



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00267-CV

Dolores **REYNOSO**, et al. and All Occupants,
Appellants

v.

LOFT CONCEPTS, INC.,
Appellee

From the County Court at Law No. 3, Bexar County, Texas
Trial Court No. 2015CV00936
Honorable David J. Rodriguez, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Jason Pulliam, Justice

Delivered and Filed: May 25, 2016

AFFIRMED

Dolores Reynoso appeals the trial court's judgment in a forcible detainer action awarding possession of certain real property to Loft Concepts, Inc. We affirm the trial court's judgment.

BACKGROUND

In 2007, Reynoso purchased the property at issue by obtaining a mortgage loan from Nationstar Mortgage, LLC (Nationstar). The mortgage loan was evidenced by a promissory note which was secured by a deed of trust. The deed of trust provided that in the event of default, the lender had the right to sell the property to the highest bidder at a trustee's sale. In the event of

such a sale, Reynoso was required to immediately surrender possession of the property to the purchaser at the foreclosure sale; if possession was not surrendered, Reynoso would become a tenant at sufferance and could be removed by writ of possession or other court proceeding.

Reynoso subsequently defaulted on the loan and Nationstar invoked the power of sale under the deed of trust. Nationstar was the highest bidder at the foreclosure sale conducted on October 7, 2014 and became the grantee under a Substitute Trustee's Deed. Loft Concepts, Inc. purchased the property in December 2014 by Special Warranty Deed. Thereafter, Loft sent Reynoso notice to vacate. When Reynoso did not surrender possession, Loft filed a forcible entry and detainer action on January 9, 2015. Reynoso failed to appear in justice court and a default judgment was entered in favor of Loft. Reynoso appealed to the county court and judgment of possession was entered in favor of Loft. Reynoso timely appealed.

DISCUSSION

In her first issue, Reynoso contends Loft's failure to comply with federal laws rendered the Substitute Trustee's Deed *void ab initio*, necessitating a decision as to title, thereby depriving the lower courts of jurisdiction to hear the forcible detainer action. Reynoso maintains that she submitted a loan modification application prior to the foreclosure sale and never received a rejection letter from the loan servicer regarding the loan modification application as required by federal law. Therefore, Reynoso argues, the foreclosure sale of the property was prohibited.

Loft brought a forcible detainer action against Reynoso. A forcible detainer action concerns the determination of right of immediate possession of real property where there is no unlawful entry. *Marshall v. Housing Auth. of City of San Antonio*, 198 S.W.3d 782, 787 (Tex. 2006). The sole issue in a forcible detainer suit is who has the right to immediate possession of the premises. *Rice v. Pinney*, 51 S.W.3d 705, 709 (Tex. App.—Dallas 2001, no pet.); *see also*

TEX. R. CIV. P. 510.3(e) (in an eviction case, the “court must adjudicate the right to actual possession and not title”).

A justice court or county court at law is not deprived of jurisdiction in a forcible detainer action merely because of the existence of a title dispute. *Schlichting v. Lehman Bros. Bank FSB*, 346 S.W.3d 196, 199 (Tex. App.—Dallas 2011, pet. dismiss’d); *see Rice*, 51 S.W.3d at 709 (“Forcible detainer actions in justice courts may be brought and prosecuted concurrently with suits to try title in district court.”). In most cases, “the right to immediate possession can be determined separately from the right to title. The trial court is deprived of jurisdiction only if the determination of the right to immediate possession *necessarily requires* the resolution of the title dispute.” *Schlichting*, 346 S.W.3d at 199 (internal citations omitted).

“Where a foreclosure pursuant to a deed of trust establishes a landlord and tenant-at-sufferance relationship between the parties, the trial court has an independent basis to determine the issue of immediate possession without resolving the issue of title to the property.” *Id.*; *see Yarbrough v. Household Fin. Corp. III*, 455 S.W.3d 277, 280 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (“[A] deed of trust may include a tenancy-at-sufferance clause that creates a landlord-tenant relationship when the property is foreclosed. Under these circumstances, a defendant’s complaints about defects in the foreclosure process generally do not require a justice court to resolve a title dispute before determining the right to immediate possession, and the justice court has jurisdiction.” (internal citation and footnote omitted)); *Pinnacle Premier Props., Inc. v. Breton*, 447 S.W.3d 558, 564 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (op. on reh’g) (“[B]ecause the deed of trust contained a valid tenant-at-sufferance clause, appellees do not allege a title dispute that is intertwined with the right of immediate possession.”).

Here, the deed of trust executed between Reynoso and Nationstar provided:

If the Property is sold . . . Borrower or any person holding possession of the Property through Borrower shall immediately surrender possession of the Property to the purchaser at that sale. If possession is not surrendered, Borrower or such person shall be a tenant at sufferance and may be removed by writ of possession or other court proceeding.

The record further reflects that the property was foreclosed upon in October 2014. The property was purchased at the foreclosure sale by Nationstar. Nationstar conveyed its interest in the property to Loft. Loft gave Reynoso written notice to vacate on January 5, 2015. When Reynoso did not immediately surrender possession to Loft after the foreclosure sale, she became a tenant at sufferance. *See Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 915 (Tex. 2013) (holding tenant at sufferance does not have any legal right to possession but, instead, wrongfully maintains possession). Thus, based upon the tenant-at-sufferance clause in the deed of trust, there was an independent basis for the trial court to determine that Loft had the right to immediate possession without resolving whether the foreclosure was proper. *See Schlichting*, 346 S.W.3d at 199. If Reynoso desired to attack the foreclosure sale made under the deed of trust as invalid, she was free to bring such suit in the district court for that purpose; but, in a suit for forcible detainer, such action is not permissible. *See Williams v. Bank of New York Mellon*, 315 S.W.3d 925, 927 (Tex. App.—Dallas 2010, no pet.); *Rice*, 51 S.W.3d at 709-10. Accordingly, we hold the trial court had jurisdiction to enter the judgment of possession without addressing issues of title. Reynoso's first issue is overruled.

Reynoso next argues that federal law preempts Texas law on forcible detainer. The affirmative defense of preemption must be pled and presented to the trial court in order to preserve a preemption complaint on appeal. *See TEX. R. APP. P. 33.1(a); TEX. R. CIV. P. 94; In re Marriage of Smith*, 115 S.W.3d 126, 130-31 (Tex. App.—Texarkana 2003, pet. denied) (noting preemption arguments related to choice of law must be raised at trial or they are waived). Reynoso failed to

preserve a complaint regarding preemption for appellate review because she did not plead it or present it to the trial court. Because there is nothing in the record showing that Reynoso pled preemption as an affirmative defense or presented an argument about federal preemption in the trial court, Reynoso's preemption argument has not been preserved for our review. We therefore overrule Reynoso's second issue.

CONCLUSION

Having overruled Reynoso's issues on appeal, we affirm the trial court's judgment.

Rebeca C. Martinez, Justice