DIVISION ONE
FILED: 05/08/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

AURORA LOAN SERVICES, LLC, their successors and assigns, Plaintiff/Appellee, v. GREGORY A. GIENKO and KIMBERLY A. GIENKO, Defendants/Appellants.	1 CA-CV 11-0478 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-010379

The Honorable Michael L. Barth, Commissioner

AFFIRMED

Rick D. Sherman Attorney at Law — Phoenix
By Rick D. Sherman
Attorneys for Plaintiff/Appellee

Molever Connelly, PLLC — Scottsdale
By Loren Molever
And Scott M. MacMillian
Attorneys for Defendants/Appellants

G O U L D, Judge

¶1 Gregory and Kimberly Gienko ("the Gienkos") appeal the trial court's granting of judgment on the pleadings in this forcible detainer action. For the following reasons, we affirm.

Factual and Procedural Background

¶2 Aurora Loan Services ("Aurora") filed a forcible detainer action alleging that the Gienkos were occupying property Aurora had recently purchased in a trustee's sale, and that the Gienkos were refusing to surrender possession of this property. Aurora attached a copy of the trustee's deed to the complaint.

¶3 The Gienkos filed an answer asking the court to dismiss the complaint. In their answer, the Gienkos alleged that the trustee's sale never occurred on the date it had been set and noticed. More specifically, the Gienkos alleged that when Mrs. Gienko "appear[ed] at the time and place on the notice of sale to redeem or otherwise bid on the property," there was no "announcement or any other indicia of a postponement or continuance of the sale."

¶4 Aurora moved for judgment on the pleadings and the court granted this motion, entering judgment in Aurora's favor and directing the Gienkos to vacate the property. The Gienkos 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).

Discussion

¶5 The Gienkos' main argument on appeal is that they should have been allowed to litigate whether the trustee sale occurred before the court rendered its judgment. As a result, the Gienkos contend that the case should be remanded for trial.

¶6 A plaintiff 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). When reviewing a judgment on the pleadings, "the allegations of the complaint are viewed as true, but conclusions of law are not admitted." *Giles v. Hill Lewis Marce*, 195 Ariz. 358, 359, 988 P.2d 143, 144 (App. 1999).

¶7 The purpose of a forcible detainer action is "to afford a summary, speedy and adequate remedy for obtaining possession of premises withheld by tenants." *Olds Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 204-05, 167 P.2d 394, 397 (1946); *see also Curtis v. Morris*, 184 Ariz. 393, 398, 909 P.2d 460, 465 (App. 1995) ("*Curtis I*"). This purpose would be "entirely frustrated" if the full spectrum of quiet title issues were permitted to be litigated in the forcible detainer action. *Olds*

Bros., 64 Ariz. at 205, 167 P.2d at 397; *Curtis I*, 184 Ariz. at 398, 909 P.2d at 465.

¶8 Accordingly, the validity of a plaintiff's claim of title may not be litigated in a forcible detainer action. A.R.S. § 12-1177(A) (2003) ("[T]he only issue shall be the right of actual possession and the merits of title shall not be inquired into."); *Curtis v. Morris*, 186 Ariz. 534, 534, 925 P.2d 259, 259 (1996) ("*Curtis II*") (holding that "the prohibition against inquiring into the merits of title under § 12-1177(A) in a forcible detainer action is alive and well"); *Andreola v. Ariz. Bank*, 26 Ariz. App. 556, 557, 550 P.2d 110, 111 (1976) (same). As *Curtis I* makes clear, "permitting an inquiry into the validity of title in an FED [forcible entry and detainer] action would pose substantial difficulties for the parties" because "[t]he short time permitted before trial would render adequate discovery in actions involving potentially complex issues . . . nearly impossible." 184 Ariz. at 398, 909 P.2d at 465. Given the fact that "an 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."[1] *Id.*

[1] The most obvious example of such a subsequent proceeding would be a quiet title action. The Gienkos have filed a quiet title action based on the subject trustee's sale, and any

¶9 As a result, a necessary predicate to any forcible detainer action is that the merits of title are undisputed. *See Andreola*, 26 Ariz. App. at 557, 550 P.2d at 111; *see also Colonial Tri-City Ltd. v. Ben Franklin Stores, Inc.*, 179 Ariz. 428, 433, 880 P.2d 648, 653 (App. 1993). When a forcible detainer action directly and inextricably involves a genuine dispute as to the merits of title, the action cannot be maintained. *United Effort Plan Trust v. Holm*, 209 Ariz. 347, 351, ¶ 21, 101 P.3d 641, 645 (App. 2004). For example, parties cannot use forcible detainer actions to establish the existence of a landlord/tenant relationship, or to litigate their contract rights under a real estate contract. *RREEF Mgmt. Co. v. Camex Prods., Inc.*, 190 Ariz. 75, 77-79, 945 P.2d 386, 388-90 (1997) (dispute over the existence of a lease could not be litigated in a forcible detainer action); *Colonial*, 179 Ariz. at 433, 880 P.2d at 653 (landlord could not use forcible detainer action to establish the existence of a landlord/tenant relationship); *Taylor v. Stanford*, 100 Ariz. 346, 348-49, 414 P.2d 727, 729-30 (1966) (plaintiff could not use forcible detainer action to litigate validity and rights under an executory real estate exchange contract).

---

improprieties regarding the sale may be raised in their pending quiet title action.

¶10 However, not every defendant can avoid a forcible detainer proceeding simply by denying that a plaintiff has valid title. *RREEF Mgmt.*, 190 Ariz. at 79, 945 P.2d at 390. A defendant must establish that there is a *genuine* dispute as to title. *Id.* Generally, defendants may dispute the merits of plaintiff's title only if they can show that the foreclosure sale was void based on "fraud, misrepresentation, or concealment." *Main I Ltd. P'ship v. Venture Capital Const. & Dev.*, 154 Ariz. 256, 260, 741 P.2d 1234, 1238 (App. 1987); a*ccord In re Hills*, 299 B.R. 581, 586 (Bankr. D. Ariz. 2002) (citing as grounds to challenge the presumption of validity of a trustees' deed "deliberate notice failure, fraud, misrepresentation, or concealment.").

¶11 Pursuant to A.R.S. § 33-811(B), a "Trustee's deed creates a 'presumption of compliance' and 'conclusive evidence' that" a foreclosure sale "was conducted regularly in accordance with the required statutory notice."[2] *In re Hills*, 299 B.R. at

[2] A.R.S. § 33-811(B) provides:

> The trustee's deed shall raise the presumption of compliance with the requirements of the deed of trust and this chapter 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

586 (citing *Triano v. First Am. Title Ins. Co.*, 131 Ariz. 581, 583, 643 P.2d 26, 28 (App. 1982)); *accord Main I,* 154 Ariz. at 260, 741 P.2d at 1238. Additionally, "[k]nowledge of the trustee shall not be imputed to the beneficiary." A.R.S. § 33-811(B) (2007). Based on this evidentiary presumption, a bona fide purchaser[3] is held to hold good title by means of having a trustee's deed issued in its favor. *In re Hills*, 299 B.R. at 586; *BAM Invs., Inc. v. Roberts*, 172 Ariz. 602, 604, 838 P.2d 1363, 1365 (App. 1992).

¶12 Pursuant to A.R.S. § 33-811(B), Aurora, as the holder of the trustee's deed, is presumed to hold good title to the subject property and is entitled to possession. The Gienkos' allegation that there was no trustee's sale does not, as a matter of law, provide a legally cognizable defense to Aurora's claim for possession. The Gienkos did not allege that Aurora obtained the deed by fraud, misrepresentation or concealment, nor did they allege that Aurora had notice of any defect in the trustee's sale.

> purchasers or encumbrancers for value and without actual notice."

[3] A bona fide purchaser is one who purchases property for value without actual notice of any alleged defect in the notice of sale. *First Am. Title Ins. Co. v. Action Acquisitions, LLC*, 218 Ariz. 394, 398, ¶ 12, 187 P.3d 1107, 1111 (2008).

¶13 If, as the Gienkos contend, the sale was improperly continued by the Trustee, this fact would have no bearing on Aurora's title because the Trustee's knowledge "shall not be imputed to the beneficiary" according to the statute.[4] A.R.S. § 33-811(B). To overcome this statutory presumption, the Gienkos would have had to allege that Aurora had actual knowledge of the improper notice and/or continuance of the trustee's sale. There is no such allegation in the Gienkos' answer.

¶14 The Gienkos contend that the statutory presumption does not protect Aurora because "[h]ere, it is the lender that claims to have purchased the property, not a third party without notice." However, nothing in the statutory language suggests that purchaser or encumbrancer without actual notice would exclude a lender without such notice, and we decline to create such a rule. A.R.S. § 33-811(B); *see New Sun Bus. Park, L.L.C. v. Yuma Cnty.*, 221 Ariz. 43, 47, ¶ 16, 209 P.3d 179, 183 (App. 2009) ("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.'") (quoting *State v. Patchin*, 125 Ariz. 501, 502, 610 P.2d 1062, 1063 (App. 1980)).

[4] While it may be true that such an error, if proved, could potentially invalidate Aurora's deed during a quiet title action, it is not the type of error a court may consider in a forcible detainer action, whose sole purpose is to provide a "summary" and "speedy" means for the holder of a deed to take possession of the property. *See Olds Bros.*, 64 Ariz. at 204-05, 167 P.2d at 397.

Moreover, whatever happened between Aurora and the Gienkos before this action was filed (i.e., whether Aurora in fact was Gienkos' lender who foreclosed on the property) is not part of the pleadings and therefore may not be considered by the court when issuing a judgment on the pleadings. Ariz. R. Proc. Evict. Acts. ("RPEA") 9(d) ("The court shall not consider matters outside the pleadings when ruling on a motion for judgment on the pleadings.").[5]

¶15 The Gienkos mistakenly cite *Triano*, 131 Ariz. 581, 643 P.2d 26, for the proposition that "evidence can be introduced to show that a sale was flawed and that, therefore, the resulting deed is flawed" in this forcible detainer action. However, *Triano* involved a quiet title action, not a forcible detainer action. 131 Ariz. at 582, 643 P.2d at 27 (explaining that review was sought for a suit "seeking to quiet title to certain real property"). Moreover, *Triano*'s analysis did not consider the statutory language providing that the deed constitutes conclusive evidence that the requirements have been met because this argument apparently was not made by the *Triano* parties. *See Main I*, 154 Ariz. at 260, 741 P.2d at 1238. Accordingly, even for quiet title actions, the portion of *Triano* suggesting that evidence may still be presented to prove that the trustee did not

[5] The Rules of Procedure for Eviction Actions apply to forcible detainer actions. RPEA 1.

strictly comply with statutory requirements has been rejected by this court as dicta. *Id.* (rejecting this interpretation of *Triano* and calling that portion of *Triano* "dicta").

¶16 The Gienkos also misinterpret *Andreola*, 26 Ariz. App. at 557, 550 P.2d at 111, which stated that "the merits of title may not be litigated, although the fact of title may be proved as a matter incidental to showing a right of possession by an owner." In making this statement, *Andreola* cites *Taylor* for the proposition that plaintiffs in a forcible detainer action may, as an evidentiary fact in support of their right to possession, introduce proof that they possess title to the property. *See Taylor*, 100 Ariz. at 349-50, 414 P.2d at 730. Moreover, although *Andreola* notes there may be situations when the issue of compliance with statutory foreclosure proceedings may be litigated in a forcible detainer action, *Andreola* affirms the general rule that a trial court may not litigate the merits of title in a forcible detainer action. *Andreola*, 26 Ariz. App. at 557-58, 550 P.2d at 111-12.

Conclusion

¶17 For the foregoing reasons, we affirm the trial court's judgment. Because the Gienkos' arguments regarding title are not triable in a forcible detainer action, the trial court did not err in granting judgment on the pleadings.

/S/
_____
ANDREW W. GOULD, Judge

CONCURRING:

/S/
_____
MAURICE PORTLEY, Presiding Judge

/S/
_____
ANN A. SCOTT TIMMER, Judge