DIVISION ONE
FILED: 10/18/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MICHAEL J. BROSNAHAN, Appellant, v. FEDERAL NATIONAL MORTGAGE ASSOCATION, Appellee.	)	No. 1 CA-CV 11-0709 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Coconino County

Cause No. SO300CV201100749

The Honorable Ted S. Reed, Judge Pro Tempore

AFFIRMED

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H A L L, Judge

¶1 Michael J. Brosnahan appeals the judgment for Federal National Mortgage Association (Federal) on its claim of forcible detainer. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 On September 1, 2011, Federal filed a forcible detainer action alleging that Brosnahan was occupying and refusing to surrender possession of a property Federal purchased in a trustee's sale on February 18, 2011. Federal attached a copy of the trustee's deed to its complaint.

¶3 Two weeks later, the superior court held a hearing where Federal's attorney explained that the process server was unable to personally serve Brosnahan. Federal requested permission to serve Brosnahan by nail and mail, which the superior court granted.

¶4 On September 21, 2011, Brosnahan filed a motion to dismiss alleging lack of jurisdiction, failure to state a claim upon which relief could be granted, lack of standing, "use of fraudulent documents in the foreclosure process," breach of the foreclosure notice requirements, and breach of the Arizona Uniform Commercial Code. In the alternative, Brosnahan requested discovery, disclosure, and a jury trial.

¶5 The same day, the superior court held a hearing on the forcible detainer complaint. After hearing argument from both

[1] "We view the facts in the light most favorable to sustaining the trial court's judgment." *Southwest Soil Remediation, Inc. v. City of Tucson*, 201 Ariz. 438, 440, ¶ 2, 36 P.3d 1208, 1210 (App. 2001).

parties, the superior court denied Brosnahan's motion to dismiss and found him guilty of forcible detainer.

¶6 This appeal followed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(A)(1) (Supp. 2012).

DISCUSSION

¶7 On appeal, Brosnahan raises numerous overlapping issues that we distill to the following claims: (1) Federal's complaint in this action is barred under the doctrine of res judicata, (2) the summons issued is invalid, (3) the service of process is invalid, (4) the notice of trustee's sale is invalid, (5) the deed of trustee's sale is invalid, (6) the foreclosure process violated the Uniform Commercial Code and a Consent Order issued by the United States Department of the Treasury, (7) Federal is not entitled to the evidentiary presumption of A.R.S. § 33-811(B) (2007), and (8) Brosnahan was denied his due process right to a jury trial to present defenses under the Arizona Rules of Procedure for Eviction Actions (RPEA).

I. Res Judicata

¶8 Brosnahan argues that Federal's action in this matter is barred under the doctrine of res judicata.

¶9 Before filing its complaint in this case, Federal filed a forcible detainer action against Brosnahan under cause

number CV 2011-00403.[2] On July 1, 2011, before Brosnahan responded to that pleading, the superior court granted Federal's motion to dismiss without prejudice. *See* Ariz. R. Civ. P. 41(a)(1) (permitting a plaintiff to voluntarily dismiss a complaint, without court order, "at any time before service by the adverse party of an answer or of a motion for summary judgment"). Brosnahan contends that, after the motion to dismiss without prejudice was granted, he timely filed a "Notice to Dismiss with Prejudice" that included a request for an award of attorneys' fees and costs.[3] Because Federal did not respond to this filing, Brosnahan claims that his "unanswered motion should have been deemed granted" and therefore the first forcible detainer action should be regarded as dismissed with prejudice and a bar to this subsequent action.

¶10 Contrary to Brosnahan's claim, Federal's lack of response to his "Notice to Dismiss with Prejudice" did not bar future litigation and entitle him to an award of fees and costs. Rather, after the first cause of action was dismissed without prejudice, Federal was free to pursue the forcible detainer action under a new cause number, which is what Federal has done

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[2] Although no portion of CV 2011-00403 is included in the appellate record, we take judicial notice of the case docket in Coconino County Superior Court. *See, e.g., City of Phoenix v. Superior Court*, 110 Ariz. 155, 157, 515 P.2d 1175, 1177 (1973).

[3] The docket reflects a filing by Brosnahan on July 14, 2011, but does not identify the title of the filing.

by instituting this case. Moreover, because Brosnahan did not appeal the superior court's order dismissing the complaint without prejudice, or its apparent denial of his motion to dismiss with prejudice, and the time to do so has passed, any issue relating to filings entered in CV 2011-00403 is not properly before us.

II. Validity of the Summons and Service of Process

¶11 Broshnan contends that the summons issued to him was invalid and therefore unenforceable. Specifically, Broshnan asserts that the summons did not meet the statutory requirements of A.R.S. § 12-126 (2003).

¶12 Section 12-126(A) prescribes the form of the superior court's seal, stating the seal "shall be the vignette of Abraham Lincoln with the words 'Seal of the Superior Court of the State of Arizona in and for the County of . . . .' surrounding the vignette." Subsection B provides, in relevant part, that the seal of the superior court "need not be affixed to any proceedings in the court except a summons or writ[.]"

¶13 The summons issued to Brosnahan on September 1, 2011 did not contain the official seal of the superior court as proscribed by statute. Nonetheless, we conclude, as did the superior court, that this omission is a "technical defect" that does not render the summons invalid. *See Mosher v. Wayland*, 62 Ariz. 498, 504, 158 P.2d 654, 656 (1945) (concluding that a

defect in the title of the court as set forth in the summons, that did not mislead the parties "as to the court in which the proceedings are pending," did not invalidate the summons). The summons provided Brosnahan with notice of the proceedings that were being brought against him and informed him of the court in which they were brought. Moreover, the statute does not provide a remedy for noncompliance. Therefore, because the technical defect in the seal did not prejudice Brosnahan's procedural or substantive rights, the summons was enforceable.

¶14 Next, Brosnahan asserts that service of process was not properly effectuated. Citing Arizona Rules of Civil Procedure (Rule) 4.1(d), which governs service upon individuals, Brosnahan argues that service could only be effectuated by delivering a copy to him personally.

¶15 Pursuant to Rule 4.1(m), however, the court may order service by alternative means if the method of service otherwise established by the Rule "proves impracticable." In this case, the superior court held a hearing on September 15, 2011 at which Federal's attorney informed the court that there was a "continuing problem of service." After hearing counsel's argument, the court granted Federal's request to allow the Coconino County's Sheriff's Office to serve Brosnahan by nail and mail. The appellate record does not include a transcript of the September 15, 2011 hearing, but the transcript from the

September 21, 2011 hearing contains a reference by Federal's attorney to the superior court regarding the "multiple" attempts the process server made to effectuate personal service and the process server's belief that his "safety was in danger." Without the relevant transcript, we do not know what evidence or argument was presented at the September 15, 2011 hearing, and we must presume the missing transcript supports the court's order. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). Accordingly, we cannot conclude that the superior court erred by finding personal service "impracticable" and permitting Federal to accomplish service through an alternative method.

¶16 Moreover, Brosnahan waived both his claim of defective summons and improper service by not limiting his motion to dismiss (his response to the complaint) to the issue of jurisdiction and instead challenging the merits of the complaint. *See Kline v. Kline*, 221 Ariz. 564, 569, ¶ 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."); *Montano v. Scottsdale Baptist Hosp., Inc.*, 119 Ariz. 448, 452, 581 P.2d 682, 686 (1978) (explaining 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").

III. Validity of the Notice of Trustee's Sale

¶17 Brosnahan contends that the Notice of Trustee's Sale is invalid because it did not name the correct beneficiary of the sale as required by statute.

¶18 Pursuant to A.R.S. § 33-808(D) (2007), the notice of trustee's sale is "sufficient" if it conforms "substantially" to the sample notice set forth within the subsection. The sample notice of trustee's sale set forth in the statute includes the name and address of the beneficiary of the sale. Subsection E provides, however, that "[a]ny error or omission in the information required by subsection [D], other than an error in the legal description of the trust property or an error in the date, time or place of sale, shall not invalidate a trustee's sale." Therefore, even assuming the beneficiary listed on the notice of trustee's sale is erroneous, pursuant to statute, such an error does not invalidate the trustee's sale.

IV. Fraud

¶19 Brosnahan next raises several arguments challenging the superior court's finding that Federal has the right to possess the property. He contends that the notice and deed of trustee's sale are invalid because the underlying foreclosure proceedings upon which they are predicated were tainted by fraud. He also asserts that the allegedly fraudulent foreclosure process violated the Uniform Commercial Code and a

Consent Order issued by the United States Department of the Treasury on April 13, 2011 (requiring J.P. Morgan Chase Bank to submit its foreclosure actions or proceedings to an independent review). Moreover, he argues that Federal is not entitled to the evidentiary presumption of A.R.S. § 33-811(B) because of its status as a "foreclosure industry insider."

¶20 A person is guilty of forcible detainer by retaining possession of a property after receiving "written demand of possession" and the real property "has been sold through a trustee's sale under a deed of trust pursuant to title 33, chapter 6.1." A.R.S. § 12-1173.01(A)(2) (2003). Under such circumstances, the person entitled to possession may institute a summary forcible detainer proceeding to have the premises immediately restored. A.R.S. § 12-1175 (2003).

¶21 The purpose of a forcible detainer action is to afford a summary, speedy and adequate remedy for obtaining possession of withheld premises. *United Effort Plan Trust v. Holm*, 209 Ariz. 347, 351, ¶ 21, 101 P.3d 641, 645 (App. 2004). Because a summary forcible detainer action "does not bar subsequent proceedings between the parties to determine issues other than the immediate right to possession, [issues regarding the validity of title] are better resolved in proceedings designed to allow full exploration of the issues involved." *Curtis v. Morris*, 184 Ariz. 393, 398, 909 P.2d 460, 465 (App. 1995)

(*Curtis I*). 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) ("On the trial of an action of . . . forcible detainer, the only issue shall be the right of actual possession and the merits of title shall not be inquired into."); *see also Curtis v. Morris*, 186 Ariz. 534, 535, 925 P.2d 259, 260 (1996) (*Curtis II*). As a corollary, a defendant may not assert counterclaims, off-sets, third-party claims or cross-complaints as a defense or for affirmative relief in a forcible detainer action. *Curtis II*, 186 Ariz. at 535, 925 P.2d at 260; *Holm*, 209 Ariz. at 351, ¶ 21, 101 P.3d at 645.

¶22 As recently explained by the supreme court, under A.R.S. § 33-811, "a person who has defenses or objections to a properly noticed trustee's sale has one avenue for challenging the sale: filing for injunctive relief." *BT Capital, LLC v. TD Service Co., of Arizona*, 229 Ariz. 299, 301, ¶ 10, 275 P.3d 598, 600 (2012); *see also* A.R.S. § 33-811(C) (stating that "all persons to whom the trustee mails a notice of a sale under a trust deed . . . 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 . . . before the scheduled date of the sale").

¶23 Brosnahan does not dispute that he received notice of the trustee's sale. *Cf. Madison v. Groseth*, 230 Ariz. 8, 12-13,

¶¶ 11-15, 279 P.3d 633, 637-38 (App. 2012) (explaining that pursuant to A.R.S. § 33-811(C) a mortgagor “waive[s] all defenses and objections to the sale” by failing to obtain an injunction prior to the sale when the mortgagor had actual notice of the sale). Applying A.R.S. § 33-811(C), Brosnahan has waived all claims related to the foreclosure proceedings by failing to raise them "in an action that result[ed] in the issuance of a court order granting relief . . . before the scheduled date of the sale." *See also BT Capital*, 229 Ariz. at 307, ¶ 11, 275 P.3d at 600 (explaining that a party subject to A.R.S. § 33-811 cannot challenge a completed trustee's sale "based on pre-sale defenses or objections"). Accordingly, because Brosnahan did not seek and obtain injunctive relief before the trustee’s sale, and because his arguments regarding title are not triable in a forcible detainer action, the superior court did not err in granting judgment in favor of Federal.[4]

V. Jury Trial

¶24 Finally, Brosnahan asserts that he was entitled to a jury trial pursuant to RPEA 11(b)(1), which requires a trial on the merits if the court determines that “a defense or proper

[4] Because the fraud claim could not be raised and, therefore, has not been adjudicated in this forcible detainer action, our decision would have no preclusive effect should the same claim be raised in another forum.

counterclaim may exist" to the factual and legal allegations raised in the complaint. Because Brosnahan did not raise a viable defense or counterclaim to the complaint that could properly be considered in a forcible detainer action, the superior court did not err by proceeding without a jury trial.

VI. Attorneys' Fees

¶25 Federal has requested, without elaboration, its attorneys' fees and costs incurred on appeal pursuant to A.R.S. §§ 12-341.01(C) and -349(A) (2003). We deny its request for attorneys' fees and grant its request for costs in an amount to be determined upon its compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶26 For the foregoing reasons, we affirm.

_/s/_____
PHILIP HALL, Presiding Judge

CONCURRING:

_/s/_____
PETER B. SWANN, Judge

_/s/_____
SAMUEL A. THUMMA, Judge