

Vacated and Dismissed and Memorandum Opinion filed July 8, 2010.



In The

Fourteenth Court of Appeals

NO. 14-08-00812-CV

DELORES HART, Appellant

V.

L.B. FOSTER COMPANY, Appellee

**On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause No. 2007-36613**

MEMORANDUM OPINION

Delores Hart appeals from a final judgment granting a declaratory judgment and attorney's fees to L.B. Foster Company. Foster sought, and the trial court granted, declaratory judgment that subsequent purchasers of property owned by Foster (the Property) would not be bound by the terms of a prior settlement agreement between Foster and a previous owner of Hart's neighboring lot. Among other arguments against the declaratory judgment, Hart contended that Foster lost standing to maintain the action, and the trial court lost jurisdiction over the claims, when Foster sold the Property during the pendency of the case. We vacate the trial court's judgment and dismiss the lawsuit for want of jurisdiction.

I. Background

In 1979, L.B. Foster entered into a settlement agreement with several neighboring lot owners who had sued Foster regarding Foster's operation of a pipe-threading business on its property.¹ Under the terms of the agreement, Foster agreed to certain specified restrictions on its operations, and the neighboring lot owners agreed to release their claims. The releases of claims by the neighboring lot owners were to be "covenants running with the lands and lots of Plaintiffs." Furthermore, the terms of the agreement were to "bind the respective heirs, personal representatives, successors and assigns of Foster and of Plaintiffs, and each of them." Delores Hart subsequently purchased a neighboring lot from one of the plaintiffs in the earlier action.

In its original petition in the present lawsuit, Foster asserted that in March 2007, it entered into a Purchase and Sale Agreement providing for Foster to sell the Property to R.L.R. Investments, L.L.C.² According to Foster, R.L.R. notified Foster on May 25, 2007, that it would not proceed with the purchase unless the neighboring landowners either agreed to amend the earlier settlement agreement or acknowledged that the agreement did not bind subsequent purchasers of Foster's property. According to Foster, when R.L.R. representatives met with the landowners, the landowners declined to amend the settlement agreement or acknowledge R.L.R.'s interpretation of it. R.L.R. consequently terminated the Purchase and Sale Agreement on June 12, 2007.

In its petition, Foster listed two causes of action. In the first, Foster sought "a declaratory judgment that the Settlement Agreement does not bind subsequent owners of the Property." In support of this request, Foster stated that a "real and justiciable controversy" existed between the parties as to whether the terms of the settlement

¹ The plaintiffs' claims in the prior action apparently revolved around noise levels on Foster's property, although because the record in the present case does not contain the pleadings from the prior action, it is impossible to discern the exact nature of the claims made and subsequently released.

² Foster named twelve defendants in its Original Petition, and the trial court entered summary judgment against all twelve. Only defendant Hart brings the present appeal.

agreement were binding on subsequent owners. In its second cause of action, for slander of title, Foster alleged that it owned an interest in the Property and that the defendants “uttered and/or published disparaging and false statements about the title to the Property . . . with actual malice,” and that such “statements caused [Foster] special damages, *i.e.*, the loss of the sale of the Property to R.L.R.” Foster further sought attorney’s fees under the Texas Civil Practice and Remedies Code.

On July 19, 2007, Hart filed a counter-claim, subject to a challenge to the trial court’s jurisdiction, seeking a declaratory judgment that (1) the earlier settlement agreement, and judgment incorporating it, restrict subsequent owners of the Property, and (2) in the alternative, the Property is encumbered by an equitable servitude for the benefit of Hart’s neighboring lot. On December 17, 2007, Foster filed a motion for summary judgment again detailing the history of the prior settlement agreement, the Purchase and Sale Agreement between Foster and R.L.R., and R.L.R.’s termination of that agreement. In the motion, Foster sought both a declaration that the settlement agreement would not bind subsequent owners of the Property and attorney’s fees. It did not seek summary judgment on either its slander-of-title cause of action or Hart’s counterclaim. The trial court granted the motion for partial summary judgment on February 20, 2008, holding specifically that “[t]he Settlement Agreement . . . does not bind subsequent purchasers of [Foster’s] Property,” and that Foster was entitled to attorney’s fees.³ The order did not contain any language suggesting that it should be considered a final judgment.

On March 3, 2008, Foster conveyed the Property to CCI-B Langfield I L.L.C. (“CCI”). The warranty deed executed by Foster states that

Grantee [CCI] . . . acknowledges and agrees that . . . Grantor [Foster] does not make and hereby specifically disclaims any representation, warranties, promises, covenants, agreements or guarantees of any kind or character whatsoever, . . . as to, concerning or with respect to: . . . (G) the

³ In the same order, the trial court denied the motion for summary judgment of certain of the defendants, not including Hart.

enforceability or effect of any legal, contractual or other rights or obligations pertaining to the property

Attached as an exhibit to the deed was a list of “Exceptions and Encumbrances.” Included in this list are a lease agreement, in which CCI apparently leased the premises back to Foster, and a release and settlement agreement “as affected by order, dated February 20, 2008,” which appears to be the prior settlement agreement between Foster and the neighboring lot owners.

The trial court granted Foster’s motion for nonsuit of its slander-of-title claim on May 14, 2008. Like the partial summary judgment, this order also does not contain any finality language. On May 28, 2008, the trial court entered its final judgment in the case. In the judgment, the court referenced the prior grant of summary judgment and the nonsuit of the slander-of-title claim. The court also included language of finality, to wit: “[A]ll relief not expressly granted in this judgment is denied. This finally disposes of all parties and all claims and is appealable.”

It is uncertain whether the trial court disposed of Hart’s counterclaim in the final judgment or severed it into a separate action with a separate cause number. Although the trial court’s docket sheet reflects that a motion for severance was granted on the day that the final judgment was signed, the record does not otherwise reflect that a severance was requested or granted. There is no question, however, that the May 28 judgment was final and appealable. It is therefore clear that either the counterclaim was severed or it was disposed of in the May 28 final judgment.

From the beginning of the case below, Hart alleged that the trial court lacked jurisdiction to consider Foster’s lawsuit because there was no genuine controversy between the parties. In her Motion for New Trial and Motion for Rehearing, Hart once again argued that there was no live controversy between the parties and specifically pointed out that Foster had sold the Property to CCI. To this pleading, Hart attached a copy of the warranty deed conveying the Property from Foster to CCI. In a post-

judgment Objection to Jurisdiction, Hart further specifically alleged that having sold the Property, Foster lacked standing to maintain the lawsuit. These post-judgment motions were apparently overruled by operation of law, since the record does not contain any specific rulings on them.

In its brief, Foster alleges that this court does not have jurisdiction to consider Hart's appeal because her motion for new trial was not timely filed. In her briefing, Hart argues, among other things, that Foster lost standing to maintain the action, and the trial court consequently lost jurisdiction, when Foster sold the Property during the pendency of the case.

II. Appellate Jurisdiction

Foster premises its argument that this court lacks appellate jurisdiction on the assertion that Hart failed to timely file her motion for new trial and thus her subsequent notice of appeal was also untimely. *See generally* Tex. R. Civ. P. 329b(a) (providing that a motion for new trial must be filed within thirty days after the judgment complained of was signed). More specifically, Foster contends that the trial court's order granting nonsuit of Foster's slander-of-title claim was effectively the final judgment, and started appellate timetables, because it disposed of all remaining claims existing after the partial summary judgment had been granted, citing *In re Bennett*, 960 S.W.2d 35 (Tex. 1997), *et al.*

In *Bennett*, the court explained that where no affirmative relief has been requested by any defendant, appellate timetables would start with a trial court's dismissal of a case pursuant to the plaintiff's notice of nonsuit. *Id.* at 38. This principle is not applicable in the present case because defendant Hart had an outstanding request for affirmative relief. In her counter-claim, Hart sought a declaratory judgment that (1) the prior settlement agreement applied to subsequent owners of the Property, and (2) in the alternative, the Property is encumbered by an equitable servitude for the benefit of Hart's neighboring lot. Although the first declaratory judgment request was arguably disposed of by the

grant of partial summary judgment favoring Foster, the second request, for an equitable servitude, was not addressed in the summary judgment. Neither Foster’s motion nor the court’s order mentions Hart’s counterclaim. Moreover, the court’s order granting the nonsuit does not include any language indicating an intention to dispose of all remaining claims and parties. The argument that the counterclaim was disposed of by either the summary judgment order or the order of nonsuit is also belied by the fact that Foster subsequently sought, and the trial court granted, a final judgment discussing the prior two orders and including language of finality, disposing “of all parties and all claims.” Foster does not dispute that if the order of nonsuit was not effectively a final judgment then Hart’s motion for new trial and notice of appeal were timely. Because the trial court’s nonsuit order was not a final judgment, Foster’s argument that we lack jurisdiction because Hart filed her motion for new trial too late is without merit.

III. Standing

A. Standards of Review

In both the trial court and on appeal, Hart has challenged whether Foster—having sold the Property and nonsuited its slander-of-title cause of action—has retained standing to pursue its remaining declaratory judgment action.⁴ Standing is a constitutional prerequisite for a party to bring a lawsuit. *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). A court has no jurisdiction over a claim pursued by a plaintiff who lacks standing to assert the claim. *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008). When a plaintiff lacks standing, the proper disposition is to dismiss the lawsuit. *Id.* The test for standing requires that there be a real controversy between the parties which will actually be determined by the judicial declaration sought. *See Nootsie, Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996). Without breach of a legal right belonging to the plaintiff, no cause of action can

⁴ On appeal, Hart listed seventeen issues. Of these, issues 1, 2, 4, 5, 6, 15, and 16 appear to address jurisdictional matters. Issue 16 specifically mentions standing.

accrue to his benefit. *See Nobles v. Marcus*, 533 S.W.2d 923, 927 (Tex. 1976). “The issue of standing focuses on whether a party has a sufficient relationship with the lawsuit so as to have a ‘justiciable interest’ in its outcome” *Austin Nursing Center, Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005). For a controversy to be justiciable, there must be a real controversy between the parties that will actually be resolved by the judicial relief sought. *State Bar of Texas v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994).

We review a trial court’s ruling on jurisdiction de novo. *State Dep’t of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002). In such a review, we must determine whether facts have been alleged that affirmatively demonstrate jurisdiction. *City of Waco v. Lopez*, 259 S.W.3d 147, 150 (Tex. 2008). In doing so, we construe the pleadings liberally in favor of the plaintiff. *Id.*

When a defendant challenges the existence of material facts supporting jurisdiction, the court must consider the relevant evidence submitted by the parties. *Texas Department of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004). If the evidence is undisputed or fails to raise a question of fact, the court should rule on the plea as a matter of law. *Id.* at 228. After a defendant asserts, and supports with evidence, that the court lacks subject matter jurisdiction, the plaintiff must show the existence of a disputed fact issue in order to avoid dismissal for want of jurisdiction. *Id.* The standard of review for such jurisdictional disputes “generally mirrors that of a [traditional] summary judgment.” *Id.*

The question of a party’s standing can be raised at any time, even on appeal. *See, e.g., Bailey v. Barnhart Interest, Inc.*, 287 S.W.3d 906, 913-14 (Tex. App.—Houston [14th Dist.] 2009, no pet.). In order to maintain its claims, a party must maintain standing throughout the proceedings, even during the pendency of the appeal. *See, e.g., Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001); *Trulock v. City of Duncanville*, 277 S.W.3d 920, 924 (Tex. App.—Dallas 2009, no pet.).

B. Analysis

Hart presented evidence to the trial court that Foster conveyed the Property to CCI on March 8, 2008. The record reflects that Foster nonsuited its slander-of-title cause of action, which alleged special damages for the loss of the sale to R.L.R. According to Hart, after Foster sold the Property and nonsuited its slander-of-title cause of action, it no longer had standing to pursue its declaratory judgment action.

Foster does not dispute that it sold the Property to CCI and nonsuited its slander-of-title claim. Instead, in its brief and in oral argument, Foster asserted that it maintained standing because (1) the continued existence of Hart's severed counterclaim meant that there was still a controversy between the parties; (2) Foster still possesses the Property as leaseholder, and thus the parties have an ongoing relationship; (3) Foster may one day want to transfer the lease; and (4) if Foster were to regain title to the Property at some point, the controversy would arise again.⁵

First, even if we assume that Hart's counterclaim was severed and continues as a separate, yet unresolved action, such status would not necessarily provide standing for Foster on appeal. Foster has not cited any authority, and we are aware of none, providing that the mere existence of one lawsuit (Hart's severed counterclaim) creates standing in a separate lawsuit (Foster's declaratory judgment action). Moreover, Foster's argument presupposes that it is still a proper party to the counterclaim. Having sold the property on which an equitable servitude is sought, Foster appears unlikely to be the proper defendant in the allegedly severed action. Even if it were a proper defendant, the mere existence of Hart's lawsuit does not give Foster standing to bring its claims in this lawsuit.

⁵ In response to Hart's post-judgment pleadings, Foster argued only that the summary judgment was proper and that all of the issues raised had either been previously considered and rejected by the court, were irrelevant or immaterial, or had been waived by failure to timely raise them. We have explained that jurisdictional issues can be raised at any time, even on appeal. Furthermore, the issues were neither irrelevant nor immaterial. The extent to which the court had previously ruled on the issues is not a ground for rejecting them on appeal.

Second, Foster alleges that because it maintains a leasehold interest in the Property, the parties have an ongoing relationship that somehow gives it standing on the issue of whether subsequent owners are restricted by the settlement agreement. Foster has not explained how such a continuing relationship equates to standing in the present case. Indeed, in oral argument, Foster acknowledged that it was bound to the terms of the settlement agreement in connection with its operations on the property, regardless of who owned the property.

Foster argues that it may one day wish to transfer the lease, at which point the question of whether subsequent owners or users of the property would be bound by the settlement agreement might reemerge. Yet there is no indication that Foster has any intention of transferring the lease and no showing that it even had the authority to do so. Such a speculative future event does not create a real and live controversy between the parties. *See Gomez*, 891 S.W.2d at 245.⁶

Lastly, Foster raises the possibility that one day it could regain title to the Property and attempt to sell it once again. Foster's scenario contemplates that CCI would default on its mortgage and Foster, as mortgagee, would foreclose. Foster offers no support for the likelihood of this highly speculative occurrence. Its mere possibility does not create a real and live controversy between the parties. *See id.* Just because a party might possibly have title to a particular property in the future does not, in and of itself, invest that party with current standing to assert claims related to the property.

⁶ In its brief, Foster argued that the trial court did not lose subject matter jurisdiction under the mootness doctrine because the issues in this case are capable of repetition. However, as explained in this opinion, the trial court lost jurisdiction because Foster lost standing when it sold the Property, not because the issues themselves became moot. Furthermore, the "capable of repetition, yet evading review" exception to the mootness doctrine is generally limited in its application to government action. *See Truluck*, 277 S.W.3d at 924. Even if it applied in the present context, the possibility that Foster might at some future point attempt to sublease or transfer the lease to the property is too speculative to invest Foster with standing at the present time. *See Williams*, 52 S.W.3d at 184 (rejecting argument that parties had standing where possibility of reoccurrence of complained of conduct was speculative).

C. Conclusion

Foster's initial standing in the present lawsuit was based on its assertions that (1) it was attempting to sell the Property and required resolution regarding the effect of the settlement agreement on subsequent purchasers, and (2) Hart and the other defendants made statements regarding the Property which resulted in loss of the sale to R.L.R. Having sold the Property and nonsuited its slander-of-title claim, Foster no longer has standing to maintain this suit.

Hart's attack on Foster's standing challenged the existence of jurisdictional facts. It is uncontested that Foster sold the Property during the pendency of the case. Therefore, the evidence did not raise a fact question regarding the jurisdictional issue but instead conclusively established that Foster does not have standing. *See Miranda*, 133 S.W.3d at 227-28. Foster has not suggested any grounds for standing, and we discern none, that would merit an opportunity to amend its pleadings. *See id.* at 228, 231 (declining to give party opportunity to replead where facts did not establish any basis for subject matter jurisdiction).

We vacate the trial court's judgment and dismiss the lawsuit for want of jurisdiction.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges and Justices Seymore and Brown.