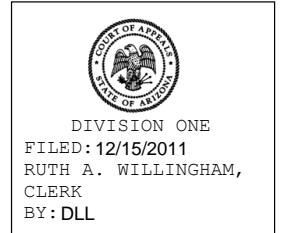


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



FEDERAL NATIONAL MORTGAGE ) 1 CA-CV 11-0095  
ASSOCIATION, )  
 ) DEPARTMENT A  
 )  
Plaintiff/Appellee, )  
 )  
 ) **MEMORANDUM DECISION**  
v. )  
 )  
 )  
RANDALL C. SEARS, ) Not for Publication -  
 ) (Rule 28, Arizona Rules  
Defendant/Appellant. ) of Civil Appellate Procedure)  
 )  
 )  
 )  
 )  
 )

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Appeal from the Superior Court in Coconino County

Cause No. S0300CV2010-00958

The Honorable Mark R. Moran, Judge

**AFFIRMED**

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Tiffany & Bosco, P.A. Phoenix  
By Mark S. Bosco  
Leonard J. McDonald  
Paul D. Cardon  
Attorneys for Plaintiff/Appellee

Randall C. Sears Flagstaff  
Defendant/Appellant, *In Propria Persona*

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**B A R K E R**, Judge

¶1 Randall Sears, Appellant, appeals from the trial court's ruling finding him guilty of forcible entry and detainer and ordering him to vacate the residence. For the following reasons, we affirm.

***Facts and Procedural History***

¶2 Appellant leased one bedroom of a house from Mr. Osuch ("Landlord") under a month-to-month rental agreement beginning August 1, 2009. In August 2010, Landlord was involved in foreclosure action on the house - he had been pursuing a loan modification since September 2009. In September 2010, Landlord and Appellant entered a 16-month rental agreement modifying the terms of Appellant's existing month-to-month lease. The modification detailed that Appellant's rent would be lowered from \$465 to \$425 per month; however, it did not contain notice that Landlord was currently involved in foreclosure action as required by Arizona Revised Statutes ("A.R.S") section 33-1331 (Supp. 2011). Landlord testified that he entered the lease modifications to convince the bank that he had a steady income in support of his request for a loan modification. Ultimately, Landlord's efforts were unsuccessful. On October 7, 2010, Federal National Mortgage Association, Appellee, purchased the house in a trustee's sale.

¶3 On October 18, 2010, Appellee sent Landlord notice of the trustee's sale and directed him to advise Appellee of his

occupancy status by October 25, or a lawsuit would be filed. Landlord and the tenants, however, continued to reside in the residence and Landlord continued to collect rent. On November 4, 2010, Appellee filed a complaint to evict Landlord and all tenants. On November 16, the court held a hearing on the matter. Landlord and Appellant were present; Landlord represented himself and Appellant was given an opportunity to present argument. At the hearing, Appellee presented statements that it had provided the tenants currently leasing the property "until January 17, 2011 to vacate the property with no additional costs or attorney fees." The court heard argument from all parties and took the matter under advisement.

¶4 The court issued a ruling finding that Landlord and Appellant were guilty of forcible entry and detainer, granting Appellee's petition, and ordering Landlord, Appellant, and all Landlord's other tenants to vacate the residence. Appellant filed a timely notice of appeal. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 12-2101(B) (2003).

#### ***Discussion***

¶5 Appellant seeks reversal of the trial court's ruling holding that he is guilty of forcible entry and detainer and

ordering him to vacate the premises.<sup>1</sup> Appellant argues the court improperly concluded he was not a bona fide tenant protected by the Protecting Tenants at Foreclosure Act of 2009, and that as a bona fide tenant he is entitled to retain possession for the remainder of the lease term. Appellant also challenges Appellee's use of "John Doe" to identify Appellant and the other tenants rather than using their names; he argues this deprived him of proper notice of the trustee's sale.<sup>2</sup>

¶16 The Protecting Tenants at Foreclosure Act of 2009 provides that a successor in interest takes interest in a foreclosed-on property subject to the rights of any bona fide tenant. Protecting Tenants at Foreclosure Act of 2009, Pub. L.

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<sup>1</sup> Appellee's answering brief argues that Appellant's claims are deficient under Arizona Rule of Civil Appellate Procedure 13. Rule 13 requires the appellant's brief to include "[a] statement of facts relevant to the issues presented for review, with appropriate references to the record" and "[a]n argument which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." ARCAP 13(a)(4), (6). As Appellee notes, Appellant's brief contains neither; however, because we are inclined to decide cases on their merits, we review the record and consider Appellant's claim that he should receive the protections of a bona fide tenant. See *Clemens v. Clark*, 101 Ariz. 413, 414, 420 P.2d 284, 285 (1966).

<sup>2</sup> Appellant's claim that he "was never served proper notice . . . as to the pending foreclosure," is an oblique statement with no factual or legal support; we will not consider it. See *in re U.S. Currency in Amount of \$26,980*, 199 Ariz. 291, 299, ¶ 28, 18 P.3d 85, 93 (App. 2000) (refusing to consider bald assertion offered without elaboration or citation to any legal authority).

No. 111-22, §§ 701-04, 123 Stat. 1660-62 (2009) (hereinafter "Protecting Tenants Act").<sup>3</sup> If the purchaser does not plan to occupy the property as a primary residence, the purchaser must honor "any bona fide lease entered into before the notice of foreclosure to occupy the premises until the end of the remaining term of the lease." Protecting Tenants Act § 702(a)(2)(A). To be considered bona fide, a lease or tenancy must meet the following requirements:

- (1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant;
- (2) the lease or tenancy was the result of an arms-length transaction; and
- (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property  
. . . .

Protecting Tenants Act § 702(b)(1)-(3).<sup>4</sup>

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<sup>3</sup> Apparently, the pertinent language of the Protecting Tenants at Foreclosure Act was not codified, however, the language of the Public Law as enacted can be found in the Statutes at Large. See Pub. L. No. 111-22, 123 Stat. 1660-62. Pursuant to amendment by Public Law 111-203, the requirements set out in §§ 701 to 703 of the Act will be in effect until December 31, 2014. See Protecting Tenants at Foreclosure Extension and Clarification, Pub. L. No. 111-203, § 1484, 124 Stat. 2204 (2010). At any rate, neither party disputes that the provisions of the Act were in effect during the events at issue.

<sup>4</sup> The court also considered definitions of bona fide and arms-length transaction as defined by Black's Law Dictionary. See *Black's Law Dictionary* 177, 109 (6<sup>th</sup> ed. 1990) (defining bona fide as "in or with good faith; honestly, openly and sincerely; without deceit or fraud"; and arms-length transaction as "a transaction negotiated by unrelated parties, each acting in his or her self interest; the basis for a fair market value

¶17 Appellant did not provide this court with a transcript of the proceedings below; accordingly, in our review we assume the trial court's findings and conclusions are supported by the record. See *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995) ("A party is responsible for making certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised on appeal."); *In re Mustonen's Estate*, 130 Ariz. 283, 284, 635 P.2d 876, 877 (App. 1981) ("Being unable to review the evidence, we must presume that it supported the trial court's finding.").

¶18 In addition to the facts outlined above, the trial court found that in August 2010 Appellant was aware that Landlord was "going through a foreclosure action on the residence," and Appellant was "aware that there was a foreclosure action pending when [he] signed the lease[] in . . . September, 2010." Thus, the court found that Appellant did not satisfy the requirements of § 702(b)(2): the lease entered into by Appellant was not the product of an arms-length transaction. Thus, there was no bona fide lease. The court noted peculiarities of the lease modifications at issue: (1) a 16-month lease term is "certainly not normal" in the rental market, (2) one of the lessees was also Landlord's agent, (3) the

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determination. A transaction in good faith in the ordinary course of business by parties with independent interests").

modifications were entered at odd times (before one of the tenant's lease terms was up for renewal), (4) both Appellant and the other tenant were aware of the foreclosure action prior to entering the lease modifications, and (5) the fact that Landlord lived in the residence with the tenants. The court concluded that Landlord had agreed to the unusual terms of the leases "not to maximize the market value of the rental, but to achieve a modification of the existing loan." Accordingly, the court found by clear and convincing evidence that Appellant's modification was not an arms-length transaction.

¶19 We do not reweigh the facts. *Forino v. Ariz. Dep't of Transp.*, 191 Ariz. 77, 81, 952 P.2d 315, 319 (App. 1997). Instead we only examine whether sufficient facts exist in the record to support the court's determination. *Id.* Here, the court did not abuse its discretion in holding that Appellant did not qualify as a bona fide tenant under § 702(b) and his tenancy was thus limited to the 90-day period following notice of foreclosure provided by Appellee on October 18, 2010.

***Conclusion***

¶10 For the reasons stated above, we affirm.

/s/

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DANIEL A. BARKER, Judge

CONCURRING:

/s/

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ANN A. SCOTT TIMMER, Presiding Judge

/s/

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PATRICK IRVINE, Judge