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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 NOT FOR PUBLICATION.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).
Court of Appeals of Arizona,
Division 2.

The BANK OF NEW YORK MELLON, fka The Bank of New York, As Trustee for the Certificate Holders of CWALT, Inc., Alternative Loan Trust 2005–63, Mortgage Pass–Through Certificates, Series 2005–63, Plaintiff/Appellee,
v.
Wendle V. LEHNERD, Defendant/Appellant.

No. 2 CA–CV 2014–0160.
|
April 15, 2016.

Appeal from the Superior Court in Pinal County; No. S1100CV201402273; The Honorable Daniel A. Washburn, Judge, The Honorable Henry G. Gooday Jr., Judge. VACATED.

Attorneys and Law Firms

Eric L. Cook, Phoenix, Counsel for Plaintiff/Appellee.

Mark J. DePasquale, PC by Mark J. DePasquale, Phoenix, Counsel for Defendant/Appellant.

Chief Judge ECKERSTROM authored the decision of the Court, in which Presiding Judge VÁSQUEZ and Judge STARING concurred.

MEMORANDUM DECISION

ECKERSTROM, Chief Judge.

***1** ¶ 1 The Bank of New York Mellon (BNYM) brought an action for forcible detainer against Wendle Lehnerd. Lehnerd was found guilty and possession of the property at issue was awarded to BNYM. Lehnerd now appeals, claiming the trial court did not have jurisdiction to enter the order. BNYM challenges this court's jurisdiction to hear this appeal. For the following reasons, we conclude we lack appellate jurisdiction, but we accept special action jurisdiction and vacate the judgment of the trial court.

Factual and Procedural Background

¶ 2 On August 19, 2014, BNYM purchased a property in Pinal County at a trustee's auction. In September of that year, BNYM sent a notice to Lehnerd requiring him to vacate the property. Later that month, after Lehnerd ignored the notice, BNYM filed a complaint in the superior court of Pinal County alleging Lehnerd was guilty of forcible detainer and requesting possession of the property, monetary damages, attorney fees, and costs.

¶ 3 A few days before the trustee's sale, Lehnerd had filed a petition to quiet title to the property in his own name in the United States District Court. In BNYM's eviction action, Lehnerd filed a motion to dismiss, arguing that because an action concerning the property at issue was already in process in federal court, the state court could not exercise jurisdiction over the same property. The superior court denied Lehnerd's motion to dismiss in a signed ruling.

¶ 4 On December 2, 2014, the superior court, in another signed ruling, awarded possession of the property to BNYM. The ruling was silent on the issue of damages, costs, and attorney fees and did not contain language pursuant to Rule 54(b) or (c), Ariz. R. Civ. P. Lehnerd filed his notice of appeal on December 5. On December 19, BNYM filed a motion for attorney fees and costs. The superior court entered a judgment on December 23, reasserting its earlier ruling awarding possession of the property to BNYM as well as awarding attorney fees and costs. Lehnerd did not file a subsequent notice of appeal.

Appellate Jurisdiction

¶ 5 BNYM challenges this court's jurisdiction to hear this appeal. It claims the December 2 ruling was not a final, appealable order and that Lehnerd's only notice of appeal was therefore premature and ineffective. [1]

¶ 6 A judgment is not appealable unless it is final. *See* A .R.S. § 12–2101(A)(1); *Baker v. Bradley,* 231 Ariz. 475, ¶ 9, 296 P.3d 1011, 1015 (App.2013). A final judgment is one that "dispose[s] of all claims and all parties." *Musa v. Adrian,* 130 Ariz. 311, 312, 636 P.2d 89, 90 (1981). The rule requiring a

final judgment that disposes of all claims and all parties comes from public policy that disfavors "piecemeal appeals." *Id.*

¶ 7 The December 2 ruling did not address BNYM's claim for attorney fees. BNYM contends that this makes Lehnerd's notice of appeal premature and renders it a nullity. Lehnerd claims that because the requirement that attorney fees be settled before a judgment is final comes from Rule 58(g), Ariz. R. Civ. P., and because eviction actions are governed by the Rules of Procedure for Eviction Actions (RPEA), and not the Arizona Rules of Civil Procedure (ARCP), except when the ARCP are incorporated by reference, *see* Ariz. R.P. Evic. Actions 1, the December 2 ruling is effectively a final, appealable order.

***2** ¶ 8 In our independent review of our jurisdiction, we have noted another potential jurisdictional issue we must address. *See Ghadimi v. Soraya,* 230 Ariz. 621, ¶ 7, 285 P.3d 969, 970 (App.2012). BNYM's complaint requested an award of "the reasonable rental value of the Property during the period of time of [Lehnerd's] forcible detainer." This claim was likewise not addressed by the trial court in either its December 2 or December 23 ruling.

¶ 9 Assuming arguendo that, as Lehnerd suggests, the ARCP do not apply to the entry of judgment in an eviction action, we nonetheless conclude the December 2 ruling here was not a final judgment because it did not address BNYM's claim for damages, nor its request for attorney fees. Rule 13 of the RPEA contemplates that a judgment finding a party guilty of forcible detainer will award the plaintiff possession of the premises, damages specified in the complaint, court costs, and attorney fees. Ariz. R.P. Evic. Actions 13(c)(1), (2), (f). Rule 2, Ariz. R.P. Evic. Actions, notes that the RPEA must be construed in connection with the statutes governing forcible detainer proceedings. Section 12–1178(A), A.R.S., states that a court entering judgment against a defendant in an eviction action "shall give judgment for the plaintiff for restitution of the premises, for ... damages, attorney fees, [and] court and other costs." Taking all of these provisions into consideration, we conclude the RPEA require all of these issues to be settled before a judgment may be considered "final," and thus appealable under § 12–2101(A)(1). It follows, then, that the December 2 ruling was not a final judgment and that Lehnerd's notice of appeal was premature and insufficient to provide this court with appellate jurisdiction.

¶ 10 The December 23 judgment, likewise, was not a final, appealable order. At oral argument, this court asked Lehnerd whether BNYM had waived the outstanding claim for money damages by not arguing it at trial. But even if BNYM did waive or abandon this claim, that is not the legal equivalent of a trial court's substantive ruling on that claim. *Cf. Nold v. Nold,* 232 Ariz. 270, ¶ 10, 304 P.3d 1093, 1096 (App.2013) (waiver is discretionary doctrine). Furthermore, BNYM requested that Lehnerd's supersedeas bond include the rental value of the property beginning on August 20, 2014, one day after the trustee's sale. This suggests BNYM believed it still had a claim for monetary damages for the period of Lehnerd's occupation of the property. Because this issue remains outstanding, there is no final, appealable order in this case.

Special Action Jurisdiction

¶ 11 Lehnerd has requested that, in the event this court finds appellate jurisdiction to be lacking, we accept special action jurisdiction over the case. Special action jurisdiction is discretionary, and is appropriate when a party "has no plain, adequate or speedy remedy by appeal." *State ex rel. Romley v. Martin,* 203 Ariz. 46, ¶ 4, 49 P.3d 1142, 1143 (App.2002), *aff'd,* 205 Ariz. 279, 69 P.3d 1000 (2003); *see* Ariz. R.P. Spec. Actions 1(a). Special action jurisdiction is proper when addressing a purely legal question, particularly when, as here, the matter is one of first impression. *Romley,* 203 Ariz. 46, ¶ 4, 49 P.3d at 1143; *accord Chartone, Inc. v. Bernini,* 207 Ariz. 162, ¶ 9, 83 P.3d 1103, 1107 (App.2004). For these reasons, in our discretion, we accept special action jurisdiction. *See* A.R.S. § 12–120.21(A)(4).

Motion to Dismiss

***3** ¶ 12 On the merits of the case, Lehnerd claims the trial court erred in denying his motion to dismiss based on the prior exclusive jurisdiction doctrine. We review de novo a denial of a motion to dismiss for lack of subject matter jurisdiction. *State ex rel. Montgomery v. Mathis,* 231 Ariz. 103, ¶ 18, 290 P.3d 1226, 1232 (App.2012).

¶ 13 Before BNYM filed this eviction action, Lehnerd filed an action in federal court to quiet title in the subject property in his own name. [2] When BNYM later filed the eviction action in state court, Lehnerd filed a motion to dismiss, arguing that because the federal court had already asserted *in rem* jurisdiction over the property, the prior exclusive jurisdiction

doctrine prevented the state court from hearing an action *in rem* regarding the same property.

¶ 14 "The prior exclusive jurisdiction doctrine holds that 'when one court is exercising *in rem* jurisdiction over a *res,* a second court will not assume *in rem* jurisdiction over the same *res.*' " *Chapman v. Deutsche Bank Nat'l Trust Co.,* 651 F.3d 1039, 1043 (9th Cir.2011), *quoting Marshall v. Marshall,* 547 U.S. 293, 311 (2006). Thus, whether the prior exclusive jurisdiction doctrine operates to bar BNYM's suit in state court depends on whether a forcible detainer proceeding under Arizona law constitutes a proceeding *in rem* (or *quasi in rem*) or *in personam*. *See Tonnemacher v. Touche Ross & Co.,* 186 Ariz. 125, 129, 920 P.2d 5, 9 (App.1996).

¶ 15 Different jurisdictions have reached different conclusions regarding this question. The majority of courts to address the issue, however, appear to have concluded that actions solely litigating the issue of possession of a property are characterized as *in rem* or *quasi in rem*. *Compare Taylor v. Cisneros,* 102 F .3d 1334, 1336, 1343 (3d Cir.1996); *Knaefler v. Mack,* 680 F.2d 671, 676 (9th Cir.1982); *Brinkman v. Bank of Am., N.A.,* 914 F.Supp.2d 984, 991 (D.Minn.2012), *with In re Perl,* 811 F.3d 1120, 1129 (9th Cir.2016); *African Methodist Episcopal Church v. Lucien,* 756 F.3d 788, 799 n. 42 (5th Cir.2014); *Seitz v. Fed. Nat'l Mortg. Ass'n,* 909 F.Supp.2d 490, 496–97, 501 (E.D.Va.2012); *Krasner v. Gurley,* 29 So.2d 224, 227 (Ala.1947); *Chapman v. Deutsche Bank Nat'l Trust,* 302 P.3d 1103, 1108 (Nev.2013); *Rogers v. Jones,* 39 S.E.2d 919, 920 (W.Va.1946).

¶ 16 Arizona has defined proceedings *quasi in rem* as follows: " 'a proceeding brought to affect the interests in the thing of particular persons.' " *State ex rel. Indus. Comm'n v. Smith,* 6 Ariz.App. 261, 263, 431 P.2d 902, 904 (1967), *quoting* Restatement (First) of Judgments § 32 cmt. a (1942). As the trial court correctly noted, Arizona forcible detainer actions are limited to the issue of possession; title may not be litigated. A.R.S. § 12–1177(A); *Taylor v. Stanford,* 100 Ariz. 346, 348–49, 414 P.2d 727, 729 (1966). But a proceeding *quasi in rem* is not limited to those cases that involve a final resolution of title —it is a proceeding to determine a particular person's interest in a property.

***4** ¶ 17 An interest in possession is indisputably an interest in a property. Blackstone notes that possession is "[t]he lowest and most imperfect degree of title," but it is nonetheless one of the "degrees requisite to form a complete title to lands and tenements." 2 William Blackstone, Commentaries *195. Under Arizona law, a forcible detainer exists if a person who is not legally entitled to possession of a property ignores a demand to give over such possession. *See* A.R.S. §§ 12–1173, 12–1173.01. As such, the action litigates the interest of a person in a property—whether or not the person currently in possession of the property has the right to continue possessing it. Accordingly, we conclude that a forcible detainer action under Arizona law is one that should be characterized as *quasi in rem.*

¶ 18 BNYM argues that the decision of the Arizona Supreme Court in *Curtis v. Morris,* which concluded that an action to quiet title and an action for forcible detainer may be concurrently heard in separate causes of action, controls here. 186 Ariz. 534, 534–35, 925 P.2d 259, 259–60 (1996). But *Curtis* did not address the prior exclusive jurisdiction doctrine, nor did it decide the nature of a forcible detainer proceeding. Moreover, it addressed separate cases brought in state courts, rather than one case brought in state court and one case brought in federal court. *Id.* This distinction is crucial because " '[a]lthough the doctrine is based at least in part on considerations of comity and prudential policies of avoiding piecemeal litigation, it is no mere discretionary abstention rule. Rather, it is a mandatory jurisdictional limitation.' " [3] *Chapman,* 651 F.3d at 1043, *quoting State Eng'r v. S. Fork Band of Te–Moak Tribe of W. Shoshone Indians,* 339 F.3d 804, 810 (9th Cir.2003). The basis of the doctrine is that when one sovereign has brought a given property into its jurisdiction, another sovereign may not defeat that jurisdiction by seeking to exercise control over the same property. *Id.* at 1043–44, *citing Kline v. Burk Constr. Co.,* 260 U.S. 226, 229 (1922).

¶ 19 BNYM asserts that the prior exclusive jurisdiction doctrine does not apply because the eviction action here is solely under state law and could not be heard in federal court. Essentially, BNYM contends that prior exclusive jurisdiction does not apply if the federal court would not have jurisdiction over the state court action. [4] But the prior exclusive jurisdiction doctrine is not limited to cases where the state court seeks to litigate the *same* interest in a given property as the federal court. Rather, the doctrine prevents a state court from litigating *any* interest in a property when the federal court has already asserted jurisdiction over that property. *Id.*

¶ 20 Because we conclude that an eviction action under Arizona law is a proceeding *quasi in rem,* and because Lehnerd's action to quiet title in federal court indisputably preceded BNYM's state court eviction action, the prior

exclusive jurisdiction doctrine applies. The trial court was without jurisdiction to hear the eviction action. Accordingly, we vacate the judgment of the trial court.

Disposition

***5** ¶ 21 For the reasons discussed above, although we conclude we do not have jurisdiction to hear this appeal, we accept special action jurisdiction. We further conclude the trial court did not have jurisdiction to hear the eviction action. We vacate the judgment of the trial court.

All Citations

Not Reported in P.3d, 2016 WL 1554292

Footnotes

1 BNYM also claims Lehnerd was required to file a notice of appeal within thirty days of the court's order denying his motion to dismiss. But an order denying a motion to dismiss is not a final judgment and may not be appealed. *See* A.R.S. § 12–2101; *Sanchez v. Coxon,* 175 Ariz. 93, 94, 854 P.2d 126, 127 (1993); *Nataros v. Superior Court,* 113 Ariz. 498, 499, 557 P.2d 1055, 1056 (1976); *Phillips v. Garcia,* 237 Ariz. 407, ¶ 5, 351 P.3d 1105, 1107 (App.2015).

2 At oral argument, BNYM claimed the appellate record was insufficient to determine the nature of Lehnerd's action in federal court. However, during the argument, BNYM conceded the federal action was one to quiet title to the same property at issue in the eviction action. In its answering brief, BNYM noted without dispute Lehnerd's characterization of the federal court action as one to quiet title. In its response to Lehnerd's motion to dismiss in the trial court, BNYM stated that Lehnerd "should make his arguments about title ... in the federal case, which he is doing." The trial court, in its ruling, described the case in federal court as one "to determine the ownership rights to the Property." We consider this record sufficient to support a conclusion that the federal court case involves a question of title to the same property at issue in this eviction action. *See Berndt v. Ariz. Dep't of Corr.,* 238 Ariz. 524, n. 9, 363 P.3d 141, 147 n. 9 (App.2015) (accepting concession that facts found by personnel board were accurate).

3 *But see Sexton v. NDEX W., LLC,* 713 F.3d 533, 536 n. 5 (9th Cir.2013) (explaining that, although court-made doctrine cannot limit subject-matter jurisdiction, prior exclusive jurisdiction is mandatory "rule of judicial abstention").

4 BNYM attempts to cite to unpublished Arizona decisions. Such decisions do not constitute citable authority except in limited circumstances not applicable here, and we therefore disregard these citations. *See* Ariz. R. Civ.App. P. 28(f); Ariz. R. Sup.Ct. 111(c).