

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
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: 03/29/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DEUTSCHE BANK NATIONAL TRUST) No. 1 CA-CV 10-0779
COMPANY, SOLELY AS TRUSTEE AND)
NOT IN ITS INDIVIDUAL CAPACITY) DEPARTMENT D
FOR THE HOME EQUITY MORTGAGE LOAN)
ASSET-BACKED TRUST, SERIES INABS) **MEMORANDUM DECISION**
2006-B UNDER THE POOLING AND) (Not for Publication -
SERVICING AGREEMENT DATED MARCH) Rule 28, Arizona Rules of
2006, its assignees and/or) Civil Appellate Procedure)
Successors,)
)
Plaintiff/Appellee,)
)
v.)
)
KEVIN R. BRANDEBURG and JANE DOE)
BRANDEBURG, husband and wife,)
)
Defendants/Appellants.)
)

Appeal from the Superior Court in Yavapai County

Cause No. V1300CV201080500

The Honorable Michael R. Bluff, Judge

AFFIRMED

McCarthy Holthus Levine
By Paul M. Levine
Matthew A. Silverman
Jessica R. Kenney
Lakshmi Jagannath
Attorneys for Plaintiff/Appellee

Scottsdale

S W A N N, Judge

¶1 This is a forcible entry and detainer ("FED") action initiated by Deutsche Bank National Trust Company ("Deutsche Bank") against Kevin Brandenburg for possession of real property ("the Property") located in Yavapai County. Brandenburg appeals the superior court's judgment in favor of Deutsche Bank. Brandenburg defended by essentially attacking the validity of Deutsche Bank's title to the Property. Because an FED action is not the proper forum for challenging the validity of title, we affirm the superior court's judgment.

FACTS AND PROCEDURAL HISTORY

¶2 After Brandenburg defaulted on a deed of trust that he had executed in connection with the Property, Deutsche Bank purchased the Property at a trustee's sale conducted on August 23, 2010, and received a Trustee's Deed Upon Sale ("Trustee's Deed"). Four days later, Deutsche Bank recorded the Trustee's Deed. Brandenburg received written notice on September 1, 2010, telling him to vacate the Property by September 6. Because Brandenburg did not do so, Deutsche Bank filed a complaint for FED on September 13. Copies of the Trustee's Deed and the written notice were attached to the complaint.

¶13 On September 21, the day of the initial hearing, Brandenburg filed a motion requesting the case's dismissal; seeking sanctions; and demanding disclosure, discovery and a jury trial. Deutsche Bank responded by arguing that Brandenburg raised inappropriate issues regarding Deutsche Bank's title to the Property rather than a proper challenge to the Trustee Deed's presumptive validity. The court denied the motion to dismiss and set the matter for a jury trial.

¶14 On September 27, Brandenburg filed an answer denying all allegations in the complaint. According to him, the complaint did not give sufficient notice of Deutsche Bank's claims. He also asserted counterclaims.¹ Deutsche Bank moved to strike the answer and counterclaims, and it moved for a judgment on the pleadings pursuant to Rule 9(d) of the Rules of Procedure for Eviction Actions ("RPEA").

¶15 At the October 4, 2010 pretrial conference, the superior court denied Deutsche Bank's motion to strike the answer. But it granted the motion to strike the counterclaims² and granted Deutsche Bank judgment on the pleadings. The court

¹ Brandenburg's counterclaims were for wrongful foreclosure; quiet title; breach of contract and breach of implied covenant of good faith and fair dealing; and unjust enrichment.

² RPEA 8 prohibits counterclaims in FED actions unless specifically allowed by statute. As Deutsche Bank pointed out, Brandenburg's answer did not set forth the statutory basis for counterclaims in this case.

entered judgment, finding Brandenburg guilty of forcible detainer and ordering him to surrender possession by October 24 or face a writ of restitution.

¶16 Brandenburg appeals,³ and we have jurisdiction under A.R.S. § 12-2101(A)(1).

STANDARD OF REVIEW

¶17 We review the superior court's conclusions of law de novo. *Giles v. Hill Lewis Marce*, 195 Ariz. 358, 359, ¶ 2, 988 P.2d 143, 144 (App. 1999) (citation omitted). But when we review a judgment on the pleadings in favor of a plaintiff, all material allegations of the opposing party's pleadings are assumed to be true. *Food for Health Co., Inc. v. 3839 Joint Venture*, 129 Ariz. 103, 106, 628 P.2d 986, 989 (App. 1981) (citation omitted). And "all allegations of the moving party which have been denied are taken as false so that a motion for judgment on the pleadings is only granted if the moving party is clearly entitled to judgment." *Id.*

DISCUSSION

¶18 "Forcible entry and detainer is a statutory proceeding whose object is to provide a summary, speedy and adequate means for obtaining possession of premises by one entitled to actual possession." *Colonial Tri-City Ltd. P'ship v. Ben Franklin*

³ Brandenburg also sought a stay pending appeal or an opportunity to post bond before the writ of restitution issued. The court held a hearing and set a \$10,000 bond.

Stores, Inc., 179 Ariz. 428, 433, 880 P.2d 648, 653 (App. 1993). In such a proceeding, the only issue before the court is the right of actual possession -- the court may not inquire into the merits of title. A.R.S. § 12-1177(A); *Curtis v. Morris*, 186 Ariz. 534, 534, 925 P.2d 259, 259 (1996).

¶19 As evidence of its right to actual possession, Deutsche Bank provided the superior court with a copy of the executed, acknowledged Trustee's Deed as well as a copy of the written notice to Brandenburg to vacate the Property. The complaint alleged that Brandenburg failed to vacate the Property and was therefore guilty of forcible detainer. Under A.R.S. § 33-811(B), a trustee's deed raises the presumption of compliance with the requirements of the deed of trust "relating to the exercise of the power of sale and the sale of the trust property."⁴ Brandenburg presented no evidence to rebut this presumption of compliance or any other evidence that showed Deutsche Bank did not have a right to actual possession. Brandenburg's general denial based on the purported vagueness of the complaint is insufficient to avoid judgment on the pleadings because the complaint adequately alleged the facts necessary to an FED claim. See *Walker v. Estavillo*, 73 Ariz. 211, 215, 240

⁴ Deutsche Bank therefore had standing to seek possession as the holder of the Trustee's Deed, which it obtained after purchasing the Property at the trustee's sale.

P.2d 173, 176 (1952); *Food for Health*, 129 Ariz. at 106, 628 P.2d at 989 (App. 1981).

¶10 Brandeburg argued to the superior court that the Trustee's Deed was invalid because Deutsche Bank was not a bona fide purchaser for value due to defects and irregularities in the recordings, including "possibly fraudulent documents." On appeal, he makes these same assertions in arguing that the superior court's proceedings violated his "right to due process."⁵ These issues, however, relate to the merits of Deutsche Bank's title, and the superior court's decision to not address them in the FED action was proper. See *Morris*, 186 Ariz. at 534, 925 P.2d at 259. Further, based on the unrebutted allegations in the complaint, no triable issue existed, and Deutsche Bank was entitled to judgment on the pleadings. See RPEA 11(d). Accordingly, we reject Brandeburg's argument that he was entitled to a jury trial.⁶

⁵ In violation of our procedural rules, Brandeburg also fails to cite any controlling authority to support his contention that the FED proceeding violated his due process rights. See ARCAP 13(a)(6).

⁶ Brandeburg argues that Deutsche Bank filed this action in bad faith under RPEA 4(a) and (b) and improperly verified the complaint under RPEA 5(b)(8). He also argues that because the notice to vacate referred to an entity other than Deutsche Bank, the notice was rendered invalid under RPEA 5(b)(1), which requires the "legal name of the party claiming entitlement to possession." These arguments are outside the scope of FED actions, they are not supported by controlling authority and Brandeburg does not include appropriate citations to the record.

¶11 Finally, Brandenburg asserts that it was reversible error for the court to remark in its final judgment that Brandenburg was properly served by Deutsche Banks's posting of the requisite legal papers at his front door and subsequent certified mailing. The court's remark was a mistake because the record reflects that Brandenburg was served pursuant to Ariz. R. Civ. P. 4.1(d) by service upon an occupant of suitable age and discretion. This court suspended the appeal and revested jurisdiction in the superior court to consider Deutsche Bank's motion to correct this clerical mistake pursuant to Ariz. R. Civ. P. 60(a). The superior court did so. We decline to reverse on this basis.

We therefore decline to address these arguments. See ARCAP 13(a)(6). We note that if the notice to vacate did improperly refer to an entity other than Deutsche Bank, Brandenburg could not reasonably have been confused about who was seeking possession of the Property -- Deutsche Bank is named as the grantee in the Trustee's Deed and is the named plaintiff in this FED action.

CONCLUSION

¶12 The judgment is affirmed. Because he is not the prevailing party, Brandenburg's request for attorney's fees on appeal is denied. Deutsche Bank requests its appellate fees pursuant to ARCAP 25. This appeal merits such an award contingent upon Deutsche Bank's compliance with ARCAP 21.

/s/

PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Judge

/s/

JON W. THOMPSON, Judge