



COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

ALEX HERNANDEZ,	§	No. 08-16-00290-CV
	§	
Appellant,	§	Appeal from
	§	
v.	§	County Court at Law No. 3
	§	
US BANK TRUST, NA AS TRUSTEE	§	of El Paso County, Texas
FOR LSF8 MASTER PARTICIPATION	§	
TRUST,	§	(TC # 2016-CCV00265)
	§	
Appellee.	§	

MEMORANDUM OPINION

Pending before the Court is Appellee's first amended motion to dismiss this appeal as moot because the writ of possession has been executed. Appellant, Alex Hernandez, has filed a response to the motion. We grant the motion and dismiss the appeal.

Hernandez is appealing a judgment granting possession of the subject property to U.S. Bank Trust. In an opinion issued on February 17, 2017, we considered Hernandez's motion to reduce the supersedeas amount and determined that he had not timely superseded the judgment. *See Hernandez v. U.S. Bank Trust, NA as Trustee for LSF8 Master Participation Trust*, 08-16-00290-CV (Tex.App.--El Paso Feb. 17, 2017, opinion on motion). On March 13, 2017, U.S. Bank Trust executed a writ of possession and took possession of the subject property.

It is well settled that issues of title are not adjudicated in a forcible-detainer suit and the only issue to be decided is the right to immediate possession of the property. *Marshall v. Housing Authority of the City of San Antonio*, 198 S.W.3d 782, 785 (Tex. 2006); *Rice v. Pinney*, 51 S.W.3d 705, 709 (Tex.App.--Dallas 2001, no pet.). While failure to supersede a forcible-detainer judgment does not divest an appellant of the right to appeal, an appeal from a forcible-detainer action becomes moot if the appellant is no longer in possession of the property, unless the appellant holds and asserts a potentially meritorious claim of right to current, actual possession of the property. *Marshall*, 198 S.W.3d at 786-87; see *Wilhelm v. Federal National Mortgage Association*, 349 S.W.3d 766, 768 (Tex.App.--Houston [14th Dist.] 2011, no pet.).

In his brief on the merits, Hernandez argues that the trial court improperly granted summary judgment in U.S. Bank's favor because a fact issue exists whether he was given 90 days' notice prior to U.S. Bank filing the forcible detainer action as required by the Protecting Tenants at Foreclosure Act of 2009. See Protecting Tenants at Foreclosure Act of 2009, Pub.L. No. 111-22, § 702, 123 Stat. 1632, 1661 (codified at 12 U.S.C. § 5220).¹ Hernandez asserted in his summary judgment response that he began renting the subject property from the prior owners on an unspecified date in September 2014 and he pre-paid the rent for the months of September through December 2014. The subject property was sold at a non-judicial foreclosure sale on November 4, 2014. The mortgage includes a provision that following a foreclosure sale, the mortgagor in the deed of trust and anyone holding under him or her, shall immediately surrender possession of the subject property to the purchaser at the foreclosure sale. If possession is not surrendered, the mortgagor or any person holding under him shall be a tenant at sufferance and may be removed

¹ Pursuant to the PTFA's sunset provision, the Act expired on December 31, 2014. The foreclosure occurred in November 2014, but U.S. Bank did not send notice to vacate until November 3, 2015, eleven months following the expiration of the PTFA.

by a writ of possession. U.S. Bank sent notice to vacate to Hernandez on November 3, 2015, but he failed to vacate, and U.S. Bank filed the forcible detainer action in the Justice Court on December 9, 2015. The Justice of the Peace concluded that Hernandez was entitled to 90 days' notice. The following day, U.S. Bank sent a new notice to vacate to Hernandez, and following the expiration of 90 days, the case proceeded in the Justice Court and a jury determined that U.S. Bank was entitled to possession. Hernandez appealed to the County Court at Law and the court entered summary judgment that U.S. Bank is entitled to possession of the subject property.

Hernandez does not dispute that he became a tenant at sufferance under the mortgage when the property was sold at the foreclosure sale. The issue raised in his brief regarding the notice to vacate under the PTFA does not constitute a potentially meritorious claim of right to current, actual possession of the property. If we allowed this appeal to continue, our opinion and judgment could not restore possession of the subject property to Hernandez because he has not presented any basis for claiming a right to continuous possession following the foreclosure sale.

In his amended response to the motion to dismiss, Hernandez asserts that his appeal is not moot because U.S. Bank no longer owned the property at the time the writ of possession was executed, and therefore, the writ of possession was improperly executed. Hernandez's argument is misguided. The issue is whether Hernandez holds and asserts a potentially meritorious claim of right to possession of the property in his own right. Because Hernandez has not alleged in his brief or his response to U.S. Bank's motion to dismiss any facts which would support a claim of right to current possession of the property, the appeal is moot. Accordingly, we grant U.S. Bank Trust's motion and dismiss the appeal as moot. *See Marshall*, 198 S.W.3d at 786-87 (appellant did not hold or assert a potentially meritorious claim of right to current, actual possession of the apartment

because her lease had expired, and she presented no basis for claiming a right to possession after the expiration of her lease). Costs of the appeal are taxed against the party incurring same.

May 11, 2017

ANN CRAWFORD McCLURE, Chief Justice

Before McClure, C.J., Rodriguez, and Palafox, JJ.