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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

U.S. BANK NATIONAL ASSOCIATION, as trustee for the C-Bass Mortgage Loan Asset-Backed Certificates, Series 2007-RP1, Plaintiff/Appellee, v. DAVID DUNN and GINGER DUNN, husband and wife, Defendants/Appellants.	2 CA-CV 2012-0056 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20103056

Honorable Richard E. Gordon, Judge

AFFIRMED

David Dunn and Ginger Dunn
Arivaca
In Propria Personae

Houser & Allison
By Charles Tony Piccuta
Irvine, California
Attorneys for Plaintiff/Appellee

E C K E R S T R O M, Presiding Judge.

¶1 Appellants David and Ginger Dunn appeal from the judgment finding them guilty of forcible detainer, ordering them to vacate their former residence and granting the right of possession in the residence to appellee U.S. Bank.[1] The Dunns argue the trial court erred when it allowed the substitution of U.S. Bank for Aurora Loan Services, Inc., as the plaintiff/real party in interest.[2] But because the Dunns failed to object to the substitution below, we affirm the judgment.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the judgment. *Walkeng Mining Co. v. Covey*, 88 Ariz. 80, 82, 352 P.2d 768, 769 (1960). U.S. Bank purchased the Dunns' former residence in March 2010 at a trustee's sale. Shortly thereafter, Aurora Loan Services initiated eviction efforts by serving the Dunns with a notice to vacate the premises and a demand for possession. The Dunns did not vacate the property, and Aurora filed a complaint in forcible detainer against them. The Dunns did not file an answer to the complaint, and the matter proceeded to trial.

¶3 At trial, Aurora moved to substitute U.S. Bank as the plaintiff and real party in interest pursuant to Rule 17(a), Ariz. R. Civ. P. The trial court asked David Dunn if he had "an objection to substituting U.S. Bank for Aurora Loan Services as group party in interests," to which he replied, "No." The court then stated it was granting the motion

[1]The full name of the appellee as set forth on the trustee's deed is "U.S. Bank National Association, as trustee for the C-Bass Mortgage Loan Asset-Backed Certificates, Series 2007-RP1."

[2]The judgment and signed minute entry order appealed from do not fully reflect this substitution; in their captions, they list only the former plaintiff, Aurora Loan Services.

and substituting U.S. Bank as plaintiff, "as there is no objection." At the end of trial, the court found that U.S. Bank had the right to possess the property, that service of the summons and complaint had been proper, and that the Dunns had received the requisite notice to vacate. The court entered judgment for possession in favor of U.S. Bank and ordered the Dunns to pay attorney fees and costs of $2,775.48. The Dunns were served with a writ of restitution at the end of May 2010 and later vacated the property. We have jurisdiction over their appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 12-1182(A), and 12-2101(A)(1). *See Morgan v. Cont'l Mortg. Investors*, 16 Ariz. App. 86, 91, 491 P.2d 475, 480 (1971).

Discussion

¶4 The Dunns argue the trial court erred when it applied the Arizona Rules of Civil Procedure instead of the Rules of Procedure for Eviction Actions (RPEA) and allowed Aurora to substitute U.S. Bank as the plaintiff. The Dunns are correct that forcible detainer actions are governed exclusively by A.R.S. §§ 12-1171 through 12-1183 and the RPEA. *See* Ariz. R. P. Evic. Actions 1. As of January 2009, the rules of civil procedure became inapplicable to forcible detainer actions except as expressly provided in the RPEA. As Rule 1 of the RPEA states: "The Arizona Rules of Civil Procedure apply only when incorporated by reference in these rules, except that Rule 80(i) shall apply in all courts and Rule 42(f) shall apply in the superior courts."[3]

[3]Rule 80(i), which pertains to unsworn declarations, and Rule 42(f), concerning changes of judge, are not relevant to this case.

¶5 Rule 9 of the RPEA allows parties to make various motions at trial, both orally and in writing, including motions to amend and "[o]ther appropriate motions." But Rule 17(a), Ariz. R. Civ. P., which allows substitution of the real party in interest as the plaintiff in order to avoid dismissal of an ordinary civil action, is referred to neither in Rule 9 nor elsewhere in the RPEA. And, although Rule 5(a), Ariz. R. P. Evic. Actions, directs courts to "liberally grant leave to amend the complaint and summons to reflect the true names of defendants," no rule in the RPEA expressly permits the substitution of plaintiffs. Section 12-1173, which is in part titled "substitution of parties," permits a landlord to prosecute an action commenced by his tenant in certain circumstances. § 12-1173(4). Otherwise, the statute is silent on the issue of substituting a plaintiff in a pending action. Thus, neither the relevant statutes nor the RPEA allow the substitution of a plaintiff as was done here.[4]

¶6 However, Dunn did not object to the substitution of U.S. Bank as the plaintiff below. And, when a party fails to object to alleged trial error in a noncriminal case, we generally do not review the issue on appeal, even for fundamental error. *See Williams v. Thude*, 188 Ariz. 257, 260, 934 P.2d 1349, 1352 (1997) ("We recognize that the 'fundamental error' doctrine should be used sparingly, if at all, in civil cases."); *see*

[4]We note that under Rules 4(a) and 5(b)(8), Ariz. R. P. Evic. Actions, a plaintiff's counsel should undertake a "reasonably diligent inquiry" to discover the owner of the property before filing a verified complaint and must exercise "reasonable care" to ensure the complaint is well grounded and accurate. Here, the deed of trust upon which the plaintiff intended to prove its right to possess the property clearly states U.S. Bank was the owner. Thus, had counsel undertaken a reasonably diligent inquiry and used the reasonable care required by the rules, the last-minute substitution of U.S. Bank as plaintiff would have been unnecessary.

also Bradshaw v. State Farm Mut. Auto. Ins. Co., 157 Ariz. 411, 420, 758 P.2d 1313, 1322 (1988) (fundamental error doctrine in civil cases "may be limited" to deprivation of constitutional right). Dunn has neither argued nor provided any authority for the proposition that fundamental error review would apply to an eviction action. *Cf. Dawson v. Withycombe*, 216 Ariz. 84, n.20, 163 P.3d 1034, 1056 n.20 (App. 2007) (declining to assess issue under fundamental error review when appellant "failed to provide any substantive argument in support of applying fundamental error review to this case" and noting such review rarely used in civil cases).

¶7 Even were we to review the claim for fundamental error, we would not find prejudice. Eviction actions are meant to "provide a summary, speedy and adequate means for obtaining possession of premises by one entitled to actual possession." *Heywood v. Ziol*, 91 Ariz. 309, 311, 372 P.2d 200, 201 (1962). Thus, no issues about title or ownership may be decided; the only issue to be determined in an eviction action is the right of possession. § 12-1177(A); *Curtis v. Morris*, 186 Ariz. 534, 534, 925 P.2d 259, 259 (1996). As to that sole issue, there was conclusive evidence presented in the form of the trustee's deed that U.S. Bank had a superior right of possession over the Dunns. *See* A.R.S. §§ 12-1173.01(A)(2), 33-811(B); *see also Andreola v. Ariz. Bank*, 26 Ariz. App. 556, 557, 550 P.2d 110, 111 (1976) (in forcible detainer action "the merits of title may not be litigated, although the fact of title may be proved as a matter incidental to showing right of possession"). The substitution of U.S. Bank for Aurora was improper. But even if we accept the Dunns' argument that U.S. Bank "should have been required to re-file under the proper Plaintiff names in order to follow the pr[e]scribed procedures for a

forcible detainer trial," the Dunns have not contended the outcome would have been any different. Accordingly, even if the substitution of U.S. Bank was fundamental error, the Dunns have not shown they suffered prejudice.

¶8 The Dunns also argue they never received a written demand for possession from either U.S. Bank or Aurora before the complaint was filed, in violation of the RPEA. Although the trial court found the Dunns had received the proper notice, the documentary evidence in the record suggests that the Dunns did not actually receive the notice to vacate and that plaintiff's counsel did not exercise due diligence in ensuring proper service under Rule 4(a), Ariz. R. P. Evic. Actions. But the Dunns' general complaints below that they lacked notice of the foreclosure and trustee's sale were aimed at challenging the validity of the trustee's sale and not the sufficiency of service in this forcible detainer action. Thus, they were insufficient to preserve the argument they now present on appeal. "[T]he general law in Arizona [is] that a party must timely present his [or her] legal theories to the trial court so as to give the trial court an opportunity to rule properly." *Payne v. Payne*, 12 Ariz. App. 434, 435, 471 P.2d 319, 320 (1970). A party therefore waives on appeal any argument not presented properly in the lower court. *Schoenfelder v. Ariz. Bank*, 165 Ariz. 79, 88, 796 P.2d 881, 890 (1990); *Crowe v. Hickman's Egg Ranch, Inc.*, 202 Ariz. 113, ¶ 16, 41 P.3d 651, 654 (App. 2002). Moreover, "[p]arties who choose to represent themselves 'are entitled to no more consideration than if they had been represented by counsel.'" *In re Marriage of Williams*, 219 Ariz. 546, ¶ 13, 200 P.3d 1043, 1046 (App. 2008), *quoting Smith v. Rabb*, 95 Ariz. 49, 53, 386 P.2d 649, 652 (1963).

¶9 The Dunns further assert that "Plaintiffs[] had no authorization or legal right to remove or take possession of the personal property" that was in the residence at the time the Dunns vacated. But not only have they made this argument for the first time on appeal, it does not relate to the issue of possession or any error in the court proceedings below; therefore, we do not address it. *See Cook v. Orkin Exterminating Co*., 227 Ariz. 331, ¶ 21, 258 P.3d 149, 153-54 (App. 2011) (we generally do not address arguments raised for first time on appeal); *see also* § 12-1177(A) (right of possession sole issue in forcible detainer action).

¶10 Finally, the Dunns request the attorney fees they incurred through previous counsel who "represented the[m] . . . in this action until [they] could no longer afford the fees in the amount of $2500.00." The Dunns also seek "remuneration in an appropriate amount" for their own "time, costs, fees and effort expended to make this appeal." We deny these requests on the following grounds. Self-represented parties cannot recover attorney fees, *Hunt Inv. Co. v. Eliot*, 154 Ariz. 357, 362, 742 P.2d 858, 863 (App. 1987), and they have "no right to recover for [their] time spent preparing for litigation." *Lisa v. Strom*, 183 Ariz. 415, 419, 904 P.2d 1239, 1243 (App. 1995). Moreover, the Dunns have cited no statutory or contractual basis for an award of fees or costs, *see Roubos v. Miller*, 214 Ariz. 416, ¶ 21, 153 P.3d 1045, 1049 (2007); *Ezell v. Quon*, 224 Ariz. 532, ¶¶ 29-31, 233 P.3d 645, 652 (App. 2010), and we can find no basis for such an award because they have not prevailed in this appeal. Their request is therefore denied.

Disposition

¶11 The judgment is affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge