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Ariz. R. Crim. P. 31.24



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

BANKUNITED, ) No. 1 CA-CV 11-0763  
)  
Plaintiff/Appellee, ) DEPARTMENT E  
)  
v. ) MEMORANDUM DECISION  
)  
FRANK STEED and JUDY STEED, ) (Not for Publication -  
) Rule 28, Arizona Rules of  
Defendants/Appellants. ) Civil Appellate Procedure)  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-017367

The Honorable Michael L. Barth, Judge *Pro Tempore*

**AFFIRMED**

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J O H N S E N, Judge

¶1 Frank and Judy Steed appeal the superior court's judgment finding them guilty of forcible detainer. For the reasons that follow, we affirm.

#### FACTS AND PROCEDURAL HISTORY

¶2 The Steeds gave a deed of trust on their home to BankUnited, FSB ("FSB") to secure repayment of a loan. After the Steeds defaulted, their home was sold at a trustee's sale in early August 2011. Between the time FSB made the loan and the date of the trustee's sale, federal authorities closed FSB and created a new federal savings bank, BankUnited, which acquired the assets of FSB. BankUnited purchased the home at the trustee's sale. After the trustee's sale, a Notice of Demand for Possession of the home was delivered to the Steeds pursuant to Arizona Revised Statutes ("A.R.S.") section 12-1173.01(A) (West 2012).<sup>1</sup> The notice did not directly identify the new owner of the home, but the "reference" line of the notice stated, "BankUnited, FSB v. Steed." When the Steeds did not vacate the home, a forcible entry and detainer ("FED") complaint was filed against them in superior court. The caption of the complaint identified the plaintiff as FSB.

¶3 At a hearing in the superior court, the Steeds responded to the complaint and counsel for the plaintiff orally

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<sup>1</sup> Absent material revisions after the relevant date, we cite a statute's current version.

moved to amend the complaint's caption to identify the plaintiff as BankUnited, the holder of the trustee's deed. The bank's counsel described the federal takeover of FSB and stated that all of FSB's assets, including the Steeds' loan, had been transferred to BankUnited. After the Steeds did not object, the court granted the motion to amend.

¶14 The Steeds then filed both an answer and a separate motion to dismiss the complaint. The motion to dismiss argued the court lacked "jurisdiction over the above-captioned action as BankUnited FSB is not [sic] valid party to raise a Complaint filed in this case." While the Steeds did not specify whether they were contesting subject matter or personal jurisdiction, the court interpreted the motion as contesting personal jurisdiction and denied it, reasoning the Steeds had submitted to the jurisdiction of the court by not objecting to the summons or complaint and pleading not guilty at the initial hearing.

¶15 BankUnited moved for judgment on the pleadings, asserting the trustee's deed demonstrated it was entitled to immediate possession of the home and that the Steeds had failed to establish any relevant issues of fact. The Steeds filed a motion to dismiss BankUnited's motion, again asserting the court lacked jurisdiction because FSB was not a party that could initiate the forcible detainer action. The court granted BankUnited's motion and denied the Steeds' motion. We have

jurisdiction of the Steeds' timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. § 12-2101(A)(1) (West 2012).

#### DISCUSSION

**A. The Superior Court Was Not Divested of Subject Matter Jurisdiction Because the Incorrect Party Was Identified as the Owner in the Notice of Demand For Possession and the Original Complaint.**

¶6 We review challenges to a superior court's subject matter jurisdiction *de novo*. *State v. Flores*, 218 Ariz. 407, 410, ¶ 6, 188 P.3d 706, 709 (App. 2008). "Subject matter jurisdiction is the power to hear and determine cases of the general class to which the particular proceedings belong. In determining the nature and scope of the superior court's subject matter jurisdiction, we first look to applicable provisions in the Arizona Constitution and statutes." *State v. Payne*, 223 Ariz. 555, 559, ¶ 6, 225 P.3d 1131, 1135 (App. 2009) (quotation omitted).

¶7 Article 6, Section 14(5), of Arizona's Constitution and A.R.S. § 12-1173 (West 2012) both explicitly grant the superior court original jurisdiction of FED actions. The Steeds contend, however, that the superior court lacked jurisdiction in this case because neither the Notice of Demand for Possession ("Notice") nor the original complaint identified BankUnited as

the owner of the home.<sup>2</sup> The Steeds argue that the defects rendered the Notice and the complaint invalid under A.R.S. §§ 12-1175(A) (West 2012) and -1173, and these violations stripped the court of subject matter jurisdiction.

¶18 Pursuant to A.R.S. § 12-1173(1), a forcible detainer occurs when “[a] tenant at will or by sufferance . . . retains possession after his tenancy has been terminated or after he receives written demand of possession by the landlord.” Under A.R.S. § 12-1175(A), only a “party aggrieved” may file a FED complaint, which must be in writing and under oath. The Steeds contend the Notice failed to comply with A.R.S. § 12-1173(1) because FSB was not the “landlord” and the original complaint failed to comply with A.R.S. § 12-1175(A) because FSB was not the “party aggrieved.” Because FED actions are created by statute, the Steeds argue BankUnited’s failure to comply with these statutes deprives the court of jurisdiction.

¶19 Whether the superior court has subject matter jurisdiction to hear an action, however, is a different question from whether it has the power to grant relief when the plaintiff has failed to prove the elements of a claim. See *State v. Maldonado*, 223 Ariz. 309, 311, ¶ 13, 223 P.3d 653, 655 (2010). In *Maldonado*, the appellant argued that the State’s failure to

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<sup>2</sup> The Steeds do not appeal the superior court’s ruling on personal jurisdiction.

file an information prior to trial as required by Article 2, Section 30, of the Arizona Constitution stripped the court of subject matter jurisdiction. *Id.* at 310, ¶¶ 4, 7, 223 P.3d at 654. The court rejected the appellant's argument, noting that Article 6, Section 14(4), grants the superior courts original jurisdiction in felony cases. *Id.* at 312, ¶¶ 20-21, 223 P.3d at 656 (quotation omitted). The court held that the constitution's separate requirement that the State file an information was not a jurisdictional rule, but merely a procedural rule whose violation would not impair the jurisdiction of the court to hear and resolve the criminal charge. *Id.* at 313, ¶ 23, 223 P.3d at 657.

¶10 Just as in *Maldonado*, assuming for purposes of argument that the Notice and complaint were defective, these defects, if not waived, at most would prevent the court from granting relief; they would not deprive the court of subject matter jurisdiction over the FED action.

¶11 The Steeds argue that *Jahnke v. Palomar Financial Corp.*, 22 Ariz. App. 369, 527 P.2d 771 (1974), supports their contention that the court lacked jurisdiction. In *Jahnke*, the court ordered entry of judgment on the pleadings in a contract action because the complaint was "defective as premature." *Id.* at 373, 375, 527 P.2d at 775, 777. The court explained:

A cause of action must exist and be complete prior to the commencement of the lawsuit and if it is not it is defective as premature. This is true where a necessary element of the cause of action does not occur until after the commencement of the action.

*Id.* (citation omitted). The Steeds assert that the Notice was defective because it failed to identify the correct owner of the property, and that as a result, the cause of action was not "complete prior to the commencement of the lawsuit." We disagree. Assuming without deciding that such an error in the statutory notice, if not waived, might impair a subsequent FED action, the defect would not deprive the superior court of jurisdiction to hear the case.

**B. The Steeds Waived Their Objection to the Notice.**

¶12 The Steeds also contend that judgment should not have been entered against them because the Notice did not comply with A.R.S. § 12-1173(1), which requires a pre-complaint "written demand of possession *by the landlord.*" (Emphasis added). BankUnited responds that the relevant provision is not A.R.S. § 12-1173 but A.R.S. § 12-1173.01, which provides that when, as here, property has been sold through a trustee's sale under a deed of trust, "a person . . . who retains possession of any . . . real property *after he receives written demand of possession* may be removed through an action for forcible detainer." (Emphasis added). BankUnited asserts that nothing

in A.R.S. § 12-1173.01 requires the Notice to identify the true owner of the property.

¶13 We need not address this issue, however, because the Steeds waived it by failing to object to the Notice in the superior court. “This court has not infrequently announced its adherence to what, with but few exceptions, is now an almost universal rule that the court will not on appeal consider for the first time a question not raised in the lower court, and which might have been heard and determined there.” *Regal Homes, Inc. v. CNA Ins.*, 217 Ariz. 159, 171, ¶ 52, 171 P.3d 610, 622 (App. 2007) (quoting *J.H. Mulrein Plumbing Supply Co. v. Walsh*, 26 Ariz. 152, 161, 222 P. 1046, 1049 (1924)).

**C. The Superior Court Properly Exercised Its Discretion to Grant BankUnited’s Motion to Amend the Complaint.**

¶14 We normally review a superior court’s ruling on a motion to amend for an abuse of discretion. *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, 292, ¶ 25, 246 P.3d 938, 943 (App. 2010). The Steeds argue, however, that the superior court lacked the power to grant the motion to amend the complaint to substitute BankUnited for FSB because nothing in the Arizona Rules of Procedure for Eviction Actions (“RPEA”) specifically allows a complaint to be amended to change the plaintiff.

¶15 Rule 9 of the RPEA, however, expressly allows parties to make oral and written motions in FED actions. Rule 9(c)



permits a court to grant a motion to amend a pleading for good cause shown, and Rule 9(g) allows "[o]ther appropriate motions." In this case, BankUnited orally moved during the preliminary hearing to amend the caption of the complaint and, because of the manner in which the complaint was written, the amendment served to substitute BankUnited for FSB as plaintiff in the action.

¶16 The Steeds cite RPEA 1, which provides that "[t]he Arizona Rules of Civil Procedure apply [in FED actions] only when incorporated by reference in these rules." They argue that while RPEA 9 generally allows for motion practice, it is silent "as to the incorporation of the [Arizona Rules of Civil Procedure] 15 and 17(a) that embody the entire procedure and process for amending pleadings to substitute a party." Arizona Rule of Civil Procedure 15 is titled "Amended and supplemental pleadings" and addresses in detail the manner in which a party may amend a pleading, the types of amendments that may be sought and when an amendment "relates back" to the filing of the original pleading. Arizona Rule of Civil Procedure 17 is titled "Parties plaintiff and defendant; capacity," and addresses, *inter alia*, real parties in interest and the capacities in which parties may appear. The failure of the RPEA to incorporate either rule does not undermine the simple statement in RPEA 9(a) that "[m]otions may be made orally in open court or by filing

and serving the opposing party," and RPEA 9(c), which broadly states, "The court may grant motions to amend pleadings for good cause shown." In short, RPEA 9 plainly authorizes the superior court to exercise its discretion to grant a motion for leave to amend a complaint.

¶17 The Steeds do not argue that the court abused its power to grant the amendment. In that regard, we note the substitution of BankUnited for FSB in the action did not prejudice the Steeds. The Steeds plainly understood the facts of the relationship between FSB and BankUnited that the bank's counsel explained to the superior court in making the oral motion to amend. In granting the motion for judgment on the pleadings, the court in this case had before it a complaint in a separate action, of which we take judicial notice, in which the Steeds sued BankUnited in 2009 to stop the impending foreclosure on the property. See *In re Sabino*, 198 Ariz. 424, 425, ¶ 4, 10 P.3d 1211, 1212 (App. 2000) (this court may take judicial notice of other actions in trial court). The caption of the Steeds' complaint in that case listed the defendant as "BankUnited, a chartered federal savings bank, as successor in interest to BankUnited, FSB." Moreover, as noted, the Steeds told the court at the initial hearing in this case that they did not object to the motion for leave to amend.

¶18 Given that RPEA 9 allows the motion to amend and that the Steeds were in no way prejudiced, we cannot conclude the superior court erred by allowing the amendment.

**CONCLUSION**

¶19 For the foregoing reasons, we affirm the superior court's judgment. Contingent on compliance with Arizona Rule of Civil Appellate Procedure 21, BankUnited may recover its costs of appeal.

/s/  
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DIANE M. JOHNSEN, Judge

CONCURRING:

/s/  
\_\_\_\_\_  
JON W. THOMPSON, Judge

/s/  
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JOHN C. GEMMILL, Judge