IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

METROPOLITAN LIFE INSURANCE COMPANY, *Plaintiff/Appellee*,

v.

GARY TIBSHRAENY, *Defendant/Appellant*.

No. 1 CA-CV 16-0510
FILED 10-3-2017

Appeal from the Superior Court in Maricopa County
No. CV2016-009635
The Honorable James R. Morrow, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Zieve, Brodnax & Steele LLP, Phoenix
By Eric Lawrence Cook
Counsel for Plaintiff/Appellee

Gary Tibshraeny, Scottsdale
Defendant/Appellant

MEMORANDUM DECISION

Presiding Judge Kenton D. Jones delivered the decision of the Court, in which Judge Jon W. Thompson and Chief Judge Samuel A. Thumma joined.

J O N E S, Judge:

¶1 Gary Tibshraeny appeals the trial court's judgment in favor of Metropolitan Life Insurance Company (MLIC) in this forcible entry and detainer (FED) action. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 MLIC held a promissory note secured by a deed of trust encumbering real property in Tempe (the Property). The borrower defaulted and, in May 2016, MLIC purchased the Property at a trustee's sale. A trustee's deed then issued to MLIC. MLIC provided Tibshraeny, the Property's occupant, written notice to vacate the premises. Tibshraeny did not do so; instead, he filed a civil lawsuit against MLIC alleging defects in the foreclosure sale and seeking compensatory damages and quiet title to the Property, which he claimed the borrower had conveyed to him in an unrecorded writing. Tibshraeny's complaint admitted the May 2016 foreclosure sale "forfeit[ed] [his] interest in the property."

¶3 MLIC then filed this FED action against Tibshraeny. *See* Ariz. Rev. Stat. (A.R.S.) § 12-1173.01(A)(1)-(2)[1] (authorizing a forcible detainer action where a person holds over in possession of property after it has been sold through a foreclosure or trustee's sale). Tibshraeny moved to dismiss, claiming the FED action was a compulsory counterclaim to his civil lawsuit. After considering evidence, testimony, and argument, the trial court denied Tibshraeny's motion and entered judgment in favor of MLIC on its FED claim. Tibshraeny timely appealed, and this Court has jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

¶4 Tibshraeny argues MLIC's FED action was precluded because it was a compulsory counterclaim that should have been pleaded in

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[1] Absent material changes from the relevant date, we cite a statute's current version.

Tibshraeny's separate civil lawsuit but was not. We review the denial of a motion to dismiss, premised upon the application of legal principles, *de novo*. *See Dressler v. Morrison*, 212 Ariz. 279, 281, ¶ 11 (2006). Dismissal is only appropriate if, "assum[ing] the truth of the complaint's allegations, . . . the [party] would not be entitled to relief on any legal theory." *Forum Dev., L.C. v. Ariz. Dep't of Revenue*, 192 Ariz. 90, 93 (App. 1997).

¶5 Tibshraeny relies entirely on Arizona Rule of Civil Procedure 13(a), which provides: "[a] pleading shall state as a counterclaim any claim that — at the time of its service — the pleader has against an opposing party if the claim . . . arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Generally, if a compulsory counterclaim is "not pled in the first action, [it is] waived and barred in any subsequent action under the doctrine of claim preclusion." *Mirchandani v. BMO Harris Bank, N.A.*, 235 Ariz. 68, 70, ¶ 8 (App. 2014) (citing *Landsford v. Harris*, 174 Ariz. 413, 418-19 (App. 1992)). However, Rule 13(a) does not apply to a FED action. *See* Ariz. R.P. Evict. Act. 1 ("The Arizona Rules of Civil Procedure apply [to FED actions] only when incorporated by reference in these rules.").

¶6 Substantively, a civil property dispute may be maintained separately from a FED action where the two cases present different issues, including where the former addresses the validity of title and the latter is concerned only with the right of possession. *See Curtis v. Morris*, 186 Ariz. 534, 534 (1996); *see also* 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."); *Old Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 205 (1946) ("[A] judgment in an action of forcible entry and detainer is not a bar to . . . subsequent proceedings between the same parties in a quiet title suit."). Indeed, our supreme court has expressly rejected an interpretation of Arizona statutes that would convert a FED action into one for quiet title, or even allow title to be litigated in a FED action. *Curtis*, 186 Ariz. at 535. The reasons for this, as stated decades ago, are a matter of policy:

> [T]he object of a forcible entry and detainer action is to afford a summary, speedy and adequate remedy for obtaining possession of premises withheld . . . and . . . this objective would be entirely frustrated if the defendant were permitted to deny his landlord's title, or to interpose customary and usual defenses permissible in the ordinary action at law. For this reason counterclaims, offsets and cross complaints are not available either as a defense or for affirmative relief in

> such action, as indicated by our statutes and the statutes of most states. And for the same reason, the merits of the title may not be inquired into in such an action, for if the merits of the title and the other defenses above enumerated were permitted and the court heard testimony concerning them, then other and secondary issues would be presented to the court and the action would not afford a summary, speedy and adequate remedy for obtaining possession of the premises.

Rushing, 64 Ariz. at 204-05. Thus, "[a]lthough the fact of title may be admitted if incidental to proving a right to possession, the merits of title cannot be litigated." *United Effort Plan Tr. v. Holm*, 209 Ariz. 347, 351, ¶ 21 (App. 2004) (citing A.R.S. § 12-1177; *Phx.-Sunflower Indus., Inc. v. Hughes*, 105 Ariz. 334, 337 (1970); and *Andreola v. Ariz. Bank*, 26 Ariz. App. 556, 557 (1976)).

¶7 Under limited circumstances, the right to possession cannot be determined without resolving "an issue whose resolution is a prerequisite to determining which party is entitled to possession." *Colonial Tri-City Ltd. P'ship v. Ben Franklin Stores, Inc.*, 179 Ariz. 428, 433 (App. 1994) (concluding a dispute regarding whether a lease exists between the parties must be resolved in a general civil action and not a summary proceeding to recover possession). Tibshraeny cites no authority suggesting purported defects in the trustee's sale create a triable dispute over the right to possession. Rather, a trustee's deed upon sale, as issued to MLIC here, "shall raise the presumption of compliance with the requirements of the deed of trust and this chapter relating to the exercise of the power of sale and the sale of the trust property, including recording, mailing, publishing and posting of notice of sale and the conduct of the sale." A.R.S. § 33-811(B); *see also Triano v. First Am. Title Ins. of Ariz.*, 131 Ariz. 581, 583 (1982) ("[I]ssuance of the trustee's deed to the . . . purchasers is conclusive evidence that the statutory requirements [of Title 33, Chapter 6.1 of the Arizona Revised Statutes] were satisfied."). This presumption, if unrebutted, provides a sufficient basis upon which to premise a forcible detainer claim.

¶8 The trial court implicitly found MLIC was entitled to possession of the Property, thereby rejecting any purported defense to the forcible detainer. *See* A.R.S. § 12-1171(3) (stating a person is guilty of forcible detainer if he "[w]illfully and without force holds over any lands, tenements or other real property . . . after [a] demand made in writing for the possession thereof *by the person entitled to such possession*") (emphasis added). Because Appellant did not include the transcript in the record on

appeal, we presume the record supports those findings. *See State ex rel. Horne v. Anthony*, 232 Ariz. 165, 172 n.5, ¶ 39 (App. 2013).

¶9 "Respect for *actual* possession of another, wrongful though it may be, is the essence of our forcible entry and unlawful detainer statutes." *Taylor v. Stanford*, 100 Ariz. 346, 348 (1966). Tibshraeny has pursued his title claim against MLIC in the civil lawsuit, but, having admitted he had no immediate right to possession, cannot subvert the purpose of the FED action, intended to provide an expeditious remedy to one in actual possession, by forcing the claims to be heard together or not at all. Accordingly, the FED action was not a compulsory counterclaim, and the trial court correctly denied Tibshraeny's motion to dismiss.

CONCLUSION

¶10 The judgment in favor of MLIC is affirmed, leaving to MLIC its efforts to seek post-judgment enforcement proceedings in the trial court.

¶11 MLIC requests an award of attorneys' fees incurred on appeal pursuant to A.R.S. §§ 12-341.01 and -349. In our discretion, we deny this request. However, as the prevailing party, MLIC is awarded its costs on appeal upon compliance with ARCAP 21(b).