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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| VANDERBILT MORTGAGE and FINANCE, INC., a Tennessee corporation, its assignees and/or successors-in-interest,<br><br>Plaintiff/Appellee,<br><br>v.<br><br>RANDY MANASSA and JULIE MANASSA, occupants and parties-in-possession,<br><br>Defendants/Appellants. | 2 CA-CV 2010-0214<br>DEPARTMENT A<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 28, Rules of Civil Appellate Procedure |

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV201004274

Honorable Craig A. Raymond, Judge Pro Tempore
Honorable Bradley M. Soos, Judge Pro Tempore

AFFIRMED

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B R A M M E R, Judge.

**¶1** Appellants Randy and Julie Manassa appeal from the default judgment entered against them and in favor of Vanderbilt Mortgage and Finance, Inc. (Vanderbilt) in a forcible detainer action. The Manassas argue they were denied procedural due process when their initial appearance was heard in front of a different judge than the one listed on the summons served upon them.[1] They also argue the court abused its discretion by refusing to vacate the judgment entered against them. We affirm.

## Factual and Procedural Background

**¶2** "We view the facts in the light most favorable to sustaining the trial court's judgment."[2] *Sw. Soil Remediation, Inc. v. City of Tucson*, 201 Ariz. 438, ¶ 2, 36 P.3d 1208, 1210 (App. 2001). Vanderbilt filed a complaint against the Manassas for forcible entry and detainer asserting Vanderbilt was entitled to possession of property it owned that the Manassas were occupying. The Manassas were served with a summons ordering them to appear on November 5, 2010 at 1:30 pm before Judge Soos. The hearing in fact was heard by Judge Raymond in a different courtroom in a different part of the courthouse with Vanderbilt's counsel appearing telephonically. Neither the Manassas,

[1]We note the Manassas argue this item was on the court's calendar showing it was assigned to Judge Soos, citing in support a copy of a calendar otherwise not found in the record on appeal.

[2]The statement of facts in the Manassas' opening brief does not contain any citations to the record as required by Rule 13(a)(4), Ariz. R. Civ. App. P., but rather cites only the appendix to that brief. Accordingly, we rely on our own review of the record for our recitation of the facts. *See Flood Control Dist. of Maricopa Cnty. v. Conlin*, 148 Ariz. 66, 68, 712 P.2d 979, 981 (App. 1985) (court may disregard statement of facts lacking appropriate references to record and asserting facts unsupported by record).

nor their counsel, appeared at the hearing, and the court entered judgment against them, finding the Manassas guilty of forcible detainer. According to an affidavit of the Manassas' counsel provided on appeal, he was in Judge Soos's courtroom at the time, waiting for the judge to appear and hear the case.[3]

**¶3** The case was recalled half an hour later with the Manassas' counsel appearing before Judge Raymond. At that time, the Manassas filed a motion to dismiss for lack of service of process, which the court denied. The court affirmed its prior order and admonished the Manassas' counsel for his conduct. This appeal followed.

**Discussion**

**¶4** The Manassas argue they were denied procedural due process because Judges Soos and Raymond failed to notify them of the change of judge for their forcible detainer hearing. The Manassas contend their counsel was present in Judge Soos's courtroom, where the summons had indicated the matter was scheduled to be heard, when Judge Raymond conducted the hearing in a different courtroom. We review constitutional questions de novo. *Citizens Telecomms. Co. of White Mountains v. Ariz. Dep't of Revenue*, 206 Ariz. 33, ¶ 21, 75 P.3d 123, 128 (App. 2003).

**¶5** Procedural due process requires that a party be provided an opportunity to be heard at a meaningful time and in a meaningful manner. *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971); *Emmett McLoughlin Realty, Inc. v. Pima Cnty.*, 212 Ariz. 351,

[3]Although generally we do not refer to matters not in the record, we do so here to provide context for the Manassas' argument on appeal.

¶ 17, 132 P.3d 290, 294 (App. 2006) (due process requires party receive adequate notice and have opportunity to be heard). Due process is satisfied if notice "is reasonably calculated under all of the circumstances to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." *Iphaar v. Indus. Comm'n*, 171 Ariz. 423, 426, 831 P.2d 422, 425 (App. 1992). Rule 5(a), Ariz. R. P. Evic. Actions, requires that the summons served in an eviction action include the name of the court where the hearing will occur, its street address, city, and telephone number, and the date and time set for the hearing. *See also* Ariz. R. P. Evic. Actions 1 (rules apply to forcible detainer actions).

**¶6** The Manassas were provided an opportunity to be heard. *See Emmett McLoughlin Realty, Inc.*, 212 Ariz. 351, ¶ 17, 132 P.3d at 294. Counsel apparently went to Judge Raymond's chambers, and the case was recalled. Vanderbilt's counsel was telephoned and appeared, and the trial court was presented with the Manassas' motion to dismiss. The Manassas do not argue that hearing differed in some way from the hearing they may have received in Judge Soos's courtroom at the earlier time, and we have not been provided with a transcript suggesting otherwise.[4] *See In re Property at 6757 S. Burcham Ave.*, 204 Ariz. 401, ¶ 11, 64 P.3d 843, 846-47 (App. 2003) (in absence of

[4]To the extent the Manassas argue in their reply brief that they were denied the procedures required for an initial appearance under Rule 11, Ariz. R. P. Evic. Actions, we generally do not address issues raised for the first time in the reply brief, *see Mason v. Cansino*, 195 Ariz. 465, n.1, 990 P.2d 666, 668 n.1 (App. 1999), and because we have no record of those proceedings, we do not address the argument further, *see In re 6757 S. Burcham Ave.*, 204 Ariz. 401, ¶ 11, 64 P.3d at 846-47.

transcript we presume record supports trial court's decision). And counsel for the Manassas made a special appearance solely to request the matter be dismissed for lack of proper service, a request the court heard and on which it ruled. Accordingly, the Manassas' due process rights were not violated.

**¶7** Moreover, the summons served here complied with Rule 5(a) and was not required to list the judge who initially would hear the matter. It was sufficient constitutionally to apprise the Manassas of the hearing and provide them the opportunity to present their objections. *See Iphaar*, 171 Ariz. at 426, 831 P.2d at 425. The Manassas have not cited any authority suggesting either a change of judge violates due process, or that a party must be provided notice when the hearing judge changes. *See* Ariz. R. Civ. App. P. 13(a)(6) (appellate brief argument shall contain "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, 393-94 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal). And although the Manassas may have been misled by the extraneous reference in the summons to the specific judge who was to hear the matter, by counsel's own admission, other litigants with matters scheduled before Judge Soos were able to locate the correct place where they were heard.

**¶8** The Manassas also argue the trial court abused its discretion by refusing to vacate the judgment in response to their oral motion to set aside the default judgment. Whether to set aside a default judgment is left to a trial court's sound discretion, and we

review that decision for a clear abuse of discretion. *Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 185, 188, 836 P.2d 398, 401 (App. 1992).

**¶9** On appeal, the Manassas contend they argued in the trial court that 1) Vanderbilt was not the grantee named in the trustee's deed and lacked standing to file a forcible entry and detainer action; 2) the plaintiff named in the complaint was not the same as that in the caption of the summons; and 3) the trustee's deed was issued by an improper party.[5] The Manassas do not develop these arguments on appeal,[6] *see Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393-94 n.2 (appellant's failure to develop and support argument waives issue on appeal), nor does the record reflect that these arguments were raised in the trial court, *see* Ariz. R. Civ. App. P. 13(a)(6) (appellate brief argument shall contain "citations to the . . . parts of the record relied on"). In their motion to dismiss, filed the same day as the scheduled hearing, the Manassas stated they were appearing "solely for the purpose of challenging the jurisdiction of the court" for failure to serve valid process upon defendants—an argument they do not assert on appeal.[7]

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[5]Because we do not reach the merits of the Manassas' arguments, we need not determine whether these issues properly could have been raised at a forcible entry and detainer hearing. *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.").

[6]The Manassas further developed these and related arguments for the first time in their reply brief. However, generally we do not address issues that an appellant raises for the first time in the reply brief. *See Mason v. Cansino*, 195 Ariz. 465, n.1, 990 P.2d 666, 668 n.1 (App. 1999).

[7]On appeal, the Manassas concede that Randy Manassa was served personally.

**¶10** To the extent the Manassas' arguments were not raised properly in the trial court, they are waived. *See Maher v. Urman*, 211 Ariz. 543, ¶ 13, 124 P.3d 770, 775 (App. 2005) (argument not raised in trial court waived on appeal). Even if some or all of these arguments had been raised below, we must presume the record before the court supported its determination of those issues because the Manassas did not provide this court with a transcript or narrative statement of the initial hearing or of the subsequent hearing where it allegedly raised these arguments after the court recalled the case. *See* Ariz. R. Civ. App. P. 11(a), (c) (appellant may submit narrative statement to superior court for approval if transcript unavailable). Nor did the Manassas develop a record of the arguments below by filing a motion to set aside the judgment pursuant to Rule 15, Ariz. R. P. Evic. Actions.

**¶11** As the appellants, the Manassas bore the "responsibility to include in the record on appeal 'such parts of the proceedings as [they] deem[ed] necessary.'" *In re 6757 S. Burcham Ave.*, 204 Ariz. 401, ¶ 11, 64 P.3d at 846-47, *quoting* Ariz. R. Civ. App. P. 11(b)(1). "'We may only consider the matters in the record before us. As to matters not in our record, we presume that the record before the trial court supported its decision.'" *Id.*, *quoting Ashton-Blair v. Merrill*, 187 Ariz. 315, 317, 928 P.2d 1244, 1246 (App. 1996); *see also State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, ¶ 16, 66 P.3d 70, 73 (App. 2003). Therefore, we presume sufficient evidence was presented to the trial court to support its refusal to vacate the judgment, and it did not abuse its discretion in declining to do so.

**Disposition**

**¶12** For the foregoing reasons, we affirm.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge