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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 10/25/2011  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

FEDERAL NATIONAL MORTGAGE ) No. 1 CA-CV 10-0689  
ASSOCIATION, )  
 ) DEPARTMENT A  
 )  
Plaintiff/Appellee, )  
 ) **MEMORANDUM DECISION**  
v. )  
 ) (Not for Publication -  
KEVIN E. THOMAS, ) Rule 28, Arizona Rules of  
 ) Civil Appellate Procedure)  
Defendant/Appellant. )  
 )

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Appeal from the Superior Court in Maricopa County

Cause No. CV2010-000315

The Honorable Jay L. Davis, *Judge Pro Tempore*

**AFFIRMED**

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Tiffany & Bosco, PA Phoenix  
By Mark S. Bosco  
Leonard J. McDonald, Jr.  
Attorneys for Plaintiff/Appellee

Kevin E. Thomas Phoenix  
Appellant *In Propria Persona*

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**T I M M E R**, Presiding Judge

¶1 Appellant Kevin E. Thomas ("Thomas") appeals from the trial court's September 30, 2010 entry of judgment finding him guilty of forcible detainer of residential real property

following a trustee's sale at which the appellee, Federal National Mortgage Association ("FNMA"), purchased the property. For the following reasons, we affirm.

#### **BACKGROUND<sup>1</sup>**

¶12 Thomas's daughter, April, owned residential property ("Property"), which she refinanced in November 2007. To that end, she signed a promissory note, which was secured by a deed of trust encumbering the Property. Thomas alleges April then quitclaimed her interest in the Property to him. April subsequently defaulted on the loan. Ultimately, FNMA purchased the Property at a trustee's sale held on November 30, 2009. April, Thomas, and possibly other occupants refused to vacate the Property after the sale, which led to the forcible detainer proceedings.

¶13 On January 2, 2010, FNMA filed a complaint for forcible detainer against April and all other unknown occupants. Thomas declared himself a co-defendant and then removed the case to federal court. While the case was pending in federal court, the superior court nevertheless granted judgment for FNMA. On July 19, the case was remanded to superior court, and FNMA conceded that the judgment was void due to lack of jurisdiction. FNMA subsequently served Thomas and April to ensure personal

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<sup>1</sup> We view the facts in the light most favorable to sustaining the judgment. *State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994).

jurisdiction. On September 30, the trial court found April and Thomas guilty of forcible detainer and ordered them to surrender possession of the property within five days. Thomas timely appealed.

#### DISCUSSION

¶4 Although Thomas raises multiple challenges to the judgment, we distill them into five distinct issues, which we address in turn.<sup>2</sup>

##### A. Personal jurisdiction (arguments 1 and 2)

¶5 Thomas argues the trial court lacked personal jurisdiction over him because there was a "lack of service on the right party (defendant home owner of record/occupant)." We review the superior court's exercise of personal jurisdiction de novo. *Morgan Bank (Delaware) v. Wilson*, 164 Ariz. 535, 536, 794 P.2d 959, 960 (App. 1990).

¶6 As support for his argument, Thomas cites, without explanation, *Davis v. Kleindienst*, 64 Ariz. 251, 169 P.2d 78 (1946). The *Davis* decision is irrelevant: it involves a real property title dispute and does not discuss personal jurisdiction or proper service. See *id.*

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<sup>2</sup> FNMA argues Thomas waived some issues by failing to raise them to the trial court. But FNMA fails to specify which issues were not raised. Additionally, as neither party provided us with a trial transcript, we cannot determine whether Thomas properly raised all issues. We exercise our discretion to consider Thomas' arguments.

¶17 Thomas was properly served. In a forcible entry and detainer action, “[s]ervice of the summons and complaint shall be accomplished by either personal service or post and mail service . . . as provided by Rule 4.1 or 4.2 of the Arizona Rules of Civil Procedure.” Arizona Rules of Procedure for Eviction Actions (“RPEA”) 5(f). Rule 4.1 allows individuals to be served by delivering a copy of the summons and complaint to the individual personally or “by leaving copies thereof at that individual’s dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.” Ariz. R. Civ. P. 4.1(d). On August 25, 2010, FNMA successfully served, at the Property, April and a man who refused to give his name. According to the process server, the unidentified man was of suitable age and discretion. Additionally, Thomas had made clear that he then resided at the Property. Therefore, FNMA properly served Thomas, and the trial court had personal jurisdiction over him. In light of our decision, we need not decide whether Thomas alternatively waived service and submitted to the trial court’s jurisdiction.

**B. Title issues (arguments 5 and 6)**

¶18 Thomas next contends the trial court erred by entering a forcible detainer judgment because he still owns the Property due to defects in the trustee’s sale. We disagree. In a forcible detainer action, the only issue properly before the

court is the right of actual possession; the court may not inquire into the merits of title. Ariz. Rev. Stat. ("A.R.S.") § 12-1177(A) (2003); see also *United Effort Plan Trust v. Holm*, 209 Ariz. 347, 351, ¶ 21, 101 P.3d 641, 645 (App. 2004) ("The only issue to be decided in the action is the right of actual possession. Thus the only appropriate judgment is the dismissal of the complaint or the grant of possession to the plaintiff."). Thomas's argument concerning ownership of the Property is properly addressed in a quiet title action.<sup>3</sup>

¶9 Thomas failed to provide this court a transcript of the trial, as he was obligated to do. ARCAP 11(b)(1). Consequently, we presume the evidence presented at trial supported the court's factual findings, including FNMA's right of possession. *Kohler v. Kohler*, 211 Ariz. 106, 108 n.1, ¶ 8, 118 P.3d 621, 623 n.1 (App. 2005). The court did not err in rejecting Thomas's arguments concerning title.

#### **C. Bad faith (argument 4)**

¶10 Thomas also argues the trial court erred by not determining that FNMA initiated this action in bad faith.

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<sup>3</sup> Thomas claims to hold title via the quitclaim deed. But a quitclaim deed conveys to the grantee no greater rights to property than the grantor possessed. *Lake Havasu Cmty. Hosp., Inc. v. Ariz. Title Ins. & Trust Co.*, 141 Ariz. 363, 372, 687 P.2d 371, 380 (App. 1984), overruled on other grounds by *Barmat v. John & Jane Doe Partners A-D*, 155 Ariz. 519, 524, 747 P.2d 1218, 1223 (1987). Thus, prior to the trustee's sale, Thomas's ownership interest was encumbered by the deed of trust.

Specifically, he asserts FNMA committed bad faith by failing to ascertain his ownership interest in the Property before filing suit. Thomas cites *Roy & Titcomb, Inc. v. Villa*, 37 Ariz. 574, 296 P. 260 (1931), to support his contention. *Villa* held that, in order to have an effective mortgage on property, a prospective mortgagee had to ascertain who had possession of the property and, if not the title holder of record, verify that the possessor did not also claim ownership. *Id.* at 577-79, 296 P. at 261. Thomas does not explain *Villa's* alleged relevance to the facts in this case, and we conclude *Villa* is not applicable.

¶11 As in most legal proceedings, parties to an eviction proceeding have a duty to file pleadings in good faith. RPEA 4(b). Thomas cites no portions of the record supporting his argument that FNMA did otherwise. With no transcript, we again must assume the evidence supported the trial court's finding that FNMA did not act in bad faith. Further, the trustee's sale cut off Thomas's interest in the Property and transferred title to FNMA; there was no adverse ownership interest for FNMA to discover before it initiated this action.

**D. Trial by jury (argument 3)**

¶12 Thomas next argues the trial court unconstitutionally denied his request for a jury trial. He fails to explain the basis for his argument, and we do not discern any merit. The federal and state constitutions each guarantee trial by jury in

most *criminal* cases, but there is no general constitutional right to a jury in *civil* cases. See U.S. Const. amend. VI; Ariz. Const. art. 2, § 23. While there is a limited statutory right to a trial by jury in a forcible detainer action, Thomas waived that right by failing to request a jury trial upon appearance in the case. See A.R.S. § 12-1176(B) (Supp. 2010) (providing that 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.”); RPEA 11(d) (stating that a “[f]ailure 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.”). The record shows Thomas asked for a jury trial in his second amended answer filed on September 22, 2010, which was only eight days prior to trial and nine months after commencement of the litigation - long after Thomas’s initial appearance. The court did not err by refusing Thomas’s untimely request for a jury trial.

**E. Unresolved motions (argument 7)**

¶13 Thomas finally argues the trial court erred by failing to rule on his motions before trial, but he fails to explain how he suffered prejudice. Any motions not ruled upon at the time judgment is entered are deemed denied by operation of law. *Atchison, Topeka & Santa Fe Ry. Co. v. Parr*, 96 Ariz. 13, 15, 391 P.2d 575, 577 (1964). Therefore, the trial court’s failure

to rule on Thomas's motions automatically denied them, and no motions remained pending at the time of judgment.

#### **Attorney fees on appeal**

¶14 FNMA requests attorney fees and costs incurred in this appeal pursuant to A.R.S. § 12-349(A) (2003), which requires us to assess reasonable attorney fees and expenses against a party who "brings or defends a claim without substantial justification" or "unreasonably expands or delays the proceeding." We agree with FNMA that there was no factual or legal justification for Thomas to bring and maintain this appeal, and Thomas's appeal unreasonably expanded the forcible detainer action. Thomas failed to explain his arguments or provide a transcript of the trial, thereby preventing us from fully exploring the merits of his conclusory challenges. We award FNMA its reasonable attorney fees and costs subject to its compliance with Rule 21 of the Arizona Rules of Civil Appellate Procedure.

¶15 We deny Thomas's requests for attorney fees and costs as he is not the prevailing party, he represented himself, and he fails to cite any authority for such an award.



**CONCLUSION**

¶16 For the foregoing reasons, we affirm.

/s/  
Ann A. Scott Timmer, Presiding Judge

CONCURRING:

/s/  
Daniel A. Barker, Judge

/s/  
Patrick Irvine, Judge