DIVISION ONE
FILED: 02/03/2011
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

M&I MARSHALL & ILSLEY BANK,	)	No. 1 CA-CV 10-0136
	)	
Plaintiff/Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
LOUIS IZZO,	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure)
Defendant/Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-032421

The Honorable Barbara A. Hamner, Judge Pro Tempore

AFFIRMED

Greenberg Traurig, LLP — Phoenix
By Laura E. Sixkiller
And Julie R. Barton
Attorneys for Plaintiff/Appellee

Rhoads & Associates, PLC — Phoenix
By Douglas C. Rhoads
Attorneys for Defendant/Appellant

S W A N N, Judge

¶1 Louis Izzo appeals from the trial court's decision in favor of M&I Marshall & Ilsley Bank ("M&I") in a forcible detainer action. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In March 2004, Izzo received a construction loan for $850,000 from M&I, secured by real property (the "Cowboy Court property"). Izzo defaulted on the loan and the Cowboy Court property was sold at a trustee's sale. A trustee's deed, issued and recorded after the sale, listed Larry O. Folks as the trustee, identified M&I as the grantee, and conveyed the property to M&I. M&I sent a certified letter demanding possession of the property, but Izzo refused to surrender possession. M&I then filed a complaint for Forcible Detainer after Foreclosure Sale against Izzo.

¶3 On October 21, a process server tried to personally serve Izzo with the complaint and summons at the Cowboy Court address, but no one answered the door. When no one answered the door the next day, the process server "conspicuously posted a copy of the [] documents upon the main entrance" of the residence and sent a copy by certified mail to Izzo at the Cowboy Court address. Izzo signed for the documents the next day. The summons set a November 5, 2009 date for appearance.

¶4 Before the November 5 forcible detainer hearing began, Izzo's counsel, Douglas Rhoads, introduced himself and Izzo to M&I's counsel. Izzo did not enter the courtroom, but Rhoads

represented him.[1] Although Rhoads told the court, "We're not arguing service," he nonetheless requested clarification concerning whether "there [is] any rule that modifies the service requirements under [Ariz. R. Civ. P.] 4.1 . . . in an eviction action[.]" The court explained that with "forcible detainers . . . two attempts at personal service, then posting and mailing is how it's handled and there's not special permission requested to do that." On M&I's request, the matter was continued until December 3.

¶5 Immediately before the December 3 hearing, Izzo filed a Notice of Special Appearance Regarding Lack of Personal Service and a Motion to Stay Pending Immediate Full Disclosure [and] Request for Jury Trial. M&I filed a response to both motions and the court held oral argument before denying them. Izzo filed an answer and counterclaim. After a bench trial, the court found Izzo guilty of forcible detainer.

¶6 Izzo timely appeals. We have jurisdiction pursuant to A.R.S. § 12-2101(B).

---

[1] Rhoads had not, however, filed a notice of appearance. *See* Ariz. R.P. Evic. Act. ("RPEA") 4(e) (requiring attorneys to file a written notice of appearance or provide such notice "orally on the record" before appearing or filing any document in any eviction action). The court advised Rhoads to file the notice, which he agreed to do. On appeal, Izzo does not contest the fact that Rhoads was his counsel of record at that hearing. *See Schabel v. Deer Valley Unified Sch. Dist. No. 97,* 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996) ("Issues not clearly raised and argued in a party's appellate brief are waived.").

DISCUSSION

¶7 Izzo first contends that his due process rights were violated because the summons and complaint were not personally served, the complaint did not comply with RPEA 5(d)(2), and the trial court denied his request for a jury trial.[2] Second, he challenges the propriety of conducting a forcible detainer proceeding while civil litigation was pending.

¶8 Forcible detainer actions are statutory in nature. *Hinton v. Hotchkiss,* 65 Ariz. 110, 114, 174 P.2d 749, 753 (1946). This court reviews statutory application and interpretation de novo. *Naslund v. Indus. Comm'n of Ariz.,* 210 Ariz. 262, 264, ¶ 8, 110 P.3d 363, 365 (App. 2005).

I. DUE PROCESS VIOLATIONS

A. Personal Service

¶9 Service of the complaint and summons in forcible detainer actions is made by delivering a copy of the documents to an "individual personally or by leaving copies thereof at that individual's dwelling house or usual place of abode with

[2] The first issue also included a fourth subpart -- that Izzo's due process rights were violated by insufficient "[d]isclosure of evidence to prepare a defense" –- that the opening brief does not discuss. We therefore decline to address it now. *See Schabel,* 186 Ariz. at 167, 920 P.2d at 47.

some person of suitable age and discretion." *See* RPEA 5(f); Ariz. R. Civ. P. 4.1(d).[3]

¶10 In his opening brief, Izzo asks this court to

> appreciat[e] the distinction drawn between service of process required in the landlord-tenant context, see A.R.S. § 33-1377 (allowing for "post and mail" for tenants), and such form as service of process accomplished after a non-judicial foreclosure sale, A.R.S. § 12-1175 and RPEA 5(f) requiring personal service pursuant to ARCP 4.1 and RPEA 5(g) recognizing the importance of valid service and requiring the issue be raised at the initial appearance.

Though Izzo does not argue this point further, we find no error because RPEA 5(g) provides that any objections to service are waived when the "defendant appears at the initial appearance . . . unless the defendant asserts those objections at the initial appearance or in a previously filed written answer."[4] Here, Izzo was physically present immediately before the November forcible detainer hearing, and he was represented at that hearing by counsel who specifically told the court that he

[3] RPEA 5(f) specifically incorporates the provisions of Ariz. R. Civ. P. 4.1. *See* RPEA 1 (allowing the Arizona Rules of Civil Procedure to apply in forcible detainer actions "only when incorporated by reference").

[4] Although the trial court erroneously concluded that in general "nail and mail service is appropriate in these kinds of matters," we affirm if the court was correct for any reason.

was "not arguing service." Those actions constituted waiver of the service issue under RPEA 5(g).

B. RPEA 5(d)(2)

¶11 Izzo correctly notes that RPEA 5(d)(2) requires that complaints seeking judgment for reasons other than the non-payment of rent must state the reason for termination of the tenancy with specific facts, "including the date, place and circumstances of the reason for termination, so that the tenant has an opportunity to prepare a defense." But Izzo fails to explain how that rule would require reversal in this case, and it does not appear that Izzo was deprived of notice of the basic facts giving rise to M&I's claim. Failure to substantively argue an issue on appeal results in its waiver.[5] *See* ARCAP 13(a)(6); *State v. Moody,* 208 Ariz. 424, 452 n.9, ¶ 101, 94 P.3d 1119, 1147 n.9 (2004). We therefore do not address this issue further.

C. Right to Jury Trial

¶12 Izzo asserts that he sufficiently pleaded and disclosed his request for jury trial but that the trial court "wrongfully denied" his request.

[5] Moreover, the complaint appears to comply with the provisions of RPEA 5(d)(2) because it identified the Cowboy Court property, explained the action was "brought pursuant to A.R.S. § 12-1171 *et seq.,* relating to Forcible Entry and Detainer," and described the October 2, 2009 trustee's sale and resulting trustee deed.

¶13 In a forcible detainer action, "[i]f the plaintiff does not request a jury, the defendant may do so *on appearing* and the request shall be granted." A.R.S. § 12-1176(B) (emphasis added). *See also* RPEA 11(d) ("Failure to request a jury trial at or before the initial appearance shall be deemed a waiver of that party's right to a jury trial."); *cf. Mason v. Cansino,* 195 Ariz. 465, 466, ¶ 4, 990 P.2d 666, 667 (App. 1999) (holding that the right to a jury trial in a civil matter "is presumptively waived unless at least one litigant demands a jury trial").

¶14 Here, it is uncontested that Izzo appeared at the initial hearing on November 5 and did not request a jury trial. Under RPEA 11(d), his failure to do so was sufficient reason for the trial court to deny his untimely December 3 motion. *Cf. Brewster-Greene v. Robinson,* 34 Ariz. 547, 552, 273 P. 538, 539 (1929) (affirming trial court's decision to grant defendant's request made *after* the initial hearing but at first opportunity after plaintiff's request, granted prior to initial appearance, was later waived).

¶15 On appeal, Izzo points only to the use of the word "shall" in A.R.S. § 12-1176(B) to support his claim that the trial court erred in refusing his request. But the record demonstrates that Izzo did not make this argument before the trial court. He likewise never discussed his jury request at

all during oral argument on his motion. Even when M&I urged the court to deny the request for jury trial because it was untimely filed and because there were "no issues for a jury to decide," Izzo did not argue to the contrary. *See* RPEA 11(d) ("At the initial appearance, if a jury trial has been demanded, the court shall inquire and determine the factual issues to be determined by the jury. If no factual issues exist for the jury to determine, the matter shall proceed to a trial by the judge alone . . . .").

¶16 Failure to object to evidence, testimony, or arguments waives those matters on appeal. *State v. Thomas,* 130 Ariz. 432, 435, 636 P.2d 1214, 1217 (1981). Therefore, the issue is not properly before us now. *Scottsdale Princess P'ship v. Maricopa Cnty.,* 185 Ariz. 368, 378, 916 P.2d 1084, 1094 (App. 1995) (appellate court will not consider arguments not first presented in superior court).

II. FORCIBLE DETAINER PROCEEDING

¶17 Finally, Izzo questions "[w]hether a forcible detainer action is a proper forum for non-judicial foreclosure involving unrecorded transfers of beneficial interest and with civil litigation pending."

¶18 On appeal from a trial to the court, we must affirm if any evidence supports the trial court's judgment; we review legal issues de novo. *Inch v. McPherson*, 176 Ariz. 132, 136,

859 P.2d 755, 759 (App. 1992). Forcible detainer is an action created by statute to provide a summary, speedy remedy to gain possession of premises. *Mason*, 195 Ariz. at 466, ¶ 5, 900 P.2d at 667. It is available to one who has purchased property at a trustee's sale under a deed of trust. A.R.S. § 12-1173.01(A).

¶19 After receiving payment from the purchaser, the trustee executes and delivers to the purchaser the trustee's deed. A.R.S. § 33-811(B) provides:

> The trustee's deed shall raise the presumption of compliance with the requirements of the deed of trust and [A.R.S. §§ 33-801 to -821, governing deeds of trust] 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 trustee's deed shall constitute conclusive evidence of the meeting of those requirements in favor of purchasers or encumbrancers for value and without actual notice.

All persons to whom the trustee sends notice of a sale under a trust deed "waive all defenses and objections to the sale not raised in an action that results in the issuance of" injunctive relief pursuant to Ariz. R. Civ. P. 65. A.R.S. § 33-811(C).

¶20 Izzo now contends that M&I did not "enjoy the right to a conclusive presumption of good title" pursuant to A.R.S. § 33-811(B) and (C) because it had "actual notice of the dispute before the conveyance of any applicable trust deed." He did not advance this argument at trial, and it is therefore not

properly before us now. *Scottsdale Princess,* 185 Ariz. at 378, 916 P.2d at 1094.

¶21 Even if we did consider this issue now, we would find no error in the court's decision. The "dispute" Izzo references is M&I's alleged "unrecorded transfers of beneficial interest in the securitized note"[6] -- an issue that relates only to M&I's ability to declare a default and compel a trustee's sale. The only issue properly litigated in a forcible detainer action is the right of actual possession; "the merits of title shall not be inquired into." A.R.S. § 12-1177(A); *Mason*, 195 Ariz. at 468, ¶ 8, 990 P.2d at 669. When title is disputed, a defendant can seek relief in a separate action by seeking to enjoin the sale. And though Izzo did file a separate civil action seeking remedies based on M&I's allegedly defective rights in the property, he did so one day before the October trustee sale was scheduled and then did not serve it on M&I until January 2010. Accordingly, the trial court correctly determined that the trustee's deed was dispositive on the question of title and that M&I was entitled to possession.

[6] He also asserts this issue is supported by "highly dubious and irregular claim of payment of '$580,453.00 cash in lawful money.'" But he provides no further explanation of this issue, nor supplies any citation to the factual record.

ATTORNEY'S FEES ON APPEAL

¶22 Both Izzo and M&I request an award of attorney's fees and costs on appeal. M&I is entitled to the award pursuant to A.R.S. § 12-1178(A) (requiring the court to award attorney's fees and other costs to plaintiff when a defendant is found guilty of forcible detainer), after compliance with ARCAP 21. *See DVM Co. v. Stag Tobacconist, Ltd.*, 137 Ariz. 466, 468, 671 P.2d 907, 909 (1983) (holding that attorney's fees are not available in a forcible detainer action unless expressly provided by statute).

CONCLUSION

¶23 For the foregoing reasons, we affirm.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PHILIP HALL, Presiding Judge

/s/
_____
SHELDON H. WEISBERG, Judge