DIVISION ONE
FILED: 05/24/2011
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DEUTSCHE BANK NATIONAL TRUST COMPANY, Plaintiff-Appellee, v. WILLIAM MUSA SAYEGH, Defendant-Appellant.	)	1 CA-CV 10-0452 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2010-091245

The Honorable Kirby D. Kongable, Judge *Pro Tempore*

AFFIRMED

Tacker & Associates — Avondale
by George A. Tacker
Attorney for Appellant

Miles, Bauer, Bergstrom & Winters LLP — Henderson, NV
by Jeremy T. Bergstrom
Attorneys for Appellee

W E I S B E R G, Judge

¶1 William Musa Sayegh ("William") and his brother Munir Sayegh ("Munir") (collectively "Defendants"), appeal from the superior court's judgment in favor of Deutsche Bank National

Trust Company ("Deutsche") in the latter's action for forcible detainer. Defendants contend that a request for a jury trial contained in Munir's answer to the complaint for forcible detainer constituted a timely request for a jury. For reasons that follow, we affirm the superior court's conclusion that, under the circumstances, Defendants waived the right to a jury trial.

BACKGROUND

¶2 In March 2010, Deutsche filed a complaint for forcible detainer against William and the occupants of a house Deutsche had purchased at a trustee's sale on November 10, 2009. At the time set for a forcible detainer hearing on March 29, 2010, George Tacker appeared as counsel for Munir, who was occupying the subject house. Tacker entered a not guilty plea on Munir's behalf. The court's minute entry does not indicate that Tacker requested a jury trial, however, and Defendants have not provided us with a transcript of that proceeding. The court ordered Munir to file an answer to the complaint and set trial for April 27.

¶3 In his answer, Munir demanded a jury trial. He also denied that Deutsche had an ownership interest in the house, that a valid trustee's sale had occurred, or that he had been properly served with notice of the demand for surrender of the premises or with the summons, complaint, and eviction sheet.

¶4 At the April 27 court date, Tacker noted his prior request for a jury trial and cited Arizona Revised Statutes ("A.R.S.") section 12-1176(B) (Supp. 2010), which states: "If the plaintiff [in a forcible detainer action] does not request a jury, the *defendant may do so on appearing* and the request shall be granted." (Emphasis added.) Tacker argued that Munir officially appeared with the filing of his answer and thus that the jury request was timely. Counsel for Deutsche responded that failure to request a jury trial at or before the March 29 initial appearance waived that right.

¶5 The superior court concluded that the Rules of Procedure for Eviction Actions ("RPEA") clarified A.R.S. § 12-1176 and that Munir had waived the right to a jury trial. The matter proceeded, and Deutsche introduced a certified copy of the trustee's deed showing that Deutsche was the record owner. Tacker challenged only the adequacy of service of the five-day notice. After continuing the trial until May 18, 2010, the court found that Munir was not a bona fide tenant who otherwise might be entitled to remain in the premises and ordered judgment for Deutsche. The court issued a signed judgment against William and Munir at the conclusion of the trial.

¶6 Defendants timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-1182(A) (2003), 12-120.21 (2003); *see*

Morgan v. Cont'l Mortg. Investors, 16 Ariz. App. 86, 91, 491 P.2d 475, 480 (1971).

DISCUSSION

¶7 The sole issue on appeal is whether the applicable statute and RPEA allow a defendant, who has made an initial appearance in a forcible detainer action without requesting a jury trial, to later demand a jury trial in his answer to the complaint. This poses a question of law for our *de novo* review. *See City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 178, ¶ 5, 181 P.3d 219, 225 (App. 2008) (statutory interpretation is reviewed de novo); *Adrian E. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 96, 99, ¶ 9, 158 P.3d 225, 228 (App. 2007) (application of procedural rules is reviewed *de novo*).

¶8 When interpreting statutes, we attempt to give effect to the legislature's intent. *Allstate Ins. Co. v. Univ'l Underwriters, Inc.*, 199 Ariz. 261, 264, ¶ 8, 17 P.3d 106, 109 (App. 2000). Thus, we examine the statutory language, and if it is clear and unambiguous, we need not consider other rules of construction. *Buencamino v. Noftsinger*, 223 Ariz. 162, 164, ¶ 7, 221 P.3d 41, 43 (App. 2009). Similarly, when interpreting procedural rules, we seek to advance "our supreme court's intent in promulgating" those rules and do not look beyond their terms if they are plain and unambiguous. *Potter v. Vanderpool*, 225 Ariz. 495, 498, ¶ 8, 240 P.3d 1257, 1260 (App. 2010); *Harper v.*

Canyon Land Dev., LLC, 219 Ariz. 535, 536, ¶ 4, 200 P.3d 1032, 1033 (App. 2008) (giving effect to rule's language unless it is ambiguous or would create an absurd result).

¶9 The relevant statute, A.R.S. § 12-1176(B), states only that a "defendant may [request a jury] on appearing." It does not define "on appearing." Deutsche, however, cites RPEA 11, entitled "Initial Appearance and Trial Procedures." Subsection (d) states in part: "Contested detainer matters shall be set for a trial by a judge alone unless a jury trial is demanded by the plaintiff in the complaint *or by the defendant at or before the initial appearance*. *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." (Emphasis added.)

¶10 RPEA 11(a) provides: "On the date and at the time set for the initial appearance, and after announcing the name of the plaintiff and the defendant, the court shall . . . [c]all the case, identify the parties and any attorneys . . . present." RPEA 11(a)(i). The court then shall "[s]tate or summarize the material allegations contained in the complaint [, and] . . . [a]sk the defendant whether the defendant contests the allegations." RPEA 11(a)(2),(3). RPEA 11(b) states that a "defendant shall not be required to answer until the initial appearance." RPEA 11(b)(2). It also provides that if a defendant challenges the complaint's allegations, the court must

determine whether a legal defense may exist and, if so, must "order a trial on the merits." RPEA 11(b)(1). The court may order a written answer be filed with the court, or if trial is not continued, the court may accept an oral answer. *Id*.

¶11 Just as we interpret individual statutory provisions in the context of the entire statute to achieve a consistent interpretation, *Pima County by City of Tucson v. Maya Construction Co.*, 158 Ariz. 151, 155, 761 P.2d 1055, 1059 (1988), we construe rules on the same subject in harmony with each other. *State v. Sanders*, 205 Ariz. 208, 217, ¶ 38, 68 P.3d 434, 443 (App. 2003) (court rules are construed in same way as statutes). Furthermore, RPEA 2 states: "These rules shall be construed in accordance with statutory provisions related to forcible entry and detainer actions . . . ."

¶12 The RPEA anticipate that the initial appearance, as happened here, may take place before the filing of either an oral or written answer. RPEA 11(a). In that event, the initial appearance at which the court summarizes the complaint's allegations and asks the defendant whether he contests the allegations is the time when a defendant must ask for a jury trial, and failure to ask at that initial appearance "shall be deemed a waiver" of the right to a jury trial. RPEA 11(d). Accordingly, because Munir did not request a jury trial at his initial appearance and waited to do so in his answer, the

superior court properly concluded that he had waived the right to have a jury trial.

¶13 Nonetheless, Munir argues that RPEA 7 requires the filing of an answer "[o]n or before the initial return date," which was March 29. He notes that his answer was not filed as mandated, but instead, at the return hearing on March 29, the court ordered him to file an answer by April 2.[1] Because trial did not begin until April 27, Munir contends that the four-day delay in receipt of his answer did not prejudice Deutsche and that Deutsche still would have had 25 days to prepare for a jury trial if the court had allowed it.

¶14 Although Deutsche does not assert that prejudice would have resulted from accession to Munir's jury demand in his answer, we note that "forcible detainer is a statutorily created remedy [designed] . . . to provide 'a summary, speedy and adequate remedy for obtaining possession of the premises.'" *Mason v. Cansino*, 195 Ariz. 465, 466, ¶ 5, 990 P.2d 666, 667 (App. 1999) (quoting *Olds Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 204, 167 P.2d 394, 397 (1946)). This summary process is reflected in RPEA 11(c), which states: "Whenever possible, the trial should be held on the initial return date." The Rule,

[1]Munir also observes that the court did not forbid him from requesting a jury in the April 2 answer, but one obvious explanation is because it was already too late to do so.

however, allows for a trial continuance of "up to . . . ten days . . . on the request of a party for good cause shown or to accommodate the demands of the court's calendar." The Rule also permits a continuance beyond ten days if "both parties" agree.

¶15 Here, more than ten days elapsed between the return hearing and trial, but without a transcript of the March 29 hearing that might explain the delay, we must assume that both parties agreed to it.[2] Moreover, Defendants cite no authority that would permit the court to ignore the clear language of RPEA 11(d). If our supreme court had wished to allow the court to grant a belated jury trial demand "for good cause," it easily could have said so. We affirm the ruling that Munir's request was untimely.

¶16 In the reply brief, Defendants assert for the first time that when the superior court extended the deadline for Munir to file an answer, the court thereby implicitly extended the time for requesting a jury trial. Defendants cite no authority that would allow the court to supersede the plain language of RPEA 11(d), and Deutsche has not had an opportunity to respond to this assertion. We decline to further consider

[2]As appellants, Defendants must "mak[e] certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised." *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). In the absence of a transcript, we presume that it supports the trial court's ruling. *Kohler v. Kohler*, 211 Ariz. 106, n. 1, 118 P.3d 621, 623 n. 1 (App. 2005).

it. *In re Guardianship of Pacheco*, 219 Ariz. 421, 426 n.6, ¶ 18, 199 P.3d 676, 681 n.6 (App. 2008)

¶17 Defendants request an award of attorneys' fees and costs as the successful party pursuant to A.R.S. § 12-1178(B) (Supp. 2010) (if defendants are found not guilty of forcible detainer, they shall receive judgment "for damages, attorney fees, court and other costs"). Even if this statute applied to an appeal, Defendants have not succeeded: Munir was found guilty of forcible detainer, and we have not vacated that judgment.

¶18 Deutsche also requests its attorneys' fees "and other relief" pursuant to Arizona Rule of Civil Appellate Procedure ("ARCAP") 21 and A.R.S. § 12-1181 (2003). ARCAP 21 is not a substantive basis for awarding attorney's fees, however. *See Bed Mart, Inc. v. Kelly*, 202 Ariz. 370, 375, ¶ 24, 45 P.2d 1219, 1224 (App. 2002) (Rule 21 merely explains procedure for requesting attorneys' fees).

¶19 Section 12-1181(A) states:

> On trial of the action in superior court, appellee, if out of possession and the right of possession is adjudged to him, shall be entitled to *damages* for withholding possession of the premises during pendency of the appeal and the court shall also render judgment in favor of appellee and against appellant and the sureties on his bond for *damages proved and costs*.

(Emphasis added.) The statute does not expressly authorize an award of attorneys' fees. In a prior case interpreting § 12-1178(A), we observed that "[a]s a general rule, when the legislature means to authorize the recovery of attorneys' fees, it expressly states that intention" and held that statutory references to "charges" and "costs" did not authorize an award of attorneys' fees on appeal. *Camelback Plaza Dev., L.C. v. Hard Rock Café Int'l, Inc.*, 200 Ariz. 206, 209, ¶ 10, 210, ¶ 13, 25 P.3d 8, 11, 12 (App. 2001). Accordingly, in the absence of authority, we deny Deutsche's request for attorneys' fees on appeal. Deutsche is entitled to its costs pursuant to A.R.S. § 12-1181(A) and may submit a request in compliance with ARCAP 21(a).

CONCLUSION

¶20 We affirm the ruling that Munir's demand for a jury trial was untimely. We grant Deutsche's request for an award of its costs incurred on appeal.

/s/
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
LAWRENCE F. WINTHROP, Judge