

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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ALLY BANK, *Plaintiff/Appellee*,

*v.*

KEVIN E. THOMAS, *Defendant/Appellant*.

No. 1 CA-CV 16-0551  
FILED 12-14-2017

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Appeal from the Superior Court in Maricopa County  
No. CV2016-002663  
The Honorable James R. Morrow, Judge *Pro Tempore* (Retired)  
The Honorable David W. Garbarino, Judge *Pro Tempore*

**AFFIRMED**

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APPEARANCE

Kevin E. Thomas, Phoenix  
*Defendant/Appellant*

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**MEMORANDUM DECISION**

Judge Randall M. Howe delivered the decision of the Court, in which  
Presiding Judge James P. Beene and Judge Kent E. Cattani joined.

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HOWE, Judge:

¶1 Kevin Thomas (“Thomas”) appeals the trial court’s granting of summary judgment in Ally Bank’s favor. For the following reasons, we affirm.

**FACTS AND PROCEDURAL HISTORY**

¶2 In 2008, Thomas’s daughter April executed a promissory note secured by a deed of trust on real property located in Phoenix, Arizona. After April defaulted on the note, Ally Bank, as the deed of trust’s beneficiary, requested that the trustee conduct a trustee’s sale. At the subsequent trustee’s sale in January 2016, Ally Bank purchased the property and thereafter recorded its trustee’s deed upon sale.

¶3 The following month, because Ally Bank believed that April and others still lived on the property, it served a written notice to vacate by mailing and posting the notice on the property. When April failed to vacate the property, Ally Bank brought a forcible detainer action against her and all other persons who might possess the property. The trial court scheduled a hearing on the action to take place in May 2016.

¶4 At the hearing, Thomas appeared and pled not guilty. The court ordered Thomas to answer Ally Bank’s forcible detainer complaint and set trial for later that month. Thomas answered, alleging that he was the successor in interest and the property’s title holder after April quitclaimed the deed to him. He further alleged that Ally Bank committed fraud in obtaining the trustee’s deed and it knew that he was living at the property but failed to list him as a party in the forcible detainer action.

¶5 Ally Bank moved for summary judgment, arguing that no genuine issue of material fact existed and that as a matter of law, Thomas was guilty of forcible detainer. Ally Bank attached to its motion the trustee’s deed upon sale showing it as the purchaser at the trustee’s sale. During this time, Thomas moved to consolidate the forcible detainer case with a separate lawsuit he brought against Ally Bank. The court denied Thomas’s consolidation request. The court then granted Ally Bank summary judgment, finding that the allegations in the complaint were true and correct and ordering that the defendants immediately surrender the property to Ally Bank. Thomas timely appealed. At Thomas’s request, the trial court stayed the issuance and execution of the writ of restitution pending appeal on the condition that Thomas pay \$700 a month in rent to the Clerk of the Court at Maricopa County.

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¶6 Thomas then moved in the trial court for relief from final judgment. This Court stayed the appeal to allow the trial court to consider the relief from judgment motion. The trial court subsequently denied the motion and Thomas amended his appeal to include the trial court's denial.

¶7 In April 2017, while the case was on appeal, Ally Bank filed an emergency motion to lift the stay of execution of the writ of restitution after discovering that Thomas had failed to pay the required \$700 a month for the previous six months. Three days later, the trial court held an emergency hearing. Though the court informed Thomas of the hearing, he failed to appear. After the hearing, the court lifted the stay of the writ of restitution. Subsequently, the sheriff's office executed the writ of restitution and delivered possession of the property to Ally Bank.

### DISCUSSION

¶8 Thomas argues that he is not subject to Ally Bank's forcible detainer lawsuit because he has a superior interest in the property. He additionally makes several arguments on appeal that are not related to the underlying forcible detainer lawsuit. Although Thomas's opening brief fails to appropriately cite to legal authority for his arguments, and thus could be deemed waived, *see Ritchie v. Krasner*, 221 Ariz. 288, 305 ¶ 62 (App. 2009), in our discretion we will address the forcible detainer issue. We review the grant of a summary judgment motion de novo. *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 199 ¶ 15 (App. 2007). Because no genuine dispute of material fact exists, the trial court correctly granted Ally Bank summary judgment.

¶9 Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). In pertinent part, a person who "retains possession of any land . . . after he [or she] receives written demand of possession may be removed through an action for forcible detainer . . . if the property has been sold through a trustee's sale under a deed of trust[.]" A.R.S. § 12-1173.01(A)(2). The only issue in a forcible detainer action "shall be the right of actual possession and the merits of title shall not be inquired into." A.R.S. § 12-1177(A); *see also Curtis v. Morris*, 186 Ariz. 534, 535 (1996) (noting that litigating title in a forcible detainer action "would convert a forcible detainer action into a quiet title action and defeat its purpose as a summary remedy").

¶10 Here, Ally Bank provided the trial court with the trustee's deed upon sale as an exhibit to its motion for summary judgment. That

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document established that Ally Bank purchased the property at the properly noticed trustee's sale. As such, Ally Bank proved that it was the property's owner and therefore had the right to possession of the property. The record also shows that Ally Bank served a written notice to vacate, and neither April nor Thomas surrendered possession of the property to Ally Bank. Additionally, Thomas's appearance at the forcible detainer hearing further shows that he received Ally Bank's notice to vacate. Contrary to Thomas's argument that the trustee's sale was improper and that Ally Bank was not the actual beneficiary under the deed of trust, the record does not support these arguments and they are not appropriate in a forcible detainer action. *See supra* ¶ 9. Therefore, because Ally Bank owned the property and served a notice to vacate on April and all other persons in possession of the property, the trial court correctly granted summary judgment for Ally Bank.

CONCLUSION

¶11 For the foregoing reasons, we affirm.



AMY M. WOOD • Clerk of the Court  
FILED: AA