Affirmed and Memorandum Opinion filed July 22, 2010.

In The

Fourteenth Court of Appeals

NO. 14-06-00824-CV

JAMES M. RAMEY AND SEAN RAMEY, APPELLANTS

V.

BANK OF NEW YORK, AS TRUSTEE, APPELLEE

On Appeal from County Civil Court at Law No. 1
Harris County, Texas
Trial Court Cause No. 860916

MEMORANDUM OPINION

This appeal arises from a forcible-detainer action brought by Bank of New York. The county civil court at law found in favor of the bank. James Ramey and Sean Ramey filed a pro se notice of appeal to this court.

I

Ramey defaulted under the terms of a deed of trust. The property was sold at foreclosure and under the terms of the deed Ramey became a tenant at sufferance. The bank gave Ramey notice to vacate within three days and filed a forcible-detainer action. The justice-of-the-peace court found in favor of the bank and rendered judgment against

James Ramey and all other occupants. James Ramey appealed to the county civil court at law and filed several counterclaims. That court also rendered judgment for the bank and denied Ramey's counterclaims. From that judgment, the Rameys appeal and raise three issues.

II

A

In their first issue, the Rameys claim both the justice court and the county court at law lacked subject-matter jurisdiction. Specifically, the Rameys contend the underlying foreclosure sale violated the automatic stay imposed by a bankruptcy proceeding James Ramey filed. Further, the Rameys argue a trespass-to-try-title suit filed before the forcible-detainer action was heard precluded the county court at law from proceeding.

A bankruptcy court may annul a stay to validate actions taken during the period of time covered by the stay. *See Goswami v. Metropolitan Sav. & Loan Ass'n*, 751 S.W.2d 487, 489 (Tex. 1988) (citing *Claude Regis Vargo Enters. v. Bacarisse*, 578 S.W.2d 524, 527 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.)). The bank requests we take judicial notice of an order annulling the automatic stay *ab initio* and validating the foreclosure sale, which the bankruptcy court signed on October 24, 2005.

We may take judicial notice for the first time on appeal of a fact "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Tex. R. Civ. Evid. 201(b)(2). Judicial notice is mandatory if requested by a party and we are supplied with the necessary information. Tex. R. Civ. Evid. 201(d). We may take judicial notice for the first time on appeal. *See Office of Pub. Util. Counsel v. Pub. Util. Comm'n*, 878 S.W.2d 598, 600 (Tex. 1994). The bank has directed this court to the order, available at https://ecf.txwb.uscourts.gov/doc1/1801466872, and the

authenticity and contents of the order are capable of accurate and ready determination by resort to a published record whose accuracy cannot reasonably be questioned. Accordingly, we take judicial notice of the fact the bankruptcy court annulled its stay for the period of time covering the foreclosure sale and validated the sale. The Rameys' claim that the foreclosure sale is invalid because of the bankruptcy stay is therefore overruled.

The question of title is not adjudicated in a forcible-entry-and-detainer action; rather, the only issue is the right to actual possession. *See* Tex. R. Civ. P. 746; *Scott v. Hewitt*, 127 Tex. 31, 90 S.W.2d 816, 818–19 (1936). An action for forcible entry and detainer is not exclusive of other remedies, it is cumulative. *See Goggins v. Leo*, 849 S.W.2d 373, 376 (Tex. App. Houston [14th Dist.] 1993, no writ). The displaced party is entitled to bring a separate suit in the district court to determine the question of title, as the Rameys have done, and the suits may be prosecuted concurrently. *Villalon v. Bank One*, 176 S.W.3d 66, 70–71 (Tex. App.—Houston [1st Dist.] 2004, pet. denied). The plaintiff in a forcible-entry-and-detainer action is not required to prove up title, "but need only show sufficient evidence of ownership to demonstrate a superior right to immediate possession." *Goggins*, 849 S.W.2d at 377. A suit to try title in district court does not necessarily deprive the court in which a forcible-detainer action was brought of jurisdiction. *See Villalon*, 176 S.W.3d at 70–71. The existence of a landlord-tenant relationship provides a basis for the court to determine the right to immediate possession without resolving the question of title. *Id*. at 71. In this case, the deed establishes a landlord-tenant relationship after a foreclosure sale. The relationship therefore existed when the forcible detainer action was heard and the county court at law could determine possession without quieting title.

In support of their argument, the Rameys cite *Hopes v. Buckeye Retirement Co., L.L.C., Ltd.*, No. 13-07-00058-CV, 2009 WL 866794 (Tex. App.—Corpus

Christi-Edinburg Apr. 2, 2009, no pet.) (mem. op.), and *Mitchell v. Armstrong Capital Corp.*, 911 S.W.2d 169 (Tex. App.—Houston [1st Dist.] 1995, writ denied). Both are distinguishable from the case at bar because in those case the only basis upon which the court could determine the right of possession was title. Here, the court could determine possession based on the landlord-tenant relationship arising from the deed of trust. For these reasons, we find the Rameys' argument that the trespass-to-try-title suit precluded a determination in the forcible-entry-and-detainer action to be without merit. Having rejected both of the Rameys' arguments that the justice court and the county court at law lacked subject-matter jurisdiction, we overrule the Rameys' first issue.

B

In their second issue, the Rameys assert the county court at law erred in concluding the written notices to vacate met the requirements of the Texas Property Code. *See* Tex. Prop. Code Ann. §§ 24.002, 24.005 (Vernon 2000 & Supp. 2009). Under section 24.005(b), the Rameys were entitled to three days' written notice to vacate before the bank filed a forcible detainer suit. Tex. Prop. Code Ann. § 24.005(b) (Vernon Supp. 2009). Section 24.005(f) provides the notice "shall be given in person or by mail at the premises in question. . . . Notice by mail may be by regular mail . . . to the premises in question." Tex. Prop. Code Ann. § 24.005(f) (Vernon Supp. 2009).

We first note that a complaint about not receiving proper notice to vacate cannot be raised for the first time on appeal. *See Reynolds v. Wells Fargo Bank, Nat'l Ass'n*, 245 S.W.3d 57, 60 (Tex. App.—El Paso 2008, no pet.); *Jimmerson v. Homecomings Financial, LLC*, No. 02-07-00305-CV, 2008 WL 2639757, *2 (Tex. App.—Fort Worth 2008, no pet.) (mem. op.). When the bank sought to introduce a copy of the notice to vacate at the hearing, James Ramey objected, "The service is improper on this, Your Honor. It was sent to another attorney that we don't use any more. We never got a copy of this." The court overruled the objection as going to the weight to be given the exhibit, not its

admissibility. The Rameys rely on this exchange to demonstrate preservation of their lack-of-notice complaint. But the Rameys' objection to the exhibit does not comport with the issue they raise on appeal. *See* Tex. R. App. P. 33.1(a).

Furthermore, the Rameys' "Notice of Counterclaim" and "Trespass to Try Title Lawsuit" both recite that "[o]n January 13, 2006, a Notice to Vacate the property was issued from the Defendant." *See Ellis v. Fremont Inv. & Loan*, No. 02-06-00414-CV, 2008 WL 2168268 (Tex. App.—Fort Worth, 2008, no pet.) (mem. op.) (noting that Ellis admitted to receiving notice to vacate in the county court). The Rameys did not allege any lack of notice in their answer to the forcible-detainer action, or their motion for new trial. At the de novo trial on the forcible-detainer action, the court queried, "this court is now ready to proceed to the determination as to who has greater right of possession of the premises, possession being the only issue before the Court at this time. Is that correct?" Both of the Rameys agreed. They failed to apprise the trial court of their complaint regarding notice to vacate. *See* Tex. R. App. P. 33.1(a).

Moreover, the record contains the affidavit of William Attomore averring that "[o]n January 13, 2006, a Notice to Vacate was forwarded by certified mail, return receipt requested, *and regular mail, postage prepaid*, to Defendant, James. M. Ramey and all other occupants of 1506 Dawnbrook Drive, Houston, Texas 77068, demanding that the Defendants vacate the property within three (3) days or forcible detainer proceeding would be commenced against them and all other occupants." The Rameys cite *Gore v. Homecomings Financial Network, Inc.*, No. 05-06-01701-CV, 2008 WL 256830 (Tex. App.—Dallas 2008, no pet.) (mem. op.), but in that case the first-class mail envelope bore notations affirmatively showing the notice was not delivered. The case at bar is more akin to *Jimmerson*, wherein the record revealed the notice to vacate was mailed by first-class mail and there was no evidence that Jimmerson did not receive the notice to vacate by first-class mail. *Jimmerson*, 2008 WL 2639757, *2, n.4. The record does not establish

the county court at law erred in concluding the bank gave notice to vacate in accordance with the requirements of the Texas Property Code.

For these reasons, the Rameys' second issue is overruled.

C

In their third issue, the Rameys claim the county court at law lacked subject-matter jurisdiction to consider their counterclaims. According to the Rameys, their counterclaims exceeded the scope of claims allowed in a forcible-detainer action. As the Rameys characterize their counterclaims, they sought injunctive relief, costs for defending the eviction action, and $750,000 in actual and punitive damages. In the judgment, the county court ruled that the Rameys "shall take nothing on their counterclaims."

Damages for other causes of action are not recoverable in a forcible-entry-and-detainer action. *See Krull v. Somoza*, 879 S.W.2d 320, 322 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (citing Tex. R. Civ. P. 752 and *Hanks v. Lake Towne Apartments*, 812 S.W.2d 625, 626–28 (Tex. App.—Dallas 1991, writ denied)). Therefore, the county court at law did not have subject-matter jurisdiction over all of the Rameys' counterclaims. *See Hong Kong Dev., Inc. v. Nguyen*, 229 S.W.3d 415, 435 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Hanks*, 812 S.W.2d at 629. Those counterclaims should have been dismissed, without prejudice, rather than denied because the forcible-detainer action is cumulative of other remedies a party may have. *See Hanks*, 812 S.W.2d at 629. Accordingly, we sustain the Rameys' final issue, in part.

* * *

We reverse and remand the judgment of the county court at law for the limited purpose to dismiss, without prejudice, the Rameys' counterclaims that were not related to

withholding or defending possession of the premises during the pendency of the appeal. In all other respects, the judgment of the trial court is affirmed.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Yates, Seymore, and Brown.