

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

DEUTSCHE BANK NATIONAL TRUST COMPANY, solely as Trustee for
Harborview Mortgage Loan Trust Mortgage Loan Pass-Through
Certificates, Series 2007-4, *Plaintiff/Appellee*,

v.

MICHAEL J. PENCE, TAUNI R. PENCE,
Occupants and Parties-In-Possession,
Defendants/Appellants.

No. 1 CA-CV 15-0693
FILED 11-1-2016
AMENDED PER ORDER FILED 11-1-16

Appeal from the Superior Court in Maricopa County
No. CV2015-001808
The Honorable Brian S. Rees, Commissioner

AFFIRMED

COUNSEL

Michael J. Pence, Tauni R. Pence, New River
In propria persona Defendants/Appellants

Houser & Allison, PC, Phoenix
By Robert W. Norman, Calvin J. Platten, Jr.
Counsel for Plaintiff/Appellee

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MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Samuel A. Thumma joined.

T H O M P S O N, Judge:

¶1 Defendant-appellants Michael J. and Tauni R. Pence (the Pences) appeal from the trial court's grant of judgment against them in this forcible entry and detainer action. Finding no error by the trial court, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 The Pences reside in a home in New River. On January 20, 2015, after the Pences defaulted on the 2007 promissory note secured by the real property, the home was sold at a trustee's sale. Plaintiff-appellee Deutsche Bank National Trust Company (Deutsche Bank) was the successful bidder at the trustee's sale. Deutsche Bank filed a forcible entry and detainer action against the Pences in May 2015 when the couple failed to surrender the property.

¶3 The Pences' defense to the forcible entry and detainer action was to dispute the chain of title as to Deutsche Bank and to assert that an action was ongoing in Federal District Court on that issue. After a trial on the forcible entry and detainer, a judgment was entered against the Pences. The trial court set a \$5,700 bond and noted the Federal District Court matter had been dismissed. The Pences timely appealed and posted a \$5,700 bond.¹

¹ We take judicial notice that the Pences have filed an appeal of the dismissal of their federal claim [No. 15-16607 and D.C. No.: 2:15-cv-02587, respectively]. As of this date, an opening brief and answering brief have been filed in the federal appeal; the Pences have sought leave to file a late reply brief.

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DISCUSSION

¶4 The Pencés assert the trial court did not have jurisdiction due to the then-pending Federal District Court matter, that such an action created judicial estoppel, and that the trial court erred when it failed to consider their evidence regarding the chain of title and, therefore, whether Deutsche Bank was the correct party to bring this action. The Pencés also state that they did not receive proper notice of the trustee’s sale.²

¶5 The Pencés do not dispute that there was an original promissory note secured by a deed of trust, in their name, on the property. They do not dispute that that mortgage was later assigned to one or more other financial institutions. They do not dispute that they continue to reside on the property after the trustee’s sale.

¶6 We defer to the trial court’s factual findings unless clearly erroneous. See *Ahwatukee Custom Estates Mgmt. Ass'n v. Turner*, 196 Ariz. 631, 634, ¶ 5, 2 P.3d 1276, 1279 (App. 2000). A factual finding is clearly erroneous only where no substantial evidence supports it. See *Visco v. Universal Refuse Removal Co.*, 11 Ariz. App. 73, 75, 462 P.2d 90, 92 (1969). We review the interpretation and application of statutes de novo. *Schwarz v. City of Glendale*, 190 Ariz. 508, 510, 950 P.2d 167, 169 (App. 1997) (citation omitted).³

¶7 Deutsche Bank asserts on appeal that there is a statutory presumption that when real property is sold through a trustee’s sale, the requirements for such a sale have been complied with and, further, that chain of title is not a defense in a forcible entry and detainer action. See A.R.S. § 33-811(B) (2014); A.R.S. § 12-1177(A) (2016); *Triano v. First Am. Title*

² The Pencés raised the notice issue in a declaratory judgment action filed in a separate Maricopa County superior court matter, CV 2015-05389. The superior court dismissed the complaint with prejudice in March 2016 and we are not aware of any appeal of that ruling.

³ We do not have a transcript of the forcible entry and detainer trial. As the appellants, the Pencés were responsible for making certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised on appeal. See Ariz. R. Civ. App. P. 11. When a party fails to include necessary items, we assume the items support the court’s findings and conclusions. *In re Mustonen’s Estate*, 130 Ariz. 283, 635 P.2d 876 (App. 1981).

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Ins. Co., 131 Ariz. 581, 643 P.2d 26 (App. 1982). Deutsche Bank is correct on both counts.

¶8 Section 33-811(B) states, in pertinent part:

The trustee's deed shall raise the presumption of compliance with the requirements of the deed of trust and this chapter relating to the exercise of the power of sale and the sale of the trust property, including recording, mailing, publishing and posting of notice of sale and the conduct of the sale. A trustee's deed shall constitute conclusive evidence of the meeting of those requirements in favor of purchasers or encumbrancers for value and without actual notice.

And, A.R.S. § 12-1177(A) reads, "On the trial of an action of forcible entry or forcible detainer, the only issue shall be the right of actual possession and the merits of title shall not be inquired into." Given these two statutes, the trial court did not commit legal error in finding in favor of Deutsche Bank. There is no jurisdictional issue. Indeed, the Federal District Court matter has been dismissed. And, because of the evidence supplied by Deutsche Bank, specifically the Trustee's Deed Upon Sale and the Notice to Vacate, there is no relevant factual dispute. The judgment is affirmed.

¶9 Deutsche Bank requests attorneys' fees pursuant to A.R.S. §§ 12-341.01 (2016) and -349 (2016). Pursuant to A.R.S. § 12-341.01, in an exercise of our discretion, we award Deutsche Bank reasonable attorneys' fees in an amount to be determined after compliance with Rule 21, Ariz. R. Civ. App. P.

CONCLUSION

¶10 For the above stated reasons, the judgment is affirmed.



AMY M. WOOD • Clerk of the Court
FILED: JT