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JUL -7 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

KONDAUR CAPITAL CORPORATION, a Delaware corporation, Plaintiff/Appellee, v. KEITH JAMES McKINNEY, Defendant/Appellant.	2 CA-CV 2010-0211 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV201004337

Honorable William J. O'Neil, Judge

AFFIRMED

Gust Rosenfeld, P.L.C.
By Mark L. Collins and Robert M. Savage — Tucson
Attorneys for Plaintiff/Appellee

James McKinney II — Mesa
In Propria Persona

K E L L Y, Judge.

¶1 Appellant Keith James McKinney[1] appeals from the trial court's November 19, 2010, entry of judgment finding him guilty of forcible detainer of real property following a trustee's sale. He argues (1) the court erred in determining service of process was proper, (2) appellee Kondaur Capital Corporation (Kondaur) lacked standing to bring the forcible detainer action, (3) Kondaur's complaint was insufficient under applicable rules of procedure, (4) the forcible detainer action was an improper forum in which to decide the issues raised, (5) the court erred in denying his request for a jury trial, (6) the court violated his right to due process by not allowing him to present evidence of title, and (7) the meaning of A.R.S. § 33-811(C) should be clarified on appeal. Finding no error we affirm.

Background

¶2 "We view the facts in the light most favorable to sustaining the trial court's judgment." *Sw. Soil Remediation, Inc. v. City of Tucson*, 201 Ariz. 438, ¶ 2, 36 P.3d 1208, 1210 (App. 2001). In February 2007, Keith's father, James H. McKinney, acquired a loan secured by a deed of trust encumbering the subject residential property. The deed of trust was recorded, and James also signed a promissory note. James defaulted on the payment of the loan, and a trustee's sale was held. At the sale, Kondaur acquired title to the property.

[1]Keith uses the name "James McKinney II" on appeal, and referred to himself as "James McKinney" below. Concerned that Keith and his father, plaintiff James H. McKinney, were using identical names, the trial court ordered the two to appear and present identification to differentiate themselves. The driver's license presented to the court revealed Keith's given name is "Keith James McKinney" and we therefore refer to him as such.

¶3 James and Keith filed a lawsuit challenging the trustee's sale in which they raised several issues, including whether Kondaur had acquired proper title to the property.[2] The trial court ultimately granted summary judgment against the McKinneys and dismissed the complaint.[3]

¶4 Following the trustee's sale, the McKinneys continued living at the property, and Kondaur sent a letter demanding possession. After the McKinneys failed to vacate, Kondaur filed an action to evict them from the property, pursuant to A.R.S. § 12-1173.01, and the trial court set a hearing on the matter. The McKinneys filed a "Special Answer and Counterclaim," but failed to appear at the hearing. At the hearing, the court acknowledged receipt of the answer and counterclaim and continued the proceeding to a later date. The McKinneys again failed to appear. At the rescheduled hearing, the court found that the McKinneys had been properly served, that it had jurisdiction, and that the McKinneys were guilty of forcible detainer. In a separate ruling, the court entered formal judgment in favor of Kondaur.[4] This appeal followed.[5]

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[2]This litigation was conducted under a different superior court case number.

[3]The trial court's ruling is the subject of a separate appeal currently pending before us.

[4]The court later entered a corrected judgment due to a clerical error, pursuant to Rule 60(a), Ariz. R. Civ. P.

[5]Although Kondaur asserts James joined in the appeal, the record does not reflect this. In any event, James filed a notice asserting he was "dismiss[ing] without prejudice his portion of [the] appeal." We therefore address the issues in the appeal only as they relate to Keith.

Discussion

¶5 As a preliminary matter, we note that even though Keith is unrepresented, he is held to the same standards as a "qualified member of the bar." *Copper State Bank v. Saggio*, 139 Ariz. 438, 441, 679 P.2d 84, 87 (App. 1983). A party proceeding in propria persona "is entitled to no more consideration than if he had been represented by counsel." *Id.*

¶6 As the appellant, Keith was required to "mak[e] certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised." *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). Keith did not include the transcripts of any trial court proceedings in the record on appeal. *See* Ariz. R. Civ. App. P. 11(b)(1). "We may only consider the matters in the record before us." *Ashton-Blair v. Merrill*, 187 Ariz. 315, 317, 928 P.2d 1244, 1246 (App. 1996). In the absence of a transcript, we must presume the record supports the court's ruling. *Kohler v. Kohler*, 211 Ariz. 106, n.1, 118 P.3d 621, 623 n.1 (App. 2005).

I. Service of Process

¶7 Keith first claims the trial court erred in determining service of the complaint and summons was proper. Specifically, Keith argues A.R.S. § 12-1175 and Rule 5(f), Rules of Procedure for Eviction Actions ("RPEA") require that, in a forcible detainer action, personal service be made as provided by Rule 4.1, Ariz. R. Civ. P. We review de novo whether the trial court has personal jurisdiction over a party. *Bohreer v. Erie Ins. Exch.*, 216 Ariz. 208, ¶ 7, 165 P.3d 186, 189 (App. 2007).

¶8 A trial court's jurisdiction over a person is established by "the fact of service and the resulting notice." *Hirsch v. Nat'l Van Lines, Inc*., 136 Ariz. 304, 308, 666 P.2d 49, 53 (1983). In a forcible detainer action, "[s]ervice of the summons and complaint shall be accomplished . . . as provided by Rule 4.1 or 4.2 of the Arizona Rules of Civil Procedure." RPEA 5(f). Rule 4.1(d) authorizes service "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 . . . with some person of suitable age and discretion."

¶9 Keith argues that Kondaur failed to comply with Rule 4.1 because the summons and pleadings were not delivered to him personally, but rather were posted on the main entryway of the residence and sent by certified mail.[6] We need not consider whether this method of service was proper as we find that even if a defect existed, Keith waived it. In his answer and counterclaim, Keith emphasized he was "appearing specially" and cited our decision in *Arizona Real Estate Inv., Inc. v. Schrader*, 226 Ariz. 128, 244 P.3d 565 (App. 2010). In that case, addressing a forcible detainer action, Schrader entered a special appearance and challenged only the issue of personal jurisdiction. *Id*. ¶¶ 4, 7. The trial court ruled on the issue and Schrader then entered a general appearance and contested the merits of the action. *Id*. Under the facts of

[6]The affidavits of the process server indicate that six separate attempts were made to personally serve the McKinneys. On one such attempt, the process server noted there were vehicles in the driveway, the television was on, and the front window was open. The process server also spoke with a neighbor of the McKinneys, who stated they still lived there. Based on this, the process server believed the McKinneys were avoiding service.

Schrader, we found this sufficient to avoid waiver of the issue of personal service on appeal. *Id*. ¶¶ 6-7.

¶10 Unlike Schrader, Keith did not limit his answer to the issue of jurisdiction. Rather, Keith challenged the merits of Kondaur's action at length and raised various purported counterclaims. In challenging the merits of the complaint and petitioning the trial court for relief on his counterclaims, Keith made a general appearance. *See Kline v. Kline*, 221 Ariz. 564, ¶ 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."). 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." *Montano v. Scottsdale Baptist Hosp., Inc.*, 119 Ariz. 448, 452, 581 P.2d 682, 686 (1978). And, Keith "cannot avoid the consequences of that appearance by resort[ing] to the jargon of 'special appearances.'" *Kline*, 221 Ariz. 564, n.10, 212 P.3d at 909 n.10. We therefore conclude that Keith submitted himself to the jurisdiction of the court and thus waived any defect in personal service that may have existed.

¶11 Moreover, even assuming a defect in service existed, Keith has not shown he suffered prejudice as a result. *See id*. ¶ 21 (finding service properly made despite technical defect when party served had timely actual notice). The purpose of service of process is to give the party actual notice of the proceedings. *Scott v. G.A.C. Fin. Corp.*, 107 Ariz. 304, 305, 486 P.2d 786, 787 (1971). By filing an answer and counterclaim in response to the specific allegations in Kondaur's complaint, Keith demonstrated he had actual notice of the proceedings. Because Keith entered a general appearance and had

actual notice, he cannot establish that he suffered prejudice as a result of any alleged defect in service. *See Kline*, 221 Ariz. 564, ¶ 21, 212 P.3d at 908-09 (no prejudice from technical defect in service when court has acquired jurisdiction over receiving party and party receives actual, timely notice of pleading and contents). Accordingly, we conclude the trial court properly determined it had personal jurisdiction over Keith.

II. Standing

¶12 Keith appears to raise an issue regarding Kondaur's standing to have brought the forcible detainer action. But Keith does not develop this argument beyond his assertion that "[t]here are material issues of fact regarding the standing (real party in interest) . . . asserted by Plaintiff." The argument is therefore waived. *See* Ariz. R. Civ. App. P. 13(a)(6) ("An argument . . . shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."); *Polanco v. Indus. Comm'n of Ariz.*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal).

¶13 And, in any case, Keith's claim lacks merit. Under A.R.S. § 12-1173.01(A)(2), a person "who retains possession of any land, tenements or other real property after he receives written demand of possession may be removed through an action for forcible detainer . . . [i]f the property has been sold through a trustee's sale under a deed of trust." Here, Kondaur purchased the property at a trustee's sale, and Keith, despite having received a written demand, failed to vacate the premises. Kondaur therefore had standing to bring the forcible detainer action pursuant to § 12-1173.01.

And the trustee's deed issued to Kondaur raised "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." A.R.S. § 33-811(B).

III. Sufficiency of Complaint

¶14 Keith asserts Kondaur's complaint was insufficient under applicable rules. Specifically, he argues Kondaur did not "act with due diligence to verify the holder in due course and the validity of transfers prior to initiating the action." Keith does not develop this argument further and does not explain how Kondaur allegedly failed to act with due diligence. We therefore find the argument waived. Ariz. R. Civ. App. P. 13(a)(6); *Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393 n.2.

¶15 Keith also argues Kondaur did not "plead with specificity the legal basis of [its] claim," in violation of Rule 5(d)(2), RPEA. But Keith does not specify what material information was omitted and states only that Kondaur "failed to plead . . . facts necessary for [him] to prepare a defense." Because Keith has not developed this argument, it is waived. Ariz. R. Civ. App. P. 13(a)(6); *Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393 n.2. And in any case, we find no error. Rule 5(d)(2), RPEA, 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." The complaint provided this information as well as copies of the original deed of trust, trustee's deed and written demand for possession of the property.

IV. Proper Forum

¶16 Keith claims a "forcible detainer action is an [im]proper forum for [a] non-judicial foreclosure involving securitized mortgage notes . . . invalid transfers of beneficial interests and a broken chain of title." Keith, however, did not raise this issue in the trial court. Legal theories must be presented to a trial court in a manner that provides that court with an opportunity to address all issues on their merits. *Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, ¶ 17, 158 P.3d 232, 238 (App. 2007). If an argument is not raised below, it is waived on appeal. *Id*. Accordingly we do not consider this claim.

V. Jury Trial

¶17 Keith claims the trial court erred in denying his request for a jury trial because A.R.S. § 12-1176 mandates a jury trial be provided upon request. "[I]f a jury trial has been demanded, the court shall inquire and determine the factual issues to be determined by the jury." RPEA 11(d); *see also* 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, if the court determines "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." RPEA 11(d).[7]

[7]We recognize the mandatory language of § 12-1176(B) is at odds with the language of Rule 11(d), RPEA, permitting a bench trial and summary disposition without a trial if the trial court determines there are no factual issues for a jury to decide. We believe, however, the approach authorized by Rule 11(d) is analogous to the summary

¶18 In their answer and counterclaim, the McKinneys requested a jury trial, claiming only that material issues of fact existed regarding title to the property. As discussed above, the McKinneys had raised issues pertaining to the property's title in a separate proceeding; in any event the validity of title is not a proper subject in a forcible detainer action. *See* A.R.S. § 12-1177(A) ("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."); *Curtis v. Morris*, 186 Ariz. 534, 534, 925 P.2d 259, 259 (1996) (citing statute). We therefore reject Keith's argument and conclude the court did not err in implicitly denying the request for a jury trial, as no factual issues existed for a jury to determine. *See* RPEA 11(d).

VI. Evidence of Title

¶19 Keith next claims the trial court violated his due process rights by not allowing him to present evidence of title. In support, he offers only the conclusory statement that allowing Kondaur to present evidence of title without allowing him "to do the same lacks fairness and due process." But the McKinneys raised the issue of title in a separate proceeding. Keith does not explain why due process requires he be permitted to contest the issue again in the limited context of a forcible detainer proceeding, nor does he cite any authority in support of this assertion. *See* Ariz. R. Civ. App. P. 13(a)(6); *Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393 n.2.

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disposition of civil cases authorized under Rule 56, Ariz. R. Civ. P., notwithstanding a party's demand for a jury trial.

¶20 Keith also claims § 12-1177(A) is unconstitutional on its face or as applied. Keith has not developed this argument beyond his claim that the application of § 12-1177(A) violates due process because it "was designed and intended for . . . removal of renters" and "covers-up broken chain[s] of title[]." As such, the argument is waived. Ariz. R. Civ. App. P. 13(a)(6); *Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393 n.2.

VII. Section 33-811(C), A.R.S.

¶21 Lastly, although Keith does not specifically raise the issue, he appears to challenge the meaning and constitutionality of A.R.S. § 33-811(C). He states, "[t]he definitive construction of A.R.S. § 33-811(C) should be decided because of inconsistent results." Keith did not raise this argument below. *See Airfreight*, 215 Ariz. 103, ¶ 17, 158 P.3d at 238. Accordingly, it is waived. *Id.*

Disposition

¶22 For the reasons stated above, we affirm the judgment of the trial court.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge