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.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

HOMEQ, LLC, their successors and assigns, Plaintiff/Appellee, v. JON R. DEL TURCO, Defendant/Appellant.	2 CA-CV 2010-0015
DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee, Plaintiff/Appellee, v. JON R. DEL TURCO, Defendant/Appellant.	2 CA-CV 2010-0016 (Consolidated) DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20098770

Honorable Roger Duncan, Judge Pro Tempore
Honorable Michael O. Miller, Judge

APPEAL DISMISSED IN PART;
JUDGMENT VACATED

Houser & Allison, APC
By Robert Norman — Irvine, California
Attorneys for Plaintiffs/Appellees

Jon R. Del Turco — Tucson
In Propria Persona

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

¶1 In this procedurally anomalous eviction action, the trial court entered judgment against appellant Jon Del Turco. The action was initiated by a complaint filed by the putative business entity HomEq, LLC. At trial, the court substituted appellee Deutsche Bank National Trust Company as plaintiff. Under the facts of this case, we hold that the complaint was a nullity not subject to amendment or substitution and that the trial court lacked jurisdiction to enter its judgment. We therefore vacate the court's judgment. And, for the reasons set forth below, we do not address the earlier judgment that has been rendered moot by subsequent order.

Factual and Procedural Background

¶2 Del Turco lived in a house that was foreclosed upon and sold in October 2009. On November 10, "HOMEQ, LLC, their [sic] successors and assigns" (hereinafter "HomEq"), filed a forcible entry and detainer complaint against him. Although Del Turco filed a pro se answer to the complaint, the judge presiding at the initial appearance, Judge Duncan, overlooked this fact and entered a default judgment against Del Turco on November 20. Shortly thereafter, on November 24, Judge Duncan vacated the judgment

and referred the matter to Judge Miller for a contested forcible entry and detainer hearing.[1] A bench trial was then set for December 4.

¶3 In its complaint, HomEq had alleged it was authorized to do business in Arizona, it owned the real property occupied by Del Turco, and it had made a written demand on November 4 that he surrender possession. In his answer, Del Turco admitted he had received a written demand from HomEq, but he asserted a defense that HomEq could not maintain the suit pursuant to A.R.S. § 10-1502 because it was not authorized to do business in this state. He also filed a separate motion to dismiss the action on this ground.

¶4 In his answer Del Turco had stated he was without sufficient knowledge to respond to HomEq's allegation of ownership. Two days before the trial, he filed a "memorandum to supplement the record" in which he claimed HomEq did not own the property in question. Attached to the memorandum was a copy of a trustee's deed showing the property had been conveyed by a title insurance company to Deutsche Bank on November 17. In the memorandum, Del Turco also summarized his research into HomEq's legal status and alleged that HomEq "did not exist as a corporate entity in *any* U.S. jurisdiction" as of the date of this transfer. He concluded: "(1) HomEq, LLC is a

[1]Although Judge Duncan's November 24 minute entry order specifically stated "the above order granting a Writ of Restitution is vacated and set aside," the "order" referred to was the "order signed" on November 20—that is, the signed "judgment" filed on November 20, which provided that the writ of restitution would issue "on or after November 26, 2009." Like Judge Miller below, we view this minute entry order as vacating the judgment itself, notwithstanding the imprecise terminology. And we agree with Judge Miller's conclusion that this order setting aside the judgment rendered moot Del Turco's subsequent appeal from it.

fictitious entity that does not own [the] property; (2) Deutsche Bank . . . could not possibly be a 'successor' or 'assignee' of HomEq, LLC—a fictitious entity; and (3) Deutsche Bank . . . cannot maintain an action in this Court pursuant to A.R.S. § 10-1502," as it, too, was not authorized to conduct business in the state.

¶5 At the December 4 trial, which the self-represented Del Turco did not attend, counsel for HomEq, Rick Sherman, conceded that HomEq's allegation that it had owned the property was erroneous. Sherman did not contest Del Turco's allegations regarding HomEq's legal status, and he did not allege that Deutsche Bank was a successor or assignee of HomEq. Nevertheless, Sherman moved to substitute Deutsche Bank as the real party in interest pursuant to Rule 17(a), Ariz. R. Civ. P.

¶6 Although Mr. Sherman referred to Deutsche Bank as his "client" at times throughout the trial and submitted a trial memorandum apparently requesting substitution on its behalf, he did not formally enter a notice of appearance as counsel for Deutsche Bank, either orally or in writing. In response to the trial court's question about the identity of his client, Sherman stated, "I get these cases through a California law firm . . . that has direct contact with the client," and he clarified that he had received a letter of retention on behalf of HomEq. He later agreed with the court's statement that "HomEq has no and has never had any title in the property, and is not moving on its own or even as a personal representative [i]n some other statutory capacity." He likewise appeared to agree with the court's assessment that he had previously been representing the "wrong client."

¶7 The trial court initially declined to rule on the motion out of concern that Del Turco did not have an opportunity to respond to it. Yet, after a two-hour recess and several unsuccessful attempts to contact Del Turco, the court essentially determined Del Turco had waived opposition to the substitution by his failure to appear and granted the motion, which it construed as being made under Rules 15 and 17, Ariz. R. Civ. P. The caption was subsequently amended, removing HomEq as the plaintiff and replacing it with Deutsche Bank.[2]

¶8 The trial court then received evidence establishing that Deutsche Bank was authorized to transact business in Arizona and had obtained ownership of the property on November 17. The court found Del Turco had voluntarily agreed to vacate the subject property by November 18, as he had alleged in his answer. The court then denied Del Turco's motion to dismiss, entered judgment in favor of Deutsche Bank, and granted attorney fees and costs. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21, 12-1182, and 12-2101(B). *See Morgan v. Cont'l Mortg. Investors*, 16 Ariz. App. 86, 91, 491 P.2d 475, 480 (1971).

Discussion

¶9 Although Del Turco raises a number of issues on appeal, we need decide only one: whether the trial court had jurisdiction to enter judgment in favor of Deutsche Bank. Del Turco argues HomEq's complaint was a nullity that could not be cured by substitution or amendment, and the trial court consequently lacked jurisdiction to render

[2]Although Deutsche Bank did not expressly move the trial court to do so, we understand the court's ruling as implicitly amending the allegations in HomEq's complaint.

judgment in this matter. Deutsche Bank contends Del Turco's argument that the complaint was void *ab initio* was waived due to his failure to precisely state it below.

¶10 We believe the issue was adequately raised by his argument that HomEq—the only party appearing in the action before trial—was a nonexistent entity that did not own the property in question. In any event, the appellate waiver rule is procedural rather than jurisdictional. *Odom v. Farmers Ins. Co. of Ariz.*, 216 Ariz. 530, ¶ 18, 169 P.3d 120, 125 (App. 2007). Thus, even if we were to find a waiver, we would exercise our discretion to entertain Del Turco's jurisdictional argument on appeal given the irregularity of the proceedings below.

¶11 "Jurisdiction is the power of a court to hear and determine a controversy." *Schoenberger v. Bd. of Adjustment of Phoenix*, 124 Ariz. 528, 530, 606 P.2d 18, 20 (1980). The superior court's jurisdiction is conferred by our state constitution and statutes, *id.*, specifically article VI, § 14 of the Arizona Constitution and A.R.S. §§ 12-121 through 12-136. *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, ¶ 13, 218 P.3d 1045, 1052 (App. 2009). "There are three kinds of jurisdiction: (a) [o]f the subject matter; (b) of the person; and (c) to render a particular judgment given." *Sil-Flo Corp. v. Bowen*, 98 Ariz. 77, 81, 402 P.2d 22, 25 (1965); *accord Duncan v. Truman*, 74 Ariz. 328, 332, 248 P.2d 879, 882 (1952). "Subject matter jurisdiction is 'the power to hear and determine cases of the general class to which the particular proceedings belong . . . .'" *In re Marriage of Dorman*, 198 Ariz. 298, ¶ 7, 9 P.3d 329, 332 (App. 2000), *quoting Estes v. Superior Court*, 137 Ariz. 515, 517, 672 P.2d 180, 182 (1983) (omission in *Dorman*).

Our constitution expressly grants the superior court subject matter jurisdiction over forcible entry and detainer actions. Ariz. Const. art. VI, § 14(5).

¶12 Thus, the question here is whether the trial court had the authority to render the particular judgment in this case. A court does not acquire complete jurisdiction to hear and determine a case unless the court "has obtained through due process, prescribed by law, jurisdiction over both subject matter and the parties, and the power to render the particular judgment that was rendered." *Schuster v. Schuster*, 75 Ariz. 20, 23, 251 P.2d 631, 633 (1953). "'The test of jurisdiction is whether . . . the tribunal has power to enter upon the inquiry; not whether its conclusion in the course of it is right or wrong.'" *State v. Phelps*, 67 Ariz. 215, 220, 193 P.2d 921, 925 (1948), *quoting Tube City Mining & Milling Co. v. Otterson*, 16 Ariz. 305, 311, 146 P. 203, 206 (1914).

¶13 Forcible entry and detainer actions are governed by A.R.S. §§ 12-1171 through 12-1183 and the Rules of Procedure for Eviction Actions ("RPEA").[3] *See* Ariz. R. P. Evic. Actions 1. Section 12-1171(3) provides that a person is guilty of forcible detainer[4] if he

> [w]ilfully and without force holds over any lands, tenements or other real property after termination of the time for which such lands, tenements or other real property were let to him or to the person under whom he claims, after demand made in

[3]In this decision, references to a "rule" refer to a rule from the RPEA, unless we specifically refer to a rule of civil procedure.

[4]Although HomEq titled its complaint below one for "forcible entry and detainer," it did not allege Del Turco had forcibly or unlawfully entered the premises. *See* §§ 12-1171(1)-(2), 12-1172. Deutsche Bank has correctly characterized this as a detainer action on appeal.

> writing for the possession thereof by the person entitled to such possession.

When a person remains on property after a foreclosure and sale, as Del Turco did here, he becomes a tenant at will or by sufferance, as HomEq alleged in its complaint. *See Andreola v. Ariz. Bank*, 26 Ariz. App. 556, 558, 550 P.2d 110, 112 (1976).

¶14 Section 12-1173 includes the following provision concerning tenants by sufferance:

> There is a forcible detainer if:
>
> 1. A tenant at will or by sufferance or a tenant from month to month or a lesser period whose tenancy has been terminated retains possession after his tenancy has been terminated or after he receives written demand of possession by the landlord.

Before this portion of the statute was amended, our supreme court held that a written demand to surrender the premises was a prerequisite for filing a detainer action.[5] *Alton v. Tower Capital Co., Inc.*, 123 Ariz. 602, 604, 601 P.2d 602, 604 (1979). As amended, this statute no longer specifies that "detainer proceedings cannot be commenced until five days after giving of this notice," as the court stated in *Alton*. *Id.* Yet the requirement that

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[5]The statute was first amended by 1983 Ariz. Sess. Laws, ch. 234, § 1, and again by 1987 Ariz. Sess. Laws, ch. 263, § 1, which gave it its present form. Before these amendments, the statute provided that a forcible detainer existed if

> [a] tenant at will or by sufferance, after termination of his tenancy or after written demand of possession by his landlord, or a tenant from month to month or a lesser period whose rent is due and unpaid, fails or refuses for five days after demand in writing to surrender and give possession to his landlord.

1956 Ariz. Sess. Laws 3d Spec. Sess., ch. 3, § 1 (codifying former A.R.S. § 12-1173(A)(1) (1956)).

a written demand for possession be made before an action is filed still exists, notwithstanding the apparently permissive clause, "or after . . . written demand of possession." § 12-1173(1); *see* § 12-1171(3). As § 12-1173.01(A) illustrates, a forcible detainer action may be brought following a foreclosure sale against "a person . . . who retains possession . . . *after he receives written demand of possession*." (Emphasis added.)

¶15 A forcible detainer action is a purely statutory action. *Hinton v. Hotchkiss*, 65 Ariz. 110, 114, 174 P.2d 749, 753 (1946). Our courts have noted that the expedited nature of forcible entry and detainer proceedings makes the procedural features of these statutes integral to their function. *See id*. at 116, 174 P.2d at 754; *Curtis v. Morris*, 184 Ariz. 393, 398, 909 P.2d 460, 465 (App. 1995), *aff'd*, 186 Ariz. 534, 925 P.2d 259 (1996). Section 12-1175, in particular, specifies how a forcible detainer action may be commenced. This statute permits an aggrieved party to file a complaint initiating a forcible detainer action, § 12-1175(A), and specifies that "[t]he complaint shall contain a description of the premises of which possession is claimed . . . and shall also state the facts which entitle the plaintiff to possession and authorize the action." § 12-1175(B). The only issue to be tried in the action is the right of actual possession. § 12-1177(A).

¶16 In light of these statutes, the facts that must be alleged in a complaint so as to confer jurisdiction on a trial court and state a claim for relief are, at minimum, (1) that the plaintiff has a right of actual possession and (2) that the plaintiff demanded possession of the premises in writing before filing the action. "A cause of action must exist and be complete prior to the commencement of the lawsuit[,] and if it is not[,] it is

defective as premature." *Jahnke v. Palomar Fin. Corp.*, 22 Ariz. App. 369, 373, 527 P.2d 771, 775 (1974). In other words, "the existence of a cause of action is a fundamental prerequisite to litigation." *Id.* A trial court exceeds its jurisdiction by denying a defendant's motion to dismiss and granting relief on a complaint that fails to state a claim for forcible detainer. *See Taylor v. Stanford*, 100 Ariz. 346, 347-48, 350, 414 P.2d 727, 728, 730 (1966) (concluding trial court exceeded jurisdiction when theory behind complaint insufficient to show possession and prove forcible detainer).

¶17 Here, it was conceded below that the initial plaintiff, HomEq, did not have any right to possess the subject property. It follows that HomEq's demand for possession from Del Turco was defective. Moreover, insofar as the demand for possession was made on November 4, it predated Deutsche Bank's ownership of the property and thus could not have been made by Deutsche Bank at that time. Indeed, the entire eviction action was premature, given that the property in question was conveyed to Deutsche Bank a week after the complaint had been filed. Accordingly, given the putative plaintiffs' noncompliance with § 12-1175 and related statutes, the trial court lacked jurisdiction to rule in this matter and enter judgment against Del Turco. *Cf. Taylor*, 100 Ariz. at 350, 414 P.2d at 730 (finding trial court lacked jurisdiction when facts alleged by plaintiffs insufficient to show right of possession in forcible detainer action).

¶18 Deutsche Bank disagrees with this conclusion and contends the trial court had the authority to substitute plaintiffs and amend the pleadings under either the rules of civil procedure or the RPEA. *See* A.R.S. § 12-122 (recognizing superior court may have power conferred by rule, statute, or common law). Deutsche Bank argues that "it is

permissible to substitute as plaintiff the person who has the right to sue where an action has been brought originally in the name of one having no right, so long as the cause of action and the amount of recovery remain the same, and defendant is deprived of no defense available to him at the beginning of the suit." *See Norton v. Steinfeld*, 36 Ariz. 536, 544-47, 288 P. 3, 6-7 (1930) (approving substitution of stockholders as plaintiffs for defunct corporation). But even assuming the court had the authority to bring Deutsche Bank into the action, Deutsche Bank appears to overlook the fact that it never made a written demand for possession in this case. In *Rapp v. Olivo*, 149 Ariz. 325, 327-28, 718 P.2d 489, 491-92 (App. 1986), a detainer action decided under Rule 15(d), Ariz. R. Civ. P., this court held that an analogous demand for rent, even when it is late, can cure a jurisdictional defect caused by an earlier defective demand. Here, in contrast, no belated demand for possession was ever made by Deutsche Bank to cure the defective demand made by HomEq.

¶19 In any event, we reject on its merits Deutsche Bank's argument that the court had any rule-based authority to hear this case. 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."[6] Rule 9, Ariz. R. P. Evic. Actions, allows parties to make various motions at trial, both orally and in writing,

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

including motions to amend. But the Rules of Civil Procedure relating to amendment or substitution—Rules 15 and 17(a), respectively—are referred to neither in Rule 9 nor elsewhere in the RPEA. Therefore, they do not apply.

¶20 The RPEA, together with our statutes concerning forcible entry and detainer actions, confirm the trial court lacked jurisdiction to entertain the defective complaint initiating this action. Rule 2, Ariz. R. P. Evic. Actions, states: "All eviction actions are statutory summary proceedings and the statutes establishing them govern their scope and procedure." Rule 5(b)(1), Ariz. R. P. Evic. Actions, specifically requires that a complaint "[b]e brought in the legal name of the party claiming entitlement to possession of the property." This rule is consistent with § 12-1175(B), which requires that the complaint "state the facts which entitle the plaintiff to possession and authorize the action." Although Rule 5(a) directs courts to "liberally grant leave to amend the complaint and summons to reflect the true names of defendants," the RPEA do not expressly permit 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.

¶21 Notably, the RPEA limit a plaintiff's ability to amend a complaint. Rule 11(e), Ariz. R. P. Evic. Actions, which addresses pleading requirements, states: "[T]he plaintiff shall not be permitted to advance allegations at the initial appearance or any subsequent trial unless those allegations were properly stated in the complaint." The significance of the requirement that a complaint properly and timely allege the factual

matters to be resolved at trial is underscored by § 12-1177(B), which provides: "If a jury is demanded, it shall return a verdict of guilty or not guilty of the charge as stated in the complaint. If a jury is not demanded the action shall be tried by the court." In sum, these provisions of the RPEA prohibit the very type of amendment or substitution that occurred here—an amendment alleging entirely different ownership of the subject property by a party who did not have a right of possession when the action was commenced.

¶22 Deutsche Bank nevertheless contends that Rule 9(c), which allows amendments to pleadings for "good cause," gave the court discretion to substitute parties in this action and effectively amend HomEq's complaint. "Good cause" is defined as a "stated, substantial reason, the accommodation of which will serve the interests of fairness and justice, without also causing a significant delay or harm to another party." Ariz. R. P. Evic. Actions 18(d). As the rules make clear, "[g]ood cause may include relieving a person from the consequences of a mistake or inadvertence, but not from simple neglect." *Id.*

¶23 Ordinarily, a plaintiff's right to the subject property should be determined in the course of the "reasonably diligent inquiry" undertaken by plaintiff's counsel before filing a verified complaint pursuant to Rule 5(b)(8). Consistent with counsel's due diligence obligation under Rule 4(a), Ariz. R. P. Evic. Actions, he or she must "exercise reasonable care to ensure that [his or her] pleading [is] accurate and well-grounded in fact and law." It is questionable, therefore, whether counsel's failure to establish both the existence of his client and its ownership of the subject property may constitute "good cause" under Rules 9(c) and 18(d).

¶24 At any rate, Rule 9(c) does not permit the substitution of parties that occurred here. As noted, Rule 9(c) allows an amendment to a pleading only if it serves the interests of justice and will not cause harm to the other party. The *sine qua non* of a forcible detainer claim is the right of possession. § 12-1177(A). Here, Del Turco's defense was that HomEq did not exist and did not own the property. Substituting a new plaintiff with a completely separate claim of ownership, without any prior notice to Del Turco, initiated an entirely new cause of action and necessarily caused him prejudice. The court's action was therefore neither authorized by Rule 9(c) nor any other provision of the RPEA.

¶25 Under § 12-1175(B), a forcible detainer action must be authorized by statute when the complaint is filed. Where, as here, an action is not authorized at the time the complaint is filed, the action is premature and must be dismissed for lack of jurisdiction. The complaint is void as a nullity and does not permit amendment or the substitution of parties.

Disposition

¶26 For the foregoing reasons, we vacate the judgment entered by Judge Miller on December 4, 2009, including the award of attorney fees and costs. Because the previous judgment entered by Judge Duncan was vacated, we deem Del Turco's appeal from it moot and dismiss it.

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PETER J. ECKERSTROM, Judge

CONCURRING:

_____
GARYE L. VÁSQUEZ, Presiding Judge

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VIRGINIA C. KELLY, Judge