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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 07/10/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

US BANK NATIONAL ASSOCIATION as ) 1 CA-CV 11-0586  
Trustee for GSAA 2007-9 by its )  
attorney in fact Wells Fargo ) DEPARTMENT E  
Bank N.A., Successor by merger )  
to Wells Fargo Home Mortgage, ) **MEMORANDUM DECISION**  
Inc., ) (Not for Publication -  
 ) Rule 28, Arizona Rules of  
Plaintiff/Appellee, ) Civil Appellate Procedure)  
 )  
v. )  
 )  
RACHEL A. EARL, )  
 )  
Defendant/Appellant. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-006146

The Honorable James R. Morrow, Judge

**AFFIRMED**

Law Offices of Kevin Jensen, PLLC  
by Kevin Jensen  
Attorney for Defendant/Appellant

Mesa

Tiffany & Bosco, PA  
by Leonard J. McDonald, Jr.  
David W. Cowles  
Attorneys for Plaintiff/Appellee

Phoenix

P O R T L E Y, Judge

¶1 Rachael Earl ("Earl") challenges the denial of her motion to set aside the forcible entry and detainer judgment. She asks us to vacate the order because she was not properly served. For the following reasons, we affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

¶2 US Bank National Association ("US Bank") purchased a house at a trustee's sale, and filed its forcible detainer complaint against Earl in February 2010. She appeared at the initial appearance on February 22, 2010, and informed the court that she was going to remove the case to federal court. She also filed a "Notice of Filing Notice of Removal" with the superior court, and acknowledged that she had been served, "albeit improperly . . . on or about February 17, 2010 by notice taped to [her] door." The district court subsequently remanded the matter back to the superior court.

¶3 Earl filed for Chapter 13 bankruptcy just prior to trial, and US Bank filed a motion for judgment on the pleadings. The trial was continued twice, and Earl filed a verified answer in June 2010. She, however, did not raise the affirmative defense of improper service. The trial court subsequently

granted the motion for judgment on the pleadings, and found Earl guilty of forcible detainer.<sup>1</sup>

¶14 Approximately ten months later, Earl filed a motion to set aside the judgment pursuant to the Rules of Procedure for Eviction Actions ("RPEA") 15(a)(3) and (10). The court denied her motion after finding that she had waived any objection to improper service in her answer and response to the motion. She filed this appeal after filing an unsuccessful motion for reconsideration.

#### DISCUSSION

¶15 Earl argues that the trial court erred by denying her motion to set aside the judgment. She contends that contrary to the trial court's ruling, she did not waive her objection to improper service.

¶16 We review the ruling on a motion to set aside the judgment for an abuse of discretion. *Goglia v. Bodnar*, 156 Ariz. 12, 16, 749 P.2d 921, 925 (App. 1987) (citation omitted). We review only those issues raised in the motion to set aside the judgment. *Id.* (citation omitted). Unless it is evident from the hearing that the court acted arbitrarily, unreasonably, or clearly abused its discretion, "the trial court's refusal to vacate a judgment must stand." *Id.* (citing *Indus. Park Corp. v.*

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<sup>1</sup> Earl filed her response to the motion for judgment on the pleadings on the day judgment was entered.

*U.S.I.F. Palo Verde Corp.*, 19 Ariz. App. 342, 346, 507 P.2d 681, 685 (1973)).

¶17 Eviction cases, including forcible detainer actions, are governed by the specialized procedural rules for eviction actions. RPEA 1. RPEA 5(f) states that service of process is governed by Arizona Rules of Civil Procedure 4.1 and 4.2. RPEA 5(g) outlines the consequence of untimely service. The rule provides that “[i]f the defendant appears at the initial appearance, the appearance shall constitute a waiver of any objections to the form or manner of service unless the defendant asserts those grounds at the initial appearance or in a previously filed written answer.” RPEA 5(g).

¶18 Here, Earl appeared at the February 22, 2010 initial appearance. She did not challenge service at that time, and had not filed a written answer. Her notice of removal noted that she was served “albeit improperly . . . by notice taped to [her] door,” but she did not separately seek to dismiss the case nor was service of process discussed. Instead, the discussion focused on her desire to remove the case to the district court and continue the matter.

¶19 Earl appeared at the new date, March 1, but did not move to dismiss the action for improper service. She mentioned the issue of improper service, but the commissioner noted that she was present and defending the action. Earl subsequently

filed an answer and an opposition to the motion for judgment on the pleadings, but never raised the affirmative defense of improper service or moved to dismiss the action.

¶10 Some ten months after the judgment was entered, she sought relief. After argument, the court found that the bank did not personally serve Earl but used the "nail and mail" process, which did not comply with RPEA 5(f). The court then determined that Earl failed to preserve the defense at the February 22 initial appearance, the March 1 hearing, in her answer, and in her response to the judgment on the pleadings.

¶11 Although Earl challenges the ruling, RPEA 15(a) provides that motions to set aside a judgment "shall be filed within a reasonable time" when alleging defective service of process. Her motion to set aside the judgment did not address why she believed her motion was timely. Moreover, during the argument on her motion, she only noted that she had been attempting to seek bankruptcy protection, but did not explain why she could not have filed her motion sooner. As a result, even if we were to agree with Earl that she did not waive the improper service defense by her appearances on February 22 or March 1, she did not file her motion for relief from judgment within a reasonable time. Consequently, she has waived the issue by not timely raising improper service of process so that

the matter could be resolved before the bank took possession of the house.

¶12 US Bank requests attorneys' fees pursuant to A.R.S. section 12-1178(A) (West 2012). Because the bank has prevailed, it is entitled to its reasonable attorneys' fees upon compliance with Arizona Rule of Civil Appellate Procedure 21.

**CONCLUSION**

¶13 Based on the foregoing reasons, we affirm the denial of the motion for relief from judgment.

/s/

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MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

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PHILIP HALL, Judge

/s/

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MICHAEL J. BROWN, Judge