**Reverse and Render; Affirmed and Opinion Filed March 22, 2017**

**In The**
# Court of Appeals
# Fifth District of Texas at Dallas

**No. 05-16-00511-CV**

**CHARLES DYHRE AND TRACY DYHRE, Appellants**
**V.**
**DAVID HINMAN AND TYLER IVIE, Appellees**

**On Appeal from the County Court at Law No. 2**
**Collin County, Texas**
**Trial Court Cause No. 002-02785-2015**

## MEMORANDUM OPINION

Before Justices Francis, Lang-Miers, and Whitehill
Opinion by Justice Whitehill

This is an eviction case following a foreclosure sale where the new property owners David Hinman and Tyler Ivie (Owners) sued Charles Dhyre and Tracy Dyhre (Occupants) for possession of the property. Occupants appeal the trial court's judgment awarding Owners possession, damages for rent, and appellate attorney's fees.

Occupants raise six issues, claiming the trial court erred by: (i) failing to file findings of fact and conclusions of law; (ii) hearing the case and rendering judgment when the petition was not properly verified; (iii) hearing the case and rendering judgment when all indispensable plaintiffs had not been joined; (iv) granting judgment for possession; (v) awarding damages without an evidentiary foundation and (vi) awarding appellate attorney's fees without supporting evidence.

We conclude that the trial court did not err other than by awarding appellate attorney's fees. We therefore (i) reverse the attorney's fees award and render judgment that appellees take nothing on attorney's fees and (ii) affirm the remainder of the judgment.

## I. Background

Occupants' home was foreclosed after they defaulted on their mortgage in September 2014. The Owners purchased the house at an October 15, 2015 foreclosure sale and obtained the resulting deed.

Owners later sent an eviction notice, but the Occupants refused to leave. Consequently, Owners filed a forcible entry and detainer suit in the Justice Court. The Justice Court awarded possession to Owners, and the Occupants appealed to County Court, which conducted a non-jury trial.

The Owners testified at trial and entered into evidence their deed, the eviction notice, and the original deed of trust between Occupants and the foreclosing bank. The Occupants did not present any evidence.

The trial court's judgment awarded the Owners immediate possession, $6,258.04 in damages, and appellate attorney's fees.

The Occupants requested findings of fact and conclusions of law, but they did not file a notice of past due findings when the court did not issue findings. This appeal followed.

## II. Analysis

### A. Occupants' First Issue: Did the trial court err by not issuing findings of fact and conclusions of law?

Occupants' first issue complains that the trial court failed to file findings of fact and conclusions of law in accordance with TEX. R. CIV. P. 296. Although Occupants do not explain why the findings were required or how they were harmed, they argue that the case should be reversed and remanded, or alternatively, abated. We disagree.

Occupants filed a timely request for findings of fact and conclusions of law. But Rule 297 provides that if the court does not timely make findings as requested, the requesting party shall file and serve a "Notice of Past Due Findings of Fact and Conclusions of Law." *See* TEX. R. CIV. P. 297. Occupants did not do so and therefore cannot on appeal complain about the absence of findings. *See Burns v. Burns*, 116 S.W.3d 916, 922 (Tex. App.—Dallas 2003, no pet.). We thus resolve Occupants' first issue against them.

**B. Occupants' Second Issue: Was the petition properly verified?**

Occupants assert that the petition was defective because it was only verified by one of the Owners, and without citing any authority, maintain that this alleged defect is jurisdictional.[1]

Rule 510.3(a) requires that an eviction petition "be sworn to by the plaintiff." *See* TEX. R. CIV. P. 510.3(a). Occupants, however, cite no cases for the premise that the rule requires a verification by all owners or plaintiffs. But we need not decide that question because numerous courts have held that a verification defect is not jurisdictional. *See, e.g., Norvelle v. PNC Mtge.*, 472 S.W.3d 444, 446 (Tex. App.—Fort Worth 2015, no pet.) (defective verification does not deprive court of jurisdiction); *Shutter v. Wells Fargo Bank*, 318 S.W.3d 467, 469 (Tex. App.—Dallas 2010, pet. dism'd w.o.j.) (overruling argument that defective verification is jurisdictional). Thus, any such defect here would not be jurisdictional as Occupants contend.

In addition, to the extent they assert non-jurisdictional error, without addressing whether there is a defect under rule 510.3(a), we conclude that the Occupants have not demonstrated harm. *See Shutter*, 318 S.W.3d at 470 (defective verification to a FED petition not an impediment to proceeding nor harm shown). Instead, the trial court specifically asked the Occupants' lawyer how the Occupants would be harmed by allowing the case to proceed, noting

[1] Occupants' briefing is not clear as to whether they claim that both of the Owners who are party plaintiffs needed to verify, or whether they should also have included a third party, Shane Jones. It appears the court previously ruled that Jones was not a proper plaintiff and did not have standing.

that they had received notice and would be able to cross-examine all party plaintiffs. The Occupants' response was to cite a case referencing res judicata and necessary parties. Thus, there is nothing to demonstrate how a defective verification prevented the court's determination of immediate possession.

Accordingly, we resolve Occupants' second issue against them.

**C. Occupants' Third Issue: Did the Owners fail to join an indispensable party plaintiff?**

An individual named Shane Jones signed the original demand for possession along with the Owners. Hinman testified that Jones was a business partner who had planned to participate in the purchase of the property before the bank found him unacceptable. Occupants now argue that "[i]t is plain from the facts of the demand for possession which was made, and the failure to include Jones as a party despite the argument of [Occupants] for abatement and/or jurisdictional defect in that regard, the Judgment should be reversed." We understand the Occupants to argue that Jones should have been joined as an indispensable party and the failure to join him was jurisdictional. We disagree.

Nothing in the record establishes that Jones was an indispensable party.[2] The issue was who as between the Owners and the Occupants had the superior right to immediate possession of the property. *See Williams v. Bank of New York Mellon*, 315 S.W.3d 925, 927 (Tex. App.—Dallas 2010, no pet.). Thus, Owners, the only two grantees under their deed, needed only to present sufficient evidence of *their* ownership to demonstrate a superior right to immediate possession vis a vis the Occupants. *See Rice v. Pinney*, 51 S.W.3d 705, 709 (Tex. App.—Dallas

[2] An indispensable party is one whose presence is required for just adjudication. *See* TEX. R. APP. P. 39; *see also Haney Elec. Co. v. Hurst*, 624 S.W.2d 602, 611 (Tex. Civ. App.—Dallas 1981, writ dism'd). Moreover, "[a]" failure to join indispensable parties does not render a judgment void; there could rarely exist a party who is so indispensable that his absence would deprive the court of jurisdiction to adjudicate between the parties who are before the court." *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985).

2001, no pet.) (providing a detailed explanation regarding forcible entry and detainer requirements).

The evidence admitted at trial included the deed of trust, the special warranty deed, and the notice to the Occupants to vacate the property. The evidence shows that the Owners purchased the property from the bank. Jones is not listed on the deed as an owner, and the Occupants presented no evidence at all. Therefore, Owners established a superior right to immediate possession as to the Occupants, and nothing demonstrates that Jones should have been joined as a party.

We thus resolve the Occupants' third issue against them. *See Shutter*, 318 S.W.3d at 470–471; *Rice*, 51 S.W.3d at 709-713.

D. **Occupants' Fourth Issue: Did the trial court err in awarding judgment for possession under deed of trust's tenancy at sufferance provision?**

The Occupants argue that the Owners were not entitled to the benefit of the language in the deed of trust providing for tenancy at sufferance because the Owners were not in privity with Occupants.[3] Occupants argue lack of privity because Hinman and Ivie (Owners) were not parties to the deed of trust.[4]

Occupants' argument fails because the Owners were transferees from the Deed of Trust trustee, which transaction transferred all deed of trust rights, including the tenancy at sufferance rights to the Owners. That transfer was sufficient to establish the Owners' landlord-tenant relationship with Occupants and Owners' correlative rights to enforce the deed of trust's tenancy at sufferance clause against Occupants. *See Schlichting v. Lehman Bros. Bank FSB*, 346 S.W.3d 196, 199–200 (Tex. App.—Dallas 2011, pet. dism'd); *Rice*, 51 S.W.3d at 709-713. Therefore,

[3] This language provides that if the Occupants do not surrender the property after foreclosure they become a "tenant at sufferance and may be removed by a writ of possession or other court proceeding."

[4] To the extent that Owners are making other arguments on this issue they are forfeited as inadequately briefed. *See* TEX. R. APP. P. 38.1.

the trial court did not err in awarding the Owners possession of the property, and we resolve Occupants' fourth issue against them.[5]

**E. Occupants' Fifth Issue: Is there sufficient evidence of damages?**

Occupants argue that there was a "complete lack of evidentiary foundation" for the damages awarded to Owners. Specifically, Occupants complain about Hinman's testimony based on the "presumed rental value of the property," without reference to comparable value in the "relevant submarket or neighborhood." We understand this to challenge the legal sufficiency of the evidence to support damages, which we decide against appellants.[6]

Occupants' briefing under this issue is inadequate for not citing a single supporting authority. *See* TEX. R. APP. P. 38.1(i); *Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 284–85 (Tex. 1994). Regardless, we nonetheless reject this issue based on Hinman's testimony.

Hinman testified about what the Occupants should have been paying for rent. He explained that he has been a real estate agent for ten years and rents two to three residential properties per month. According to Hinman, an analysis of comparable houses "in a three mile radius around this home [of] what is leased for the past year and what is on the market now" showed the reasonable rental value of the property to be $2,500 monthly. The trial court awarded damages based on $2,000 monthly.

A property owner is qualified to testify to the value of his property. *Nat. Gas Pipeline Co. v. Justiss*, 397 S.W.3d 150, 155 (2012). Here, Hinman is not just an owner, he is also a real

[5] The Occupants previously challenged the foreclosure in a separate lawsuit that was dismissed on summary judgment. Occupants appealed to this court but the case was dismissed when they failed to file a brief. *See Dyhre v. One West Bank*, No. 05-15-01451-CV, 2016 WL 3625995, at *1 (Tex. App.—Dallas July 6, 2016) (mem. op.).

[6] *See City of Keller v. Wilson*, 168 S.W.3d 802, 816-21 (Tex. 2005).

estate agent familiar with the area market. His testimony is sufficient to support the rental damages awarded.

We thus resolve Occupants' fifth issue against them.

**F. Is there sufficient evidence of appellate attorney's fees?**

We understand Occupants' sixth issue to complain that there is no evidence to support the attorney's fees award. We agree.

Owners argue that because there are no findings of fact and conclusions of law, we imply all findings necessary to support the trial court's judgment. Although this is generally true , there must be some evidence to support the judgment and the implied finding. *See BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002) (when there are no findings of fact and conclusions of law, all facts necessary to support the judgment and supported by the evidence are implied). Here, there is no evidence whatsoever concerning attorney's fees. As a result, there is no evidence to support an implied finding on attorney's fees. Occupants' sixth issue is therefore sustained.

## III. Conclusion

We reverse the attorney's fees award and render judgment that Owners take nothing for attorney's fees. The remainder of the trial court's judgment is affirmed.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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# Court of Appeals
# Fifth District of Texas at Dallas

## JUDGMENT

CHARLES DYHRE AND TRACY DYHRE, Appellants

No. 05-16-00511-CV V.

DAVID HINMAN AND TYLER IVIE, Appellees

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Trial Court Cause No. 002-02785-2015.
Opinion delivered by Justice Whitehill.
Justices Francis and Lang-Miers participating.

In accordance with this Court's opinion of this date, appellees' attorney's fees award is **REVERSED** and judgment is **RENDERED** that appellees take nothing on attorney's fees. The remainder of the judgment is **AFFIRMED**.

It is **ORDERED** that appellees DAVID HINMAN AND TYLER IVIE recover their costs of this appeal from appellants CHARLES DYHRE AND TRACY DYHRE.

Judgment entered March 22, 2017.