

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 0242

*WDM*

*JEW*

*file by WDM*

TRUSTEE FOR BONDHOLDERS UNDER THAT CERTAIN  
TRUST INDENTURE DATES DECEMBER 1, 2007, RELATIVE  
TO LOUISIANA LOCAL GOVERNMENT ENVIRONMENTAL  
AUTHORITY TAX-EXAMPT REVENUE BONDS  
(SOUTHGATE SUITES PROJECT), SERIES 2007A  
(GO ZONE) (NON-AMT)

VERSUS

SOUTHGATE SUITES LLC, SOUTHGATE TOWERS LLC,  
ROBERT W. DAY, JANICE E. DAY,  
& WASHINGTON STATE BANK

Judgment Rendered: DEC 10 2013

\* \* \* \* \*

On Appeal from the  
19<sup>th</sup> Judicial District Court,  
In and for East Baton Rouge Parish,  
State of Louisiana  
Trial Court No. 611,831, Section 24

The Honorable R. Michael Caldwell, Judge Presiding

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BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

**CRAIN, J.**

Wells Fargo Bank, National Association (Trustee)<sup>1</sup> appeals a judgment sustaining an exception of no cause or right of action and dismissing its claims against Washington State Bank. After consideration of the evidence adduced at the evidentiary hearing held pursuant to this court's remand order, we dismiss this appeal as moot.

**FACTS AND PROCEDURAL HISTORY**

This suit arises from Southgate Suites, LLC's construction of the Staybridge Suites Hotel in Baton Rouge. Pertinent to this appeal, Trustee alleges that the property on which the hotel was to be built was owned by Southgate Towers, LLC, and encumbered by a mortgage in favor of Washington State Bank. Southgate Towers conveyed the tract on which the hotel was to be built to Southgate Suites and Washington State Bank executed a partial release of its mortgage as to that tract. As part of the financing for the construction, Southgate Suites entered into a loan agreement, with payment and obligations secured by a mortgage in favor of Trustee. After construction, it was discovered that the tract on which the hotel was built is approximately thirty-two feet shorter than originally represented or believed, resulting in the hotel encroaching onto land still owned by Southgate Towers and encumbered by Washington State Bank's mortgage. Trustee explains that approximately fourteen guest rooms, as well as portions of the hotel's lobby,

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The plaintiff in this suit is Wells Fargo Bank, National Association, as Trustee for Bondholders under that certain Trust Indenture dated December 1, 2007, relative to Louisiana Local Government Environmental Facilities and Community Development Authority Tax-Exempt Revenue Bonds (Southgate Suites Project), Series 2007A (GO Zone) (Non-AMT). Wells Fargo Bank is the successor trustee to U.S. Bank, National Association, and was substituted as party plaintiff. For ease of reference, the plaintiff is referred to herein as "Trustee."

food service, conference room areas, and parking improvements lie upon Southgate Tower's tract, which has impaired its rights with respect to the hotel.

Trustee instituted this suit against multiple defendants, including Washington State Bank. Trustee's claims against Washington State Bank include reformation of the partial release of mortgage to reflect the parties' true intention as to the length of the tract released, and recognition of a predial servitude allowing "for the continued use and operation of the Hotel without any interference from Southgate Towers" without compensation owed to Southgate Towers or Washington State Bank. The trial court sustained an exception of no cause or right of action filed by Washington State Bank and dismissed Trustee's claims against it. Trustee appeals contending the trial court erred in sustaining the exception and dismissing both its reformation and servitude claims against Washington State Bank.

In their appellate briefs, the parties referenced events that occurred after the appeal was taken. Specifically, Trustee stated that the hotel was sold at judicial sale as a result of a separate foreclosure proceeding, and that it credit bid on the hotel, with the resulting sheriff's deed issued in the name of its affiliate, Red Stick Operating Company, L.L.C. Trustee also stated that Red Stick had filed a motion to be added as an additional plaintiff in the suit. During oral arguments, the parties acknowledged that the hotel was sold in the foreclosure proceeding and as a result, the mortgage held by Trustee was extinguished.

Because of the parties' representations, this court questioned whether this appeal is now moot, and, correlatively, whether this court now lacks subject matter jurisdiction. In an effort to answer that question, this appeal was stayed, and the matter was remanded to the trial court for the limited purpose of receiving evidence of the referenced judicial sale and whether the mortgage on the property

held by Trustee had been extinguished. The record has been supplemented with the evidence adduced at that hearing, the parties have submitted supplemental briefs on the jurisdictional issue, and the stay has been lifted.

### DISCUSSION

Subject matter jurisdiction is the legal power and authority of a court to hear and determine a particular class of actions or proceedings, based upon the object of the demand, the amount in dispute, or the value of the right asserted. La. Code Civ. Pro. art. 2. Appellate courts have the duty to examine subject matter jurisdiction *sua sponte*, even when the issue is not raised by the parties. *Gaten v. Tangipahoa Parish School System*, 11-1133 (La. App. 1 Cir. 3/23/12), 91 So. 3d 1073, 1074; *Tobin v. Jindal*, 11-0838 (La. App. 1 Cir. 2/10/12), 91 So. 3d 317, 321 n.6.

It is well settled that courts will not decide abstract, hypothetical or moot controversies, or render advisory opinions with respect to such controversies. *Cat's Meow, Inc. v. City of New Orleans, through the Department of Finance*, 98-0601 (La. 10/20/98), 720 So. 2d 1186, 1193; *Tobin*, 91 So. 3d at 321. An issue is moot when a judgment or decree on that issue has been deprived of practical significance or made abstract or purely academic. *Animal Legal Defense Fund v. State, Dept. of Wildlife and Fisheries*, 12-0971 (La. App. 1 Cir. 4/25/13), \_\_\_ So. 3d \_\_\_, \_\_\_, *writ denied*, 13-1565 (La. 10/4/13), 122 So. 3d 1025. A case is moot when a rendered judgment or decree can serve no useful purpose and give no practical relief or effect. *Id.* If the case is moot, there is no subject matter on which the judgment of the court can operate. *Id.* Although jurisdiction may exist at the outset, it may abate if the case becomes moot while the case is proceeding. *See Tobin*, 91 So. 3d at 321. The controversy must normally exist at every stage of the proceeding, including the appellate stages. *Id.*

The judgment that is the subject of this appeal sustains a peremptory exception of no cause or right of action and dismisses Trustee's claims against Washington State Bank, which included reformation of a release of mortgage and recognition of a predial servitude.<sup>2</sup> On appeal, Trustee raises two issues: 1) whether Trustee has a right to reform a release of mortgage to which it was not a party, based on alleged mutual mistake of the contracting parties, where the release of mortgage affects Trustee's separate mortgage; and 2) whether Trustee has standing to seek declaratory judgment regarding the existence of a predial servitude under Louisiana Civil Code article 670 in favor of the owner of the hotel building, based on its security interest in the hotel. Both issues are asserted by Trustee as holder of a mortgage, which is reflected in the following assignments of error urged by Trustee:

1. The district court erred in sustaining Washington State Bank's peremptory exception of no right or no cause of action with respect to Trustee's claim for contractual reformation, *as its security interest in the Hotel was directly impacted by Washington State Bank's mortgage over the encroaching portion of the Hotel*, and because numerous cases from Louisiana courts have allowed non-parties to a contract to seek judicial reformation under Louisiana Civil Code article 1949.

2. The district court erred in sustaining Washington State Bank's peremptory exception of no right or no cause of action with respect to Trustee's claim for a predial servitude under Louisiana Civil Code article 670, *as Trustee merely requested that a declaratory judgment issue regarding the existence of the servitude in order to adequately protect its interest in the hotel.*

(Emphasis added.)

The evidence adduced at the hearing conducted on remand confirms the parties' representations that, after this appeal was taken, the hotel was sold at

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<sup>2</sup> There is no single exception of no cause or right of action. *Wingfield v. State Through Dept. of Transp. and Development*, 97-1567 (La. App. 1 Cir. 6/29/98), 716 So. 2d 164, 166, writ denied, 98-2068 (La. 11/6/98), 728 So. 2d 395. Although often confused and improperly combined, the peremptory exceptions of no cause of action and no right of action are separate and distinct. La. Code Civ. Pro. art. 927A(5) and (6); *Badeaux v. Southwest Computer Bureau, Inc.*, 05-0612 (La. 3/17/06), 929 So. 2d 1211, 1216.

judicial sale and is now owned by Red Stick. Further, Trustee's mortgage has been extinguished. Thus, the issue of whether Trustee, as holder of a security interest in the hotel, has a right of action is moot.

Trustee argues that this appeal is not moot because it currently holds a 100% economic interest in the hotel as the sole shareholder of Red Stick, the hotel's current owner. However, Red Stick is a legal entity separate and distinct from its shareholder in terms of procedural capacity. *See Bankston v. Tasch, LLC*, 09-1573 (La. App. 4 Cir. 6/2/10), 40 So. 3d 495, 498. Moreover, the parties have indicated that Red Stick is pursuing its own rights with regard to the property it now owns.

In its supplemental brief filed after remand, Trustee argues that it has the right to assert the reformation claim because it was a party to the "four-party transaction" that underlies this litigation, and also because it was a third-party beneficiary of the release of mortgage. However, the record, as supplemented, reflects that Trustee now holds no mortgage on the subject property. Accordingly, the issues presented in this appeal, namely the rights of one holding a security interest in the hotel, are now moot.

Appeals are favored in the law and will not be dismissed for technicalities. *Emmons v. Agricultural Ins. Co.*, 158 So. 2d 594, 599 (La. 1963). Both parties urge this court to render an opinion on the substantive issues raised in this appeal, because it would affect the litigation currently pending in the trial court. However, the issues of whether Trustee, as holder of a security interest in the hotel, has a right or cause of action for reformation of the release of mortgage or for recognition of a predial servitude, are moot because Trustee no longer holds that security interest. This court is limited in its subject matter jurisdiction to justiciable controversies, and is not empowered to render an advisory opinion regarding the rights of other litigants, despite the parties' requests. *Cf. Williams v.*

*International Offshore Services, LLC*, 11-1240 (La. App. 1 Cir. 12/7/12), 106 So. 3d 212, 217, *writ denied*, 13-0259 (La. 3/8/13), 109 So. 3d 367 (recognizing that subject matter jurisdiction cannot be waived or conferred by the consent of the parties).

### **CONCLUSION**

For the foregoing reasons, this appeal is dismissed as moot. Costs of this appeal are assessed to Wells Fargo Bank, National Association.

**APPEAL DISMISSED.**