IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

BANK OF NEW YORK MELLON, FKA THE BANK OF NEW YORK, AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE ALTERNATIVE LOAN TRUST 2006-OA17, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2006-OA17,
Plaintiff/Appellee,

v.

IAN ORNSTEIN,
Defendant/Appellant.

No. 2 CA-CV 2016-0062
Filed January 18, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20153644
The Honorable Catherine M. Woods, Judge

AFFIRMED

COUNSEL

Tiffany & Bosco, P.A., Phoenix
By Leonard J. McDonald, Jr.
Counsel for Plaintiff/Appellee

Ian Ornstein, Tucson
In Propria Persona

MEMORANDUM DECISION

Judge Vásquez authored the decision of the Court, in which Presiding Judge Howard and Chief Judge Eckerstrom concurred.

V Á S Q U E Z, Judge:

¶1 In this action for forcible entry and detainer (FED), Ian Ornstein appeals from the trial court's judgment in favor of the Bank of New York Mellon. On appeal, Ornstein raises several arguments challenging the underlying trustee's sale of his former property. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the trial court's judgment. *Lewis v. Pleasant Country, Ltd.*, 173 Ariz. 186, 188, 840 P.2d 1051, 1053 (App. 1992). In April 2015, the Bank purchased Ornstein's property through a trustee's sale under a deed of trust. Four months later, the Bank initiated this FED action to evict Ornstein, and it subsequently filed a motion for a judgment on the pleadings. In his response, Ornstein disputed "the fact of title" and noted that the parties were litigating the issue of title in a separate case in Maricopa County. The trial court continued this action until resolution of the Maricopa County case.

¶3 In February 2016, the trial court held a trial in the FED action. It entered a judgment in favor of the Bank after taking judicial notice of the fact that, in the Maricopa County case, the court had dismissed Ornstein's complaint. This appeal followed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

Discussion

¶4 As a preliminary matter, even though Ornstein is self represented, he is held to the same standards as a "qualified member of the bar." *Copper State Bank v. Saggio*, 139 Ariz. 438, 441, 679 P.2d 84, 87 (App. 1983). A party proceeding in propria persona "is entitled to no more consideration than if he had been represented by counsel." *Id.* An appellant is required to "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); *see also* Ariz. R. Civ. App. P. 11(c). Here, Ornstein apparently ordered transcripts, but he did not file them with this court until he filed his reply brief. *See* Ariz. R. Civ. App. P. 11.1(d) ("Delivery and Filing of Transcripts"). Consequently, the Bank did not have an opportunity to review the transcripts before filing its answering brief. We therefore do not consider the transcripts on appeal. *Cf. Dawson v. Withycombe*, 216 Ariz. 84, ¶ 91, 163 P.3d 1034, 1061 (App. 2007) ("We will not consider arguments made for the first time in a reply brief."). In the absence of properly filed transcripts, we must presume the record supports the trial court's judgment. *Kohler v. Kohler*, 211 Ariz. 106, n.1, 118 P.3d 621, 623 n.1 (App. 2005).

¶5 Ornstein raises nine issues attacking the validity of the underlying trustee's sale. However, his opportunity to challenge the underlying trustee's sale had passed before this FED action began. Section 33-811(C), A.R.S., provides: "The trustor . . . shall waive all defenses and objections to the sale not raised in an action that results in the issuance of [an injunction against the sale]." Ornstein cannot challenge the validity of the trustee's sale now that the sale is complete.[1] *See BT Capital, LLC v. TD Serv. Co. of Ariz.*, 229 Ariz. 299, ¶ 10, 275 P.3d 598, 600 (2012) (under § 33-811(C), "a person who has defenses or objections to a properly noticed trustee's sale has one avenue for challenging the sale: filing for injunctive relief").

[1] Ornstein apparently sought injunctive relief before the trustee's sale in a separate action before the Pima County Superior Court, but the court denied relief.

¶6 Moreover, even assuming Ornstein's arguments were not waived pursuant to § 33-811(C), they are not proper issues in an FED action.[2] An FED action is a summary proceeding created by statute to provide a speedy remedy to gain actual possession of a property. *Mason v. Cansino*, 195 Ariz. 465, ¶ 5, 990 P.2d 666, 667 (App. 1999). In such an action, "the only issue shall be the right of actual possession and the merits of title shall not be inquired into." A.R.S. § 12-1177(A); *accord Curtis v. Morris*, 186 Ariz. 534, 534-35, 925 P.2d 259, 259-60 (1996). However, "the fact of title may be proved as a matter incidental to showing right of possession by an owner." *Curtis*, 186 Ariz. at 535, 925 P.2d at 260, *quoting Andreola v. Ariz. Bank*, 26 Ariz. App. 556, 557, 550 P.2d 110, 111 (1976); *see Taylor v. Stanford*, 100 Ariz. 346, 350, 414 P.2d 727, 730 (1966) (trial court properly considers deed as fact of title).

¶7 As we understand them, Ornstein's arguments—specifically, his claims of breach of contract, statute of limitations, breach of the covenant of good faith and fair dealing, intentional infliction of emotional distress, breach of fiduciary duty, and other statutory violations—involve the merits of title. *Cf. Phx.-Sunflower Indus., Inc. v. Hughes*, 105 Ariz. 334, 337, 464 P.2d 617, 620 (1970) (possible legal or equitable defenses that would defeat forfeiture bear on merits, not fact of title). They are therefore not proper issues in an FED action. *See Curtis,* 186 Ariz. at 535, 925 P.2d at 260. To the extent Ornstein properly challenges "the fact of title," *id.*, *quoting Andreola*, 26 Ariz. App. at 557, 550 P.2d at 111, the Bank provided a trustee's deed for the property, which "raise[s] the presumption of compliance with requirements of the deed of trust," § 33-811(B); *see* A.R.S. § 12-1173.01(A)(1) (providing for forcible detainer following foreclosure of deed of trust). And any inquiry into the merits of the

[2]In addition, because the trial transcripts are not properly before us, and because these arguments were not clearly raised in the filings below, it is unclear whether these arguments were brought to the trial court's attention. "Matters not presented to the trial court cannot for the first time be raised on appeal." *Brown Wholesale Elec. Co. v. Safeco Ins. Co. of Am.*, 135 Ariz. 154, 158, 659 P.2d 1299, 1303 (App. 1982).

deed would have been improper. *See Taylor*, 100 Ariz. at 350, 414 P.2d at 730. We therefore see no reason to disturb the trial court's judgment.[3] *See Kohler*, 211 Ariz. 106, n.1, 118 P.3d at 623 n.1.

Disposition

¶8 For the foregoing reasons, we affirm the trial court's judgment.

[3]A judgment in an FED action does not necessarily bar a subsequent quiet-title lawsuit. *Olds Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 205, 167 P.2d 394, 398 (1946).