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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

U.S. BANK NATIONAL ASSOCIATION, successor-in-interest to the FEDERAL DEPOSIT INSURANCE CORPORATION as receiver for DOWNEY SAVINGS AND LOAN ASSOCIATION, F.A., Plaintiff/Appellee, v. FRANK GAGLIARDI; JUSTIN and STOSH MILLS, Defendants/Appellants.	2 CA-CV 2010-0075 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV201000776

Honorable Craig A. Raymond, Judge Pro Tempore

AFFIRMED

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K E L L Y, Judge.

¶1 Appellant Frank Gagliardi and his tenants Justin and Stosh Mills (collectively, "appellants") appeal from the trial court's judgment finding them guilty of forcible detainer. For the following reasons, we affirm.

Facts and Procedural Background

¶2 The statement of facts in appellants' opening brief does not contain any citations to the record as required by Rule 13(a)(4), Ariz. R. Civ. App. P., but rather cites only the appendix to the brief. Citations to appendices to a brief are not citations to the record.[1] Appellee U.S. Bank National Association ("U.S. Bank") asserts that we should dismiss the appeal on this basis. Alternatively, U.S. Bank urges us to disregard appellants' statement of facts. Unless a party's brief is "totally deficient," we "prefer to decide each case upon its merits rather than to dismiss summarily on procedural grounds." *Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 342, 678 P.2d 525, 527 (App. 1984). Accordingly, we rely on our own review of the record for our recitation of the facts. *See Flood Control Dist. of Maricopa County v. Conlin*, 148 Ariz. 66, 68, 712 P.2d 979, 981 (App. 1985) (court may disregard statement of facts lacking appropriate references to record and asserting facts unsupported by record).

[1]Appellants have attached as appendices to their brief copies of certain documents labeled "exhibits," and they have cited these "exhibits" to support their factual assertions. Although Rule 13(a)(8) allows for an appendix to an opening brief, reference to an appendix does not substitute for proper citation to the record on appeal pursuant to Rule 11(a)(2), Ariz. R. Civ. App. P. Moreover, appellants do not tell us whether the documents attached to their brief are even included in the record on appeal. We therefore will not consider them. *See In re Property at 6757 S. Burcham Ave.*, 204 Ariz. 401, ¶ 11, 64 P.3d 843, 846-47 (App. 2003) (materials attached to brief not incorporated into record on appeal); *Lewis v. Oliver*, 178 Ariz. 330, 338, 873 P.2d 668, 676 (App. 1993) (court considers only record on appeal).

¶3 "We view the facts in the light most favorable to sustaining the trial court's judgment." *Sw. Soil Remediation, Inc. v. City of Tucson*, 201 Ariz. 438, ¶ 2, 36 P.3d 1208, 1210 (App. 2001). The parties agree that on May 4, 2009, Frank Gagliardi was awarded the subject property and any underlying debt associated with it as part of the dissolution of his marriage to his former wife Tami Gagliardi. After one or both of the Gagliardis apparently defaulted on the promissory note secured by a deed of trust to the property, U.S. Bank purchased the property at a nonjudicial trustee's sale on December 4, 2009. Thereafter, a trustee's deed was executed and delivered to U.S. Bank. On February 16, 2010, U.S. Bank sent the Gagliardis and other possible occupants of the property written notice demanding possession.

¶4 Because the property had not been vacated by the time specified in the demand letter, U.S. Bank filed a complaint for forcible detainer, naming as defendants Tami and Frank Gagliardi and any other occupants of the property.[2] At the preliminary hearing on March 5, 2010, Frank Gagliardi advised the trial court that tenants were residing on the property. The court granted judgment against Frank Gagliardi but deferred its ruling as to the purported tenants and ordered the hearing continued. When the hearing resumed, the parties presented evidence regarding two lease agreements and the fair market rental value of the property.[3] After the second hearing, the court found that the lease agreements "were not entered into at an arm's length transaction as the first

[2]Although Tami Gagliardi was named in the complaint, the record does not reflect that she appeared in the action, and she is not a party to this appeal.

[3]The lease at issue in this case ("three-year lease") was apparently between Frank Gagliardi, as landlord, and Justin and Stosh Mills, as tenants, for specific parts of the house located on the property. Appellants do not challenge the ruling on the other lease, apparently between Gagliardi and other tenants for a mobile home.

lease presented is a three (3) year lease and the second lease presented is a five (5) year lease," and it entered judgment in favor of U.S. Bank.

¶5 On March 17, 2010, appellants filed both a timely notice of appeal and a motion for reconsideration. The trial court denied the motion for reconsideration on March 22, 2010. Filing the notice of appeal, however, divested the court of jurisdiction to consider the motion for reconsideration. *See City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 380-81, 868 P.2d 958, 963-64 (App. 1993).

Discussion

¶6 Appellants claim the trial court erred by entering a judgment of forcible detainer against them and in favor of U.S. Bank because Justin and Stosh Mills are bona fide tenants and therefore are entitled to occupy the premises for the remainder of the lease term under the Protecting Tenants at Foreclosure Act of 2009, § 702(a), 12 U.S.C.A. § 5220 note ("PTFA").

¶7 The PTFA defines a bona fide tenant as follows:

> (b) Bona Fide Lease or Tenancy.– For purposes of this section, a lease or tenancy shall be considered bona fide only if–
>
> (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 or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy.

¶8 The trial court found "that the lease agreement[] w[as] not entered into at an arm's length transaction" based on its term. Appellants claim that the court erred in finding the three-year lease term suggested their claim of an arm's length transaction lacked credibility. We will not set aside a court's findings of fact unless they are clearly erroneous or unsupported by any credible evidence. *Kocher v. Dep't of Revenue*, 206 Ariz. 480, ¶ 9, 80 P.3d 287, 289 (App. 2003).

¶9 The transcripts of the proceedings have not been made part of the record on appeal. Appellants are obliged 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(b). In the absence of the transcripts, we will presume they support the trial court's factual findings and rulings. *Kohler v. Kohler*, 211 Ariz. 106, n.1, 118 P.3d 621, 623 n.1 (App. 2005); *In re Estate of Mustonen*, 130 Ariz. 283, 284, 635 P.2d 876, 877 (App. 1981). Therefore, we cannot say the court clearly erred in finding that the three-year lease was not an arm's-length transaction or concluding that Justin and Stosh were not bona fide tenants within the meaning of the PTFA.

¶10 Next, appellants claim the trial court erred in finding that Tami Gagliardi's signature had been required on the three-year lease and that its absence "'calls into question the validity of the lease[].'" The court set forth these findings in response to appellants' motion for reconsideration. As noted above, however, appellants had filed their notice of appeal before the court ruled on their motion for reconsideration. "Accordingly, because we lack jurisdiction to decide this issue on appeal, we do not consider it on its merits." *Navajo Nation v. MacDonald*, 180 Ariz. 539, 547, 885 P.2d

1104, 1112 (App. 1994); *see also Leroy's Liquors, Inc.*, 177 Ariz. at 380-81, 868 P.2d at 963-64.

¶11 U.S. Bank requests its attorney fees and costs pursuant to A.R.S. § 12-1178(A) and Rule 21, Ariz. R. Civ. App. P. Section 12-1178(A) entitles a plaintiff to recover attorney fees and costs if the defendant is found guilty of forcible detainer. We therefore award U.S. Bank its attorney fees and costs on appeal, predicated on its compliance with Rule 21.

Conclusion

¶12 For the reasons stated above, we affirm the trial court's judgment finding appellants guilty of forcible entry and detainer.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

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

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