DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FEDERAL NATIONAL MORTGAGE ASSOCIATION, Plaintiff/Appellee, v. RAYMOND DUMONT and KATHLEEN DUMONT, Defendants/Appellants.	No. 1 CA-CV 11-0713 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-024464

The Honorable Benjamin E. Vatz, Judge Pro Tempore

AFFIRMED

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S W A N N, Judge

¶1 Raymond Dumont and Kathleen Dumont appeal a judgment in favor of Federal National Mortgage Association ("FNMA") on its forcible detainer claim. The Dumonts' arguments on appeal

relate only to the issue of legitimacy of title. Because parties may not litigate the issue of title in a forcible detainer action, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 FNMA filed and served a forcible detainer complaint alleging that the Dumonts were occupying and refusing to surrender real property that FNMA had purchased at a trustee's sale. The superior court entered judgment in favor of FNMA in September 2010. Months later, in January 2011, the Dumonts filed a notice representing that they had sought bankruptcy protection several days before the entry of judgment. Accordingly, the superior court stayed the action and placed it on the inactive calendar.

¶3 In July 2011, after obtaining relief from the bankruptcy stay, FNMA served the Dumonts for a second time. The Dumonts responded by filing a notice of removal to federal court. After the federal court remanded the matter, the Dumonts proceeded to file, concurrently, a Rule 42(f) notice of change of judge and a "Notice of Special Appearance" asserting a "lack of personal service." At a September 19, 2011 hearing, which the Dumonts' counsel attended, the court heard argument on the notices and continued the forcible detainer hearing to September 22. Neither the Dumonts nor their counsel appeared at

the September 22 hearing, and the court granted judgment in favor of FNMA.

¶4 The Dumonts appeal from that judgment. Though they filed their notice of appeal before the court entered a signed order, there were no matters pending that could have changed the result, and the premature notice of appeal was followed by a final appealable judgment. We therefore have jurisdiction, *see Barassi v. Matison*, 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981), under A.R.S. § 12-2101(A)(1).

DISCUSSION

¶5 The Dumonts raise four arguments on appeal. First, they contend that they were not properly served with process. Second, they contend that FNMA failed to meet the pleading and proof of standing requirements of Rule 5 of the Arizona Rules of Procedure for Eviction Actions ("RPEA"). Third, they contend that FNMA's attorneys did not exercise the due diligence and good faith required by RPEA 4. Fourth, they contend that the court's failure to adjudicate the merits of FNMA's claim of title to the property amounted to a denial of due process, because the issue of title was incidental to the issue of possession and was necessary to determine whether FNMA was a bona fide purchaser. We review the interpretation of statutes and rules de novo. *Pima Cnty. v. Pima Cnty. Law Enforcement*

Merit Sys., 211 Ariz. 224, 227, ¶ 13, 119 P.3d 1027, 1030 (2005).

I. SERVICE OF PROCESS

¶6 The Dumonts' contention that they were not properly served with process is contradicted by the record. Under RPEA 5(f), Rules 4.1 and 4.2 of the Arizona Rules of Civil Procedure govern service of process in forcible detainer actions. Under Rule 4.1(d), service of process on an individual may be accomplished by "delivering a copy [of the process] to that individual personally or by leaving copies [of the process] at that individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein[.]"

¶7 The record reveals two affidavits of service of process. The first states that in September 2010, copies of the complaint and summonses were left at the Dumonts' usual place of abode (the subject property) with a person of suitable age and discretion. The second states that in July 2011, copies of the complaint and alias summonses were left at the same address with Mrs. Dumont. Both affidavits describe service of process compliant with Rule 4.1(d). The Dumonts' passing assertion that "there was a fraudulent affidavit" is unsupported by the record

-- the record does not reveal any evidence of fraud or even any prior allegation of fraud.[1]

II. STANDING AND PLEADING

¶8 The Dumonts contend that FNMA failed to meet the pleading and proof of standing requirements of RPEA 5. RPEA 5(b)(1) requires that a complaint in a forcible detainer action "[b]e brought in the legal name of the party claiming entitlement to possession of the property[,]" and RPEA 5(d)(2), which governs complaints based on circumstances other than non-payment of rent, requires that the complaint "state the reason for the termination of the tenancy with specific facts, including the date, place and circumstances of the reason for termination." FNMA's pleadings met the standards.

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[1] The record does not include a transcript of the September 19 hearing at which the Dumonts' "Notice of Special Appearance" was argued. The duty to order and include the transcript in the record on appeal was the Dumonts'. ARCAP 11(b). We must assume that the missing transcript would support the superior court's implied conclusion that the affidavits of service of process were authentic and accurate. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). Moreover, even if service had been insufficient, the Dumonts' various general appearances and conduct in the action prior to their "Notice of Special Appearance" waived any defect in service. *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) ("[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.").

¶9 The Dumonts' arguments under RPEA 5(b)(1) and 5(d)(2) are based on their theory that FNMA lacked title to the property -- and as discussed below, title is not litigable in a forcible detainer action. But even if we were to entertain the Dumonts' arguments concerning standing and pleading, the record shows both standing and adequate pleading. The complaint named FNMA as the sole plaintiff, and a trustee's deed attached to the complaint stated that FNMA had purchased the property for valuable consideration at an August 4, 2010 trustee's sale. FNMA complied with the requirements of A.R.S. § 12-1173.01 and the RPEA, and the trustee's deed was entitled to the presumption of compliance afforded by A.R.S. § 33-811(B). Further, the verified complaint was sufficiently specific: it alleged that FNMA purchased the property at the trustee's sale and gave the Dumonts written notice demanding possession of the property, but the Dumonts refused to comply. The complaint also included a copy of the written demand. Nothing more was required to show both standing and adequate pleading.

III. DUE DILIGENCE AND GOOD FAITH

¶10 The Dumonts further contend that FNMA and its attorneys violated the due diligence and good faith requirements of RPEA 4(a) and (b), arguing that "an objective attorney . . . would have immediately discovered . . . that there is an irregularity with the Assignment and Substitution of Trustee."

The record does not support the Dumonts' contentions. The Dumonts' specific allegations of irregularity describe technical deficiencies in an assignment and substitution of trustee that is not part of the record, and the balance of their arguments consists of nothing more than vague general criticisms of the mortgage system and speculation about what might have happened. We decline to address those arguments, pursuant to ARCAP 13(a)(6).

IV. TITLE MAY NOT BE LITIGATED IN A FORCIBLE DETAINER ACTION.

¶11 It is well-settled in Arizona that issues concerning title cannot be considered in a forcible detainer action. The purpose of a forcible detainer action is limited to providing 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) (citation omitted). Accordingly, A.R.S. § 12-1177(A) provides that the only issue that may be contested in a forcible detainer action is possession -- title is not litigable. 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."); *see also, e.g., Mason v. Cansino*, 195 Ariz. 465, 468, ¶ 8, 990 P.2d 666, 669 (App. 1999) ("[O]ne cannot try title in a forcible detainer action."); *United Effort Plan Trust*, 209 Ariz. at 351, ¶ 21, 101

P.3d at 645 ("The only issue to be decided in [a forcible detainer action] is the right of actual possession. Thus the only appropriate judgment is the dismissal of the complaint or the grant of possession to the plaintiff."). As a corollary, "no counterclaims, offsets or cross complaints are 'available either as a defense or for affirmative relief . . . .'" *United Effort Plan Trust*, 209 Ariz. at 351, ¶ 21, 101 P.3d at 645 (quoting *Olds Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 205, 167 P.2d 394, 397 (1946)).

¶12 All of the Dumonts' arguments are based on their theory that FNMA lacks valid title because of alleged fraud perpetrated in connection with the underlying trustee's sale. Under Arizona law, the superior court could not consider those arguments in the forcible detainer action.[2] The Dumonts' contention that this limitation violated their constitutional due process rights is unfounded. The Dumonts were free to challenge the trustee's authority and raise other defenses and objections by filing for injunctive relief before the sale occurred. *See Hogan v. Wash. Mutual Bank, N.A.*, __ Ariz. __,

[2] The Dumonts urge that we should adopt the approach of a "similar and much older" California statute that allows a "limited factual inquiry into the bona fides of the purchaser" in a forcible detainer action. We are not free to do so. The law of other states cannot alter our legislature's clear command that "the merits of title shall not be inquired into." A.R.S. § 12-1177(A).

__, ¶ 8, 277 P.3d 781, 783 (2012); *BT Capital, LLC v. TD Serv. Co. of Ariz.*, 229 Ariz. 299, 301, ¶¶ 10-11, 275 P.3d 598, 600 (2012).

CONCLUSION

¶13 We deny the Dumonts' request that we stay this appeal and seek an advisory opinion from the state attorney general's office regarding undisclosed putative "conflicts." We are unaware of any authority that would authorize or justify such a procedure.

¶14 We affirm the superior court's judgment for the reasons set forth above. We award FNMA its costs pursuant to A.R.S. § 12-341, and, in our discretion, grant FNMA's request for its attorney's fees pursuant to A.R.S. § 12-349, with both the fees and the costs to be paid by the Dumonts' counsel subject to FNMA's compliance with ARCAP 21.

¶15 We direct counsel rather than the Dumonts to pay the fees and costs because the arguments as to title asserted in this case are plainly meritless, without substantial justification, aimed at creating unreasonable delay, and counsel has made them in several cases before this court. Because the frivolousness of the title arguments is both clear-cut and long-standing, we conclude that it is appropriate that counsel bear the burden of the fees and costs in this appeal.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PHILIP HALL, Presiding Judge

/s/
_____
SAMUEL A. THUMMA, Judge