IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

RYAN B. NOVAK, et al., *Plaintiffs/Appellees*,

v.

DAVID NOVAK, *Defendant/Appellant*.

No. 1 CA-CV 21-0481
FILED 7-28-2022

Appeal from the Superior Court in Maricopa County
No. CV2021-052512
The Honorable Gary L. Popham, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Sternfels & White PLLC, Fountain Hills
By Frederick C. Horn
Counsel for Plaintiffs/Appellees

David Novak, Fountain Hills
Defendant/Appellant

MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the court, in which Presiding Judge Jennifer B. Campbell and Judge James B. Morse Jr. joined.

H O W E, Judge:

¶1 David Novak appeals the forcible detainer judgment granted to his son Ryan Novak, and Alexandra Novak, Ryan's wife. For the following reasons, we affirm.[1]

FACTS AND PROCEDURAL HISTORY

¶2 In early July 2021, Appellees filed a complaint against David for forcible entry and detainer ("FED"). The complaint alleged that they were the owners of real property located in Fountain Hills, Arizona ("Property"), David was living there without a lease or legal right to do so, and he refused to vacate after they served him a 30-day notice. Attached to the complaint was a warranty deed to the Property—naming Appellees as grantees—and the notice to vacate. David responded to the complaint and simultaneously moved to dismiss and consolidate the case with his complaint for declaratory judgment. He also requested a jury trial.

¶3 In his response, David argued that in 2012, he and Ryan orally agreed to purchase the Property together because David could not qualify for a loan with his limited Social Security funds. He alleged that he was not a renter but signed a purchase agreement on the Property, paid the down payment and improvements, and maintained the Property for nine years, and that a new purchase agreement substituted Appellees' names because they secured a loan. He also alleged that Appellees were "straw buyers," but that he had ownership interest in the Property. Attached to the response was the affidavit of the realtor that worked with David allegedly to purchase the Property and the affidavit of the former owner of a general contracting company who appraised the Property.

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[1] Because the parties share the same last name, we respectfully refer to them by their first names to avoid confusion.

¶4 At the hearing, the court denied David's motion to dismiss and consolidate as well as his request for a jury trial because a factual issue did not exist. The court found David guilty of FED pursuant to A.R.S. § 33–1375(B) and awarded immediate possession of the Property to Appellees. The court ordered him to vacate the Property and entered a writ of restitution. David petitioned for special action review, which this court declined. He later moved for and requested an immediate hearing for a finding of contempt for Ryan in the superior court, which the court denied. David timely appealed the trial court's judgment.

DISCUSSION

¶5 David makes various claims throughout his opening brief, but his argument section lacks citations to relevant authorities, statutes, and portions of the record.[2] *See* Arizona Rule of Civil Appellate Procedure ("ARCAP") 13(a)(7). An appellant is obligated to ensure that the record on appeal contains all documents and information necessary to address the issues raised. ARCAP 11(a); *Baker*, 183 Ariz. at 73. Although we hold a pro se litigant to the same standard as an attorney, *Higgins v. Higgins*, 194 Ariz. 266, 270 ¶ 12 (App. 1999), we prefer to decide each case on its merits rather than to dismiss on procedural grounds, *Adams v. Valley Nat. Bank of Ariz.*, 139 Ariz. 340, 342 (App. 1984). We thus address David's arguments, though we typically consider waived arguments unsupported by adequate explanation or citations to relevant authorities or the record. *See In re Aubuchon*, 233 Ariz. 62, 64–65 ¶ 6 (2013).

¶6 Appellees argue that the issues on appeal are moot because David has already been evicted, and "[w]hen a tenant has abandoned property after entry of judgment granting the landlord possession, the issue of mootness arises." *Thompson v. Harris*, 9 Ariz.App. 341, 344 (1969). Mootness is a "discretionary policy of judicial restraint." *Phoenix Newspapers, Inc. v. Molera*, 200 Ariz. 457, 460 ¶ 12 (App. 2001). The court may consider a moot issue where the collateral consequences of the order "will continue to affect a party." *Cardoso v. Soldo*, 230 Ariz. 614, 617 ¶ 9 (App. 2012). Because the consequences of eviction will continue to affect David, the issue is not moot.

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[2] Appellees object to the use of the transcript attached to the opening brief. The transcript is not part of the record on appeal; we consider only evidence contained in the record. *Ashton-Blair v. Merrill*, 187 Ariz. 315, 317 (App. 1996). We presume that any missing information supports the superior court's conclusions. *Baker v. Baker*, 183 Ariz. 70, 73 (App. 1995).

¶7 A FED action is a "summary, speedy and adequate statutory remedy for obtaining possession of premises by one entitled to actual possession." *Carrington Mortg. Servs. LLC v. Woods*, 242 Ariz. 455, 456 ¶ 6 (App. 2017). We review statutory and rule application and interpretation de novo. *Naslund v. Indus. Comm'n of Ariz.*, 210 Ariz. 262, 264 ¶ 8 (App. 2005). The only issue in a FED action is actual possession. A.R.S. § 12–1177(A). The action is "not a vehicle to decide whether the parties have a landlord-tenant relationship or were under a lease agreement." *United Effort Plan Tr. v. Holm*, 209 Ariz. 347, 351 ¶ 21 (App. 2004). Arizona Rule of Procedure for Eviction Actions ("Rule") 11(c) provides that the defendant to such actions may appear and contest the factual or legal allegations in the complaint in the initial appearance. The court will order a trial on the merits if it determines that a proper defense or counterclaim exists. Rule 11(c). Although these cases may proceed with a jury trial, A.R.S. § 12–1176(B), where no factual issues exist for a jury, the trial court will decide the legal issues in the matter, Rule 11(e).

¶8 Here, the court did not err. The only issue litigated was the actual possession of the Property. David did not prove through a lease agreement or any other documentation that he was entitled to actual possession of the Property. Appellees, however, presented a warranty deed. Without contravening evidence, a factual issue did not exist. Thus, the court properly denied the jury-trial request, *see Montano v. Luff*, 250 Ariz. 401, 406–07 ¶¶ 15–17 (App. 2020) (finding no right to a jury trial if no "factual issues for a jury to decide"), and found Appellees with superior right of possession of the Property.

¶9 David argues that he has ownership interest in the Property. But ownership relates to having title, and parties cannot litigate title in a FED action. A.R.S. § 12–1177(A); *Carrington Mortg. Servs. LLC v. Woods*, 242 Ariz. 455, 457 ¶ 13 (App. 2017). He also argues that *Valdez v. Delgado*, No. 1 CA-CV 18-0537, 2019 WL 4271905 (Ariz. App. Sept. 10, 2019) should govern this case because of the similarity in facts. But *Valdez* was a contract dispute involving an enforceable contract, *id.* at *1 ¶ 2, which is irrelevant to this case. Further, such actions should be brought in a separate quiet title action, *Mason v. Cansino*, 195 Ariz. 465, 468 ¶ 8 (App. 1999), which David has already commenced. He also argues that Ryan and his counsel perjured themselves and that the court knew they had done so. But the credibility of witnesses is for the fact finder to determine, *see In re Ghostley*, 248 Ariz. 112, 115 ¶ 8 (App. 2020), and the trial court here, as fact finder, found the testimony credible. While he also argues that the hearing ended before he finished his argument, the trial court has a duty and inherent authority to control its courtroom. *E.H. v. Slayton in & for Cnty. of Coconino*, 249 Ariz. 248,

255 ¶ 25 (2020). David also makes claims of the trial court's bias or prejudice. But "[a] trial judge is presumed to be free of bias and prejudice," *State v. Granados*, 235 Ariz. 321, 326 ¶ 14 (App. 2014) (quoting *State v. Ramsey*, 211 Ariz. 529, 541 ¶ 38 (App. 2005)), and he did not rebut it by a preponderance of the evidence, *see State v. Ellison*, 213 Ariz. 116, 128 ¶ 37 (2006). His primary arguments on appeal merely ask this court to reweigh the evidence, which we will not do. *See Williams v. King*, 248 Ariz. 311, 317 (App. 2020).[3] No evidence demonstrates that the trial court erred.

CONCLUSION

¶10 Appellees request attorney fees and costs pursuant to ARCAP 21. In our discretion we decline to award them attorney fees. But since Appellees are the prevailing party on appeal, we award them their costs on appeal upon compliance with ARCAP 21. For the foregoing reasons, we affirm.

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

[3] David also requested oral argument in the briefing. But because no separate request was made after the final reply brief, s*ee* ARCAP 18(a), we declined to set oral argument.