

HANDLING EVICTIONS FOLLOWING TRUSTEE'S SALES

By Scott E. Williams

Eviction Issues.

In an eviction following the trustee's sale, the new owner will desire possession of the property as soon as possible. Most buyers are investors, and utilize the eviction process on an on-going basis as part of their business - acquiring and selling real estate. Of course the buyer seeks to obtain possession as soon as possible, and at the least cost possible.

The occupants often seek to delay moving out, and/or believe that they wrongfully lost the real estate. As a result, there are several common defenses raised by the occupants: a) the court lacks jurisdiction, b) the occupant has a real property interest, and c) the sale was not valid.

I. Choosing the Court - Justice Court v. Superior Court.

In most cases the client and attorney have very little information regarding the occupants, and whether they will raise any defenses in the eviction process. As a result, most cases are filed on the assumption that the sale was valid, and the occupants do not have a defense to a forcible detainer. In Maricopa County there are 23 justice court precincts/justices of the peace ("JP"). Some JP's do not believe that evictions following trustee sales may be brought in the justice court. Many of the JP's will transfer or dismiss any case with a hint of title issues. In my practice the bulk of the cases are filed in justice court because of the price and time efficiency.

A. **Court Comparison.**

In 2000 the Justice Court jurisdiction was raised from \$5,000 to \$10,000. Of greater importance to residential landlord and tenant law was the removal of the \$1,000 per month maximum rent in Justice Court; this removal allows forcible detainers for any amount of rent per month, as long as the total remains at \$10,000 or less. Although forcible/special detainers may be brought in either Justice Court or Superior Court, almost all residential forcible/special detainers are commenced in Justice Courts because

of the greater financial and time requirements of the Superior Court.

Superior Court v. Justice Court

In cases where the total amount sought exceeds \$10,000, the special detainer must be filed in the Superior Court. Due to the extra expense of processing a special detainer in Superior Court many clients who are owed amounts slightly over \$10,000 waive the additional amounts and proceed in Justice Court. Of course, the amount waived over \$10,000 is not recoverable in the future. The detainer process and expense are significantly different between the courts. A brief comparison follows:

	<u>Superior Court</u>	<u>Justice Court</u>
Filing Fee	\$230.00	\$ 36.00
Service of Process (average)	\$ 50.00	\$ 30.00
Attorney's Fees (average default)	\$350.00	\$105.00
Writ of Restitution (average)	\$280.00	\$ 97.00
Days from filing until removal by Constable/Sheriff		
Contested	30-40 days	15-20 days
Uncontested	20-25 days	15-20 days
Appeal difficulty	More Difficult	Easy
Maximum Jurisdiction	Unlimited	\$10,000.00

It is apparent that the Justice Courts are the inexpensive and time saving option for most forcible/special detainers. However, where it is likely the justice of the peace will transfer the matter anyway, the case should be commenced in the Superior Court.

B. Court Jurisdiction.

Many attorney's and judges are of the opinion that the Superior court has exclusive jurisdiction of evictions following: **trustee's sales**, foreclosures, forfeitures, executions, and sale of the property. The above list arises from A.R.S. §12-1173.01. The argument is based upon the language of A.R.S. §12-1173.01 stating that after demand for possession the occupants "may be removed through an action for forcible detainer filed with the clerk of the **superior court...**"

In 2003 this issue came to a head when the "Teenstra Memo" was circulated among the justice courts. The memo was written by the Assistant Director of the Law Library, Richard Teenstra, allegedly at the request of some judges. The memo

concluded that superior court had exclusive jurisdiction of the matters enumerated in A.R.S. §12-1173.01. Although well written and researched, the memo is seriously flawed in its failure to recognize that A.R.S. §12-1173.01 simply added to the existing law. A.R.S. §12-1173.01(C); Curtis v. Morris, 186 Ariz. 534, 925 P.2d 259 (1996).

Prior to enactment of A.R.S. §12-1173.01, A.R.S. §12-1173 provided for the eviction of occupants after a trustee's sale as tenants at will or sufferance. Andreola v. Arizona Bank, 26 Ariz. App. 556, 558, 550 P.2d 110, 112 (1976). A.R.S. §12-1175 clearly allows filing the forcible detainer with the justice of the peace.

The fact that enactment of A.R.S. §12-1173.01 did not change existing law is fortified in subsection C, and acknowledged in the pinnacle case of Curtis v. Morris.

Long before A.R.S. §12-1173.01 was adopted, the court of appeals held that A.R.S. §12-1173 was broad enough to authorize a forcible detainer action to obtain possession of property after an occupant's interest had been terminated pursuant to a nonjudicial sale.

Curtis v. Morris, 186 Ariz. 534, 535, 925 P.2d 259, 260 (1996) citing Andreola v. Arizona Bank, 26 Ariz. App. 556, 558, 550 P.2d 110, 112 (1976).

II. Eviction Procedures.

Under court rules evictions must be prosecuted by the owner of the property or an attorney on their behalf. All Justice Courts maintain forms for filing civil suits including forcible detainers. The eviction is commenced by a Summons and Complaint against the occupants, which is filed with the court, given a court date (usually one week later), then served upon the occupants by a process server.

A. **Pre-trial Practice**

1. Counter-Claims and Discovery Not Allowed in Forcible Detainers.

Simply put, there is no pre-trial practice in eviction cases. Special and forcible detainers are governed by specific statutory rules of procedure that appear at ARS §33-1368 and ARS §12-1171, et seq. These statutes do not provide for discovery or for pre-trial motions. The Rules of Civil Procedure do not apply to this statutory remedy where the rules conflict with the statutes.

The Court of Appeals has stated in *United Effort Plan Trust v. Holm*, 209 Ariz. 347, 101 P.3d 641, (App. 2004) that:

A real dispute regarding a landlord-tenant relationship must be tried in an "ordinary civil action, in which time periods are not accelerated, counter- and cross claims are allowed, and **there is an opportunity for discovery.**" RREEF Mgmt. Co., 190 Ariz. at 79, 945 P.2d at 390. [emphasis added]

This quote was also cited in *Colonial Tri-City Ltd. Partnership v. Ben Franklin*, 179 Ariz. 428, 880 P.2d 648, (App. 1993) where the court approved the trial court's denial of witness disclosure or any other discovery.

The court in *Colonial* stated:

Here, defendant was denied its right to discover the identities of plaintiff's potential witnesses, to depose those witnesses, to obtain answers to interrogatories, and to utilize any other discovery methods provided under the Arizona Rules of Civil Procedure.

Nearly all the forcible detainer cases cite the language used in United stating:

... the action is intended to "afford a summary, speedy and adequate remedy for obtaining possession of the premises withheld by a tenant in violation of the covenants of his tenancy or lease." Cites omitted. As such, no counterclaims, offsets or cross complaints are "available either as a defense or for affirmative relief in such action." *Olds Bros. Lumber*, 64 Ariz. at 205, 167 P.2d at 400. [FN3]

The Court in *Colonial* stated:

The policy behind our holding is obvious; the summary proceedings authorized by section 33-361 and the forcible entry and detainer statutes do not furnish all of the procedural safeguards provided in a general civil action. "In order to provide an expeditious means of recovering possession, the [forcible entry and detainer] statutes provide for streamlined procedures." 2 Richard R. Powell, *Powell On Real Property* § 246[3] (1993). "Notice periods are short,

pleadings are restricted, triable issues are limited, discovery is generally unavailable, and the judgment is promptly operative." Id. [emphasis added].

Don't serve discovery requests. Discovery rules don't exist in eviction practice. The request will wind up in the landlord's attorney's trash can.

As a general rule counterclaims are not allowed in forcible/special detainers. see United Effort Plan Trust v. Holm, 209 Ariz. 347, 101 P.3d 641 (App. 2004). A small exception exists for residential housing under the Residential Act, A.R.S. §33-1365.

2. Continuances.

ARS §12-1177(C) provides for a motion to continue the trial for no more than three days in Justice Court or ten days in Superior Court. These are *calendar* days, not working days. Normally, to obtain even this short continuance good cause must be shown. Such motions are often denied. Do not rely on getting a continuance when coming to court on the return date. Be prepared to go to trial then. *Never send your client to court to get the continuance because his attorney can't be there.* The request will almost always be denied. If you can't be there don't take the case or get someone to cover for you.

3. Defenses to Forcible Detainers.

a. A.R.S. § 33-811(B) Prohibits Defendants From Attacking Plaintiff's Title To The Property.

Defendants are statutorily precluded from asserting any supposed irregularities or defects with the Sale, which was a non-judicial foreclosure. We know this because Plaintiff's Deed:

"raise[s] the presumption of compliance with the requirements of [title 33, chapter 6.1 Arizona Revised Statutes] 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. Such deed. . . constitute[s] conclusive evidence of the meeting of such requirements in favor of purchasers [such as Plaintiff here]. . . for value and without actual

notice.

A.R.S. § 33-811(B).

Pursuant to A.R.S. § 33-811(B), Plaintiff takes "conclusive" good title to the Property, free and clear of any objections Defendants may seek to assert. *Id.*; see also Bam Investments, Inc. v. Roberts, 172 Ariz. 602, 604, 838 P.2d 1363 (1992):

". . . even if the appellant were able to prove the alleged deficiencies in the trustee's sale, these would not invalidate appellees' claim to the property.

* * * *

This court has upheld the application of this statute according to its plain meaning to protect buyers in appellees' position. See *Security Savings and Loan Ass'n v. Milton*, 171 Ariz. 75, 828 P.2d 1216 (App. 1991); Main I Ltd. v. Venture Capital Const., 154 Ariz. 256, 741 P.2d 1234 (App. 1987)."

b. A.R.S. § 33-811(C) Further Prohibits Defendants From Attacking Plaintiff's Title.

It also bears mentioning that prior to the Sale, Defendants must either a temporary restraining order or preliminary injunction. This is because A.R.S. § 33-811(C) provides that:

"The trustor [here Defendants] . . . shall waive all defenses and objections to the sale not raised in an action that results in the issuance of a court order granting relief pursuant to [R]ule 65, Arizona [R]ules of [C]ivil [Pr]ocedure, entered before 5:00 p.m. [o]n the last day other than [a] Saturday Sunday or other legal holiday before the schedule date of the sale. A copy of the order, the application for the order and the complaint shall be delivered to the trustee within twenty-four hours after entering the order."

Thus, not only A.R.S. § 33-811(B), but also § 33-811(C), prevent Defendants from challenging Plaintiff's title to the Property.

c. The Issue Of Title Can Not Be Inquired Into In A Forcible

Detainer Action.

Perhaps of even greater significance than A.R.S. §§ 33-811(B) and (C), in the context of a forcible detainer, it is "black letter" law that a defendant may not attack the validity of a Trustee's Sale/Trustee's Deed Upon Sale in the forcible detainer action. This is because the validity of title cannot be litigated in a forcible detainer action. E.g., Curtis v. Morris, 186 Ariz. 534, 925 P.2d 259 (1996).

Indeed, the Arizona Supreme Court in Curtis v. Morris quoted and relied upon A.R.S. § 12-1177(A), which provides "[o]n the trial of an action of forcible detainer, the only issue shall be the right of actual possession and the merits of title shall not be inquired into."

The Supreme Court explicitly noted in Curtis v. Morris, 925 P.2d at 260 that, "[w]hile the merits of title may not be litigated in a forcible detainer action, 'the fact of title may be proved as a matter incidental to showing right of possession by an owner.'" (quoting Andreloa v. Arizona Bank, 26 Ariz.App. 556, 558, 550 P.2d 110, 112 [1976]) (a case involving a forcible detainer, filed following a non-judicial foreclosure, where the defendants were prohibited from challenging the validity of the underlying deed of trust they had pledged on the ground that, in executing the document, one of the parties supposedly did not appear before a notary public).

Both Curtis v. Morris and Andreloa v. Arizona Bank are consistent with additional "black letter" law, specifically, that in the context of a forcible detainer:

Counterclaims, cross complaints, or offsets are not available. The reason for denying counterclaims and the like and limiting judgment only to possession, costs, and recovery for unpaid rent is to preserve the proceeding as a summary remedy. Allowing other claims would increase the issues and protract the action.

Gangadean v. Erickson, 17 Ariz.App. 131, 134, 495 P.2d 1338 (1972) (rev. den.). Accord Merrifield v. Merrifield, 95 Ariz. 153, 154, 388 P.2d 153 (1963):

"The plaintiff in the instant case set up a quitclaim deed [pledged to him by his ex-wife,] showing prima facie title. The trial court[, after the defendant ex-wife alleged the quitclaim deed was invalid on the ground that it had been

obtained by duress,] improperly inquired into the merits of th[e] quitclaim deed. A.R.S. § 12-1177 prohibits such an inquiry. Consequently, the lower court erred in finding defendant not guilty of forcible detainer."

B. Trial and Judgment.

The trial date for a special detainer is usually one week after being filed with the court. At the trial, the judge will consider evidence on the issues presented.

Usually the issues are possession of the premises, and the fair rental value of the property.

If judgment is for the landlord, the Court is restricted, by law, to granting:

1. **Possession** of the premises;
2. **Rent** through the Rental Period (rent is now allowed for the full month);
3. Reasonable **late charges** as provided in a written Rental Agreement;
4. Reasonable **attorney's fees** when designated under a written Rental Agreement or if allowed in a contested matter;
5. Legal **interest** on the outstanding Judgment until paid (currently 10%);
6. Date upon which a **Writ of Restitution** can be issued (five calendar days);
7. **Damages to the unit**, under certain circumstances, only with accurate and detailed documentation. This information should be provided to the court prior to filing and should include accurate estimates or actual repair bills. It is generally best to leave these issues to a civil proceeding.

Judgments will normally contain items 1 through 6. After five days, if the tenant has not vacated the premises, then you can request a Writ of Restitution. **A Writ of Restitution** is an order prepared by the Plaintiff which is signed by the Judge and directs the Constable/Sheriff to remove the occupants from the premises. If the occupants fail to vacate or have left personal property, you will have to hire a moving and storage company, and coordinate with the constable, for the removal of the personal property or under the Arizona Residential Landlord Tenant Act, you may store the Tenant's property on the premises, if you choose. In any event you **MUST**

prepare an inventory and promptly notify the tenant of the location and cost of storage by sending a notice, certified mail, return receipt requested, to the tenants last known address and any alternative addresses of the tenant pursuant to A.R.S. §33-1368(E). **Do Not Enter the Premises or Remove Any Property until the Constable/Sheriff Has Delivered Possession to You.**

Accepting Payment of the Judgment.

After the landlord is granted judgment, the landlord is free to make a deal with the tenant. Be aware that some Judges, Constables, and Sheriff deputies will not enforce the Writ of Restitution after payments have been made. In addition, if you accept rent you create a tenancy in accordance with the payment accepted (accepting a monthly payment creates a month to month tenancy).

Therefore, any payments accepted should be clearly designated as payments against the Judgment, unless you intend otherwise. After the Judgment is satisfied, any further payment will likely waive your ability to remove the Tenant(s) without a new detainer action. When a judgment is paid the landlord must file a satisfaction of judgment.

C. Writs of Restitution.

Included in the Judgment, will be the date upon which a Writ of Restitution can be issued. A Writ of Restitution is the final step in the legal process which reverts the leased premises from the tenant to the landlord where the tenant did not voluntarily surrender possession. Under Arizona statutes, a Writ can only be issued after five (5) calendar days from the date judgment is issued (12 to 24 hours for immediate evictions).

A Writ of Restitution **is not automatic** and will **not** be filed by your attorney unless it is specifically requested by you. To obtain a Writ of Restitution, call your attorney or go to the court on or after the day the Writ can be issued as contained in the judgment.

The necessary paper work will be taken to the court from which the judgment was issued. Once it is received by the court, the Judge of that court, usually a Justice of the Peace, will review the file and sign the Writ directing the Constable of the court, to return possession of the premises from the tenant to the landlord. Once the constable has received the signed order, the Constable will then proceed to the premises.

The Constable will make an effort to contact the owner or manager. At this time, the Constable will execute on the Writ by either, 1) posting a sticker to the door of the premises directing any occupant to be removed within a set time frame, usually 24 to 48 hours, or; 2) have the occupants removed from the premises and have the landlord re-key all locks. In the case of where the sticker is used, if the tenant does not vacate the premises within the time period specified, YOU must call the Constable, inform him/her of the tenants failure to vacate, and schedule the Constable's return.

As for which procedure will be used, it is entirely up to the Constable of the court within which the property is located. Moreover, it may take several days for the Judge of the court to sign the Writ of Restitution, and for the Constable to complete the eviction.

After the Constable gives you possession, if you move any personal property into storage, on site or not, you MUST prepare an inventory and promptly notify the tenant of the location and cost of storage by sending a notice, certified mail, return receipt requested, to the tenants last known address and any alternative addresses of the tenant pursuant to A.R.S. §33-1368(E).

D. Appeals.

It is a big mistake to appeal unless there is good cause. First, appeals are often handled on the tape-recorded trial record; there are no trials *de novo* (except if the record is lost or destroyed). Second the appellate court will not second-guess the trial court's factual determinations. Third, your client faces the prospect of a substantial award of attorney's fees if you lose on appeal. Finally, and most importantly, it is never too late to try to work out most cases. But the filing of a frivolous appeal will so sour any chance of good faith negotiations that any settlement option will likely be lost.

Long-established case law in Arizona, which states that the perfecting of an appeal within the prescribed time is jurisdictional. *Edwards v. Young*, 107 Ariz. 283, 486 P.2d 181 (1971); *Newland v. Fossey*, 2 Ariz. App. 394, 409 P.2d 314 (1965); *Harbel Oil Co. v. Steele*, 80 Ariz. 368, 398 P.2d 789 (1956).

The court in the *Harbel Oil Co.* case, cited above, clearly stated that where an appeal is not filed timely the court acquires no jurisdiction other than to dismiss the attempt to appeal.

Our courts, in *Kiefer v. May*, 22 Ariz. App. 567, 529 P.2d 721 (1974), also noted that the failure to file either the notice of appeal or the appeal bond on time deprives the appellate court of jurisdiction.

1. Time Limit. The losing party has five days to file a notice of appeal after Rendition of judgment or his appeal rights are lost in a Justice Court case. ARS §12-1179(A).
2. A cost bond must be filed. A supersedeas bond must be filed in order to stay enforcement of the judgment. Rent accruing during the appeal must be paid to the court. ARS §12-1179(B)(D) and (E).
3. Appeals are on the record. There is no trial de novo on appeal of a Justice Court eviction unless the record is fatally defective. The procedure and appeal rights prescribed in Title 12, Chapter 8, Article 4 apply to special detainer actions.

ANATOMY OF AN APPEAL: THE LEGAL STEPS

There are new rules regarding Justice Court Appeals. See Superior Court Rules of Appellate Procedure - Civil ("SCRAP").

Every party to a lawsuit has the right to appeal the judge's decision. This includes landlords and tenants in a special detainer, commonly known as an eviction action. A brief overview of the appeal process from Justice Court to Superior Court.

Normally in eviction cases it is the tenant who appeals a judge's decision. The landlord has the same right to appeal but because of the costs and time it may take an appeal to run its course, very few landlords exercise this option.

Tenants, on the other hand, file the majority of eviction appeals. The reason may be to delay their removal from the apartment or to have the higher court determine if the judge's decision was legally correct.

Under A.R.S. § 12-1179, either party may appeal from Justice Court to Superior Court by filing a written notice within five calendar days after "rendition of the eviction judgment." Keep in mind that rendition of judgment is when the judge gives his or her verbal decision, not when he or she signs a written form of judgment, which might take a few days.

If the tenant does not file a written notice of appeal with the court within the five days, the case cannot be appealed. Always check the date on the notice of appeal to make sure it has been filed timely.

Next, the tenant must post a bond(s) with the court in the amount set by the court (normally the judgment amount) and pay all future rent to the Justice Court on the rental due date. If the tenant does not post the bond set by the Court, the Writ of Restitution will not be stopped and the tenant would have to move out.

If the tenant does post the bond but fails to pay future rent to the Justice Court, the landlord can file a motion in the Justice Court to allow the landlord to issue the Writ of Restitution and regain possession of the rental property. See SCRAP Rule 6(a)(5).

If the tenant files the appeal in time, posts all the bonds set by the Court and keeps the rent current, then the next requirement is to pay the appeal fee and file the written brief.

The tenant must file a written legal brief within 60 days after the deadline to file an appeal (65 days after rendition of Judgment) with the Justice Court. SCRAP Rule 8. If this is not done, a procedural motion to dismiss the appeal can be filed - although the best way is to call the Justice Court to see if they are deeming the appeal abandoned and dismissing it.

The brief tells the Court why the case was not properly decided by the Justice of the Peace. If the brief is timely filed, then the landlord must file his or her brief within 30 days. Reply briefs may not be filed unless authorized by the Superior Court.

Once the briefs are filed, the Court either sets a hearing date for oral arguments or simply reviews the entire file and issues a decision. Assuming all of the above procedures have been properly followed, the judge's decision may come anywhere from four to twelve months after the original court date in Justice Court.

E. Termination of Utility Services.

The termination of a tenant's utilities must be handled pursuant to statute, A.R.S. §33-1368(D). If a landlord is providing utility service, he may not disconnect the utilities if the tenant fails to pay rent. Such a unilateral utility termination may be used

against the Landlord in any legal proceeding and may be considered an unlawful termination of services or a constructive eviction. Pursuant to A.R.S. §33-1368(D), a landlord may only disconnect utilities provided by the landlord on the day following the day a writ of restitution is executed. Utility disconnection may only be performed by persons authorized by the utility company. Pursuant to A.R.S. §33-1364(C) the landlord may not transfer the responsibility for the payment of utilities without the tenant's written consent. Further, pursuant to A.R.S. §33-1364(A)1, if the landlord fails to pay the landlord's utility bill, the tenant(s) may give the landlord a notice, pay the bill, and deduct the paid amount from the rent.

F. Tenant Bankruptcies; Collection.

If the tenant files bankruptcy, the landlord is advised to contact their attorney immediately and take no steps towards eviction. **Upon filing of a bankruptcy, there is likely an automatic stay against you taking any further action to collect any money, or evict.** Bankruptcy counsel will likely have to file a motion to lift the automatic stay, so that you can complete the eviction after approval of the Bankruptcy Court.

G. Selling Tenant's Personal Property

If the landlord is holding personal property pursuant to the Landlord's Lien under A.R.S. §33-361. The following procedure is recommended:

1. Ensure that a notice specifying the inventory list, and the storage charges is promptly sent to the tenant certified mail, return receipt requested to the last known address and all alternative addresses known to the landlord. (Initial Notice).
2. Check with all office personnel to make sure that the tenant has made no reasonable efforts to recover the property. If the tenant notifies the landlord, in writing, on or before the sale, the tenant can reclaim the property by paying the cost of removal, storage and outstanding rent.
3. Forty (40) days after incurring lockout and seizure, send a notice to the tenant demanding payment of the rent, moving and storage charges within 10 days or the property will be sold at public auction, provide the date, time and location of the sale. Send the notice certified mail, return receipt requested, to the last known address and all alternative addresses

known to the landlord. Set the sale date at least ten days off (This date must be past 60 days after the landlord's seizure), and do not set the sale on a Sunday or legal holiday.

4. Advertise the "public sale" twice in a local newspaper with the tenant's name, e.g. "Public sale of personal property obtained by a seizure at (property address) on (Seizure date), personal property of (Tenant Name) consisting of: ... (General description of different types of property; a complete list of each individual item is not necessary) will be sold at (auction location) on (auction date) at (auction time)." (make sure ads run at least five days prior to sale date).
5. Hold the public auction at the date, time and place provided in the notice and advertisements. Sell the items to the highest bidder. NOTE: you may bid at the sale, in fact you may credit bid up to the amount of the costs of the rent, storage and moving charges. Call us if you have questions. Do not leave any property unsold, credit bid any items not otherwise bid on, so that you may dispose of your property as you see fit.
6. If excess funds, call us for directions on depositing funds with the State if necessary.
7. For a minimum of twelve months following the sale, the landlord must: 1) hold adequate records of the outstanding and unpaid rent, storage charges, moving charges and the records of the sale of personal property.

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