury trial to present defenses under Rule of Procedure for Eviction Actions ("RPEA") 11(b) (1).

¹ "As the gravity of the credit crisis emerged, Congress passed the Emergency Economic Stabilization Act ("EESA") signed into law on October 3, 2008. 12 U.S.C. § 5201 (2008). EESA is the implementing statute for the Troubled Asset Relief Program ("TARP"), and is responsible for implementing programs paid for by TARP expenditures. 12 U.S.C. §§ 5211, 5225 (2008). EESA allocated \$700 billion to Treasury to restore liquidity and stability to the financial system. Enabled with this authority, on February 18, 2009, Treasury created the Making Home Affordable Program, a comprehensive plan to stabilize the U.S. housing market. . . . HAMP is a component of the Making Home Affordable Program." *Edwards v. Aurora Loan Servs., LLC*, 791 F. Supp. 2d 144, 148 (D.D.C. 2011).

¶6 Importantly, for our resolution of their appeal, the Collingwoods do not argue that the Trustee's Deed to Fannie Mae was a forgery or did not exist. Nor, despite their general denial of the validity of that deed below, did they argue in the trial court that the Trustee's Deed was not the actual deed issued as a result of the sale of the property to Fannie Mae.

¶7 A plaintiff in a FED action is entitled to judgment on the pleadings if the complaint sets forth a claim for relief and the answer does not contain a legally cognizable defense or does not effectively deny material allegations. *Pac. Fire Rating Bureau v. Ins. Co. of N. Am.*, 83 Ariz. 369, 376, 321 P.2d 1030, 1035 (1958); *Walker v. Estavillo*, 73 Ariz. 211, 215, 240 P.2d 173, 176 (1952). "We are not bound by the trial court's determination of questions of law" and review that determination *de novo*. *Barry v. Alberty*, 173 Ariz. 387, 389, 843 P.2d 1279, 1281 (App. 1992).

¶8 Thus, to defeat a plaintiff's motion for judgment on the pleadings in a FED case, a defendant must deny the truth of a material allegation in the complaint or assert a viable legal defense on the issue of right of possession. A defendant's general use of the word "deny" is insufficient to avoid judgment on the pleadings when, as here, the complaint adequately alleges the facts necessary to prevail on a FED claim and attaches a copy of the trustee's deed.

DISCUSSION

¶9 A person who retains possession of real property after receiving a written demand of possession may be removed through a FED action if the owner has obtained title through a trustee's sale. A.R.S. § 12-1173.01(2) (2003). The purpose of a FED action is to provide rightful owners with a "summary and speedy" means of obtaining possession. *Andreola v. Ariz. Bank*, 26 Ariz. App. 556, 557, 550 P.2d 110, 111 (1976); see also *Colonial Tri-City Ltd. P'ship v. Ben Franklin Stores, Inc.*, 179 Ariz. 428, 433, 880 P.2d 648, 653 (App. 1993). The validity of a plaintiff's claim of title cannot be litigated in a FED action and the court must refrain from examining the merits of the title or underlying contractual disputes. A.R.S. § 12-1177(A) (2003); *Curtis v. Morris*, 186 Ariz. 534, 535, 925 P.2d 259, 260 (1996) ("*Curtis II*"); *Olds Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 204, 167 P.2d 394, 397 (1946); accord *Yale Tavern, Inc. v. Cosmopolitan Nat'l Bank*, 632 N.E.2d 80, 85 (Ill. Ct. App. 1994) ("[M]atters not germane to the issue of possession may not be litigated in a [FED] action; the action should be unhampered and unimpeded by questions of title and other collateral matters." (internal quotation marks omitted)).

¶10 The Collingwoods claim that the trial court erred in failing to consider their arguments regarding the validity of the trustee's sale. They argue that: (1) The trustee's sale was

based on defective documents, invalid transfers, broken title, and violations of HAMP; and (2) The other parties and the company servicing the promissory note acted in bad faith in declaring a default and appointing a substitute trustee for the sale. As discussed, we will not consider disputes concerning title or breach of contract in a FED action. See *supra* ¶ 9. Because the Collingwoods' arguments address "the validity of [the trustee's] sale and title transfer," based on alleged breaches of the underlying contracts, they are not proper for consideration in a FED action.² *Curtis v. Morris*, 184 Ariz. 393, 398, 909 P.2d 460, 465 (App. 1995) ("*Curtis I*"), *aff'd*, *Curtis II*.

¶11 The Collingwoods cite *Andreola*, 26 Ariz. App. at 558, 550 P.2d at 112, to support their contention that in a FED action, the trial court can consider arguments regarding the validity of the trustee's sale. Their reliance on *Andreola* is

² For this same reason, we do not address the Collingwoods' arguments on standing, real party in interest, and fraud. Similarly, we do not need to fully address the Collingwoods' argument that Fannie Mae was not entitled to the evidentiary presumption provided in A.R.S. § 33-811(B). Under A.R.S. § 33-811(B), "[t]he trustee's deed shall raise the presumption of compliance with the requirements of the deed of trust and [the statutes] relating to the exercise of the power of sale and the sale of the trust property." The Collingwoods challenge the validity of Fannie Mae's title and the trustee's sale process based on alleged violations of contractual duties under the note and original deed of trust. This attack is beyond the scope of a FED action. See A.R.S. § 12-1177(A). Thus, the presumption of compliance is moot because the Collingwoods have only raised issues outside of the scope of a FED action.

misplaced. The issue in *Andreola* was whether a FED action could be brought by the holder of a trustee's deed arising from a default on the original deed of trust. *Id.* at 557, 550 P.2d at 111. In holding that a FED action was appropriate in that context, the court repeated the well-established principle that disputes about title cannot be litigated in a FED action. *Id.*

¶12 Despite that holding, the *Collingwoods* point to language later in *Andreola* that a "trustor in [a] [FED] action may be able to litigate the issue of compliance with the statutory foreclosure proceeding." *Id.* at 558, 550 P.2d at 112. This broadly-worded statement, however, is dicta as the issue before the court was not whether a defendant can raise issues of compliance with the deed of trust requirements in a FED action, but whether a FED action could be brought after a non-judicial foreclosure. Furthermore, the court in *Curtis I* makes clear that such an inquest would be impermissible:

[P]ermitting an inquiry into the validity of title in a FED action would pose substantial difficulties for the parties. The short time permitted before trial would render adequate discovery in actions involving potentially complex issues such as fraudulent misrepresentations, loan transactions, or multiple transfers of title nearly impossible. Because [a] FED action does not bar subsequent proceedings between the parties to determine issues other than the immediate right to possession, those issues are better resolved in proceedings designed to allow full exploration of the issues involved.

184 Ariz. at 398, 909 P.2d at 465. The Collingwoods are trying to parlay alleged breaches of terms in the trust documents and alleged HAMP violations into violations of A.R.S. §§ 33-801 to -821 (Supp. 2011). Such challenges to the validity of the Trustee's Deed must be brought in an action to enjoin the foreclosure under A.R.S. § 33-811(C) or be waived,³ or in an

³ The Collingwoods also claim that the alleged irregularities in the trustee's sale negate any claimed waiver of defenses under A.R.S. § 33-811(C), and that to hold otherwise would violate their due process rights. The relevant portion of § 33-811(C) provides that:

The trustor, its successors or assigns, and all persons to whom the trustee mails a notice of a sale under a trust deed pursuant to § 33-809 shall waive all defenses and objections to the sale not raised 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.

The Collingwoods assert that subsection (C) must be read in conjunction with subsection (B) to waive defenses and objections only "in favor of purchasers or encumbrancers for value and without actual notice." A.R.S. § 33-811(B). We review questions of statutory construction *de novo*. *Open Primary Elections Now v. Bayless*, 193 Ariz. 43, 46, ¶ 9, 969 P.2d 649, 652 (1998). To reach the conclusion that waiver only applies in favor of purchasers or encumbrancers for value without actual notice, we would need to rewrite the language of A.R.S. § 33-811(C) to incorporate this limitation. "Our Legislature did not choose this particular language, however, and we are not at liberty to rewrite the statute under the guise of judicial interpretation." *New Sun Bus. Park, L.L.C. v. Yuma Cnty.*, 221 Ariz. 43, 47, ¶ 16, 209 P.3d 179, 183 (App. 2009) (internal quotation marks omitted).

action to quiet title.⁴ See *Olds Bros.*, 64 Ariz. at 205, 167 P.2d at 398 (“[A] judgment in [a] [FED] action . . . is not a bar to a subsequent proceeding[] between the same parties in a quiet title suit for the reason that the adjudication of the title is not available in such an action.”).

¶13 The Collingwoods also rely on various cases to support their contentions that Fannie Mae’s right to possession is not superior to their own and that the trustee’s sale can be set aside due to irregularities.⁵ These cases are unpersuasive because they do not involve FED actions or trustee’s deeds after a default of the underlying promissory note and deed of trust. See *Queiroz v. Harvey*, 220 Ariz. 273, 205 P.3d 1120 (2009) (seeking specific performance of a contract to purchase land); *Khron v. Sweetheart Props.*, 203 Ariz. 205, 52 P.3d 774 (2002) (seeking to vacate the sale of a home in a bankruptcy petition); *Pinkerton v. Pritchard*, 71 Ariz. 117, 223 P.2d 933 (1950) (seeking to limit use of an easement granted by a prior judgment); *Johansen v. Ariz. Hotel*, 37 Ariz. 166, 291 P. 1005

⁴ The Collingwoods brought a quiet title action, but it was dismissed without prejudice for lack of service. *Reed P. Collingwood v. Cent. Mortg. Co.*, CV2010-054720 (Maricopa Cnty. Super. Ct. June 29, 2011).

⁵ At oral argument on appeal, the Collingwoods claimed that prior communications between the parties’ attorneys raised an understanding that they would be given time to work out the dispute and no FED action would be filed. This, however, was not argued in the briefs, and the only evidence in the record below is insufficient to create estoppel.

(1930) (seeking rent from tenant); *Merrill v. Gordon*, 15 Ariz. 521, 140 P. 496 (1914) (seeking damages for breach of lease agreement).

¶14 Because the Collingwoods' arguments were not triable in a FED action, the trial court did not err in granting judgment on the pleadings, thereby denying the Collingwoods a jury trial. See RPEA 11(d) (stating that if no factual issue exists, the Defendant is not entitled to a jury trial).

CONCLUSION

¶15 For the foregoing reasons, we affirm the trial court's judgment.

/s/

DONN KESSLER, Judge

CONCURRING:

/s/

DIANE M. JOHNSEN, Presiding Judge

/s/

LAWRENCE F. WINTHROP, Judge