In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-20-00082-CV

VICTOR ANTOLIK AND SGN INVESTMENT TRUST, Appellants

V.

DENNIS ANTOLIK, Appellee

On Appeal from the 345th District Court
Travis County, Texas
Trial Court No. D-1-GN-17-000655

Before Morriss, C.J., Burgess and Stevens, JJ.
Opinion by Justice Burgess

O P I N I O N

This is an appeal from a post-judgment order granting a receiver's motion for authority to sell the receivership estate's interest in certain property, from which the debtor appeals. Although we conclude that the trial court had jurisdiction over the trust at issue, we nevertheless conclude that, because the sale has already taken place, the debtor's substantive complaints regarding the propriety of the sale order are moot.

I. Factual and Procedural Background

A. The Underlying Judgment and Appointment of Receiver

In 2018, the 345th Judicial District Court of Travis County entered a $250,000.00 final judgment in favor of Plaintiff Dennis Antolik against Defendant Victor Antolik.[1] The judgment was affirmed on appeal. *See Antolik v. Antolik*, 06-18-00096-CV, 2019 WL 2119646 (Tex. App.—Texarkana May 15, 2019, pet. denied) (mem. op.).[2] Following the appeal, Dennis filed an application for post-judgment turnover and the appointment of a receiver pursuant to Chapter 31 of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(b). After concluding that Victor owned non-exempt property that could not readily be attached or levied on by ordinary legal process, the trial court granted the application. The order appointed Kell C. Mercer as the receiver (Receiver), established a receivership estate,

[1]Originally appealed to the Third Court of Appeals in Austin, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001. We are unaware of any conflict between precedent of the Third Court of Appeals and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

[2]According to the Receiver, "as of February 1, 2020, with all credits and offsets applied, including all components (principal, interest, fees, and costs awarded, including costs of the receivership), the outstanding balance owed by Judgment Debtor and Defendant Victor Antolik under the Final Judgment [was] approximately $312,000.00."

and required Victor, and all third parties holding non-exempt property belonging to Victor, to turn over to the Receiver all such property within five days.[3]

B. The Receiver's Motion to Sell SGN Investment Trust's Interest in Bucephalas Partners II, LLC

In 2020, the Receiver filed a motion for authority to sell the receivership estate's interest in Bucephalas Partners II, LLC (BP II), and the receivership estate's promissory note claim against BP II. In support of that motion, the Receiver alleged that Victor had previously held, in his name, a membership interest in BP II and that BP II's primary asset consisted of an apartment complex in Gonzales County with an appraised value of $659,380.00. The Receiver further explained that Victor had assigned his membership interest in BP II to "a non-exempt, non-spendthrift 'trust' identified by . . . Victor . . . as the . . . 'SGN Investment Trust.'" The Receiver claimed that the SGN Investment Trust (SGN) was a self-settled trust formed by Victor as settlor, for the benefit of Victor as SGN's primary beneficiary. SGN owned Victor's membership interest in BP II as well as a promissory note payable to BP II in the original amount

[3]The entry of the Receivership Order created "a receivership estate wherein all of the respective non-exempt property of [Victor Antolik was] held in *custodia legis*, by the receivership as of the date of the Order." The order gave the Receiver the authority to take possession of "all of Defendant's nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment." The order stated,

> Receiver's authority applies, but is not limited to, the following non-exempt property of Defendant: (1) all documents or records, including financial records, related to property that is in the actual or constructive possession or control of Defendant; (2) all financial accounts (bank account), certificates of deposit, money-market accounts, accounts held by any third party; (3) all securities; (4) all real property, equipment, vehicles, boats, and planes; (5) all safety deposit boxes or vaults; (6) all cash; (7) all negotiable instruments, including promissory notes, drafts, and checks; (8) causes of action or choses of action; (9) contract rights, whether present or future; (10) shares, stock and membership interests; and (11) accounts receivable.

of $385,103.00 (the Note). BP II was comprised of two members—Scott A. Stevens and SGN.[4] The motion for authority to sell sought the trial court's authorization to sell the membership interest held by SGN (for Victor as beneficiary of the SGN Trust)[5] to Stevens.

C. The Hearings on the Receiver's Motion and SGN Trustee's Appearance

Following a hearing on March 11, 2020, the trial court expressed concern that SGN was not represented at the hearing.[6] As a result, the hearing was re-set for May 14, 2020. All parties,

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[4]SGN and Stevens each owned a fifty-percent interest in BP II. On February 29, 2016, SGN loaned $385,103.00 to BP II, the owner of a twenty-eight-unit apartment complex. Monthly payments were scheduled at $2,436.33. The Receiver testified that the transaction between BP II and SGN that resulted in the Note was Victor's attempt to put "his liquid assets somewhere where they could not be reached by the federal government."

[5]At the time of the hearing and throughout the trial court case, Victor was incarcerated for making and subscribing false tax returns.

[6]The record reflects that both the attorney for Victor and the Receiver unsuccessfully attempted to provide SGN's trustee with notice of the hearing. The Receiver specifically testified that the mail sent to the trustee was returned due to a bad address for the SGN Investment Trust. The Receiver's motion for authority to sell the receivership estate's interest in BP II stated,

> The so-called "**SGN Investment Trust**" is a self-settled "trust" formed by Judgment Debtor and Defendant Victor Antolik. Judgment Debtor and Defendant Victor Antolik is the sole beneficiary of the "SGN Investment Trust." After creating the "SGN Investment Trust," Judgment Debtor and Defendant Victor Antolik assigned his membership interest in BP II to the "SGN Investment Trust." According to the books and records of BP II and the Texas Secretary of State, the sole current members of BP II are Scott A. Stevens of Austin, Texas, and the "SGN Investment Trust." The "SGN Investment Trust" holds the membership interest in BP II for the benefit of Judgment Debtor and Defendant Victor Antolik. The company agreement of BP II contains customary restrictions on transfer of membership units.
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> . . . . Upon being appointed, the Receiver made demand upon Judgment Debtor and Defendant Victor Antolik for all information regarding the "SGN Investment Trust." In particular, the Receiver made demand upon Judgment Debtor and Defendant Victor Antolik for any and all documentary proof, if any, that Judgment Debtor and Defendant Victor Antolik's interest in the "SGN Investment Trust" is not property of the Receivership Estate. A copy of the Receivership Order was included with the demand. Judgment Debtor and Defendant Victor Antolik failed to respond or to provide any such documentary proof.
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> . . . .

including SGN's trustee, were represented at the May hearing. Attorney Adam Pugh announced his appearance on behalf of "Don Fillman, the trustee of the SGN Investment Trust." Pugh presented arguments to the trial court, but he prefaced those arguments with the following acknowledgment: "[T]he reason I'm here today is at the court's invitation based on Your Honor's inherent desire to afford due process to the parties." Pugh argued, "[The Receiver] is attempting to have the court declare that this trust should be disregarded pursuant to its terms, and determine what law is applicable to the trust instrument and whether or not it should be disregarded." Pugh acknowledged, "[W]e're in the inherent jurisdiction of this court, as stated by Section 115.001 of the Texas Property Code."[7] Pugh further claimed that this was "a transaction to sell a note for far less than the face value. And it's my client's [SGN's] note. And so, for that reason, we absolutely object." Pugh concluded, "[F]or those reasons, I don't think the court has jurisdiction to make this order; but I think the order, even if we were a party, would be improper and we ask the court to deny the motion." At the conclusion of the hearing, the trial court took the matter under advisement.[8]

> . . . . Upon being appointed, the Receiver also sent demand to the "SGN Investment Trust" at the address[] listed at the Texas Secretary of State for any and all documentary proof, if any, that the Judgment Debtor and Defendant Victor Antolik's interest in the "SGN Investment Trust" is not property of the Receivership Estate. The demand also included a request for all documents evidencing and/or governing the "SGN Investment Trust." A copy of the Receivership Order was attached to the demand made upon the "SGN Investment Trust." The "SGN Investment Trust" failed to respond or to provide any documentation.

[7]Pugh also claimed that SGN was not before the court and that it needed to be sued. Pugh made additional arguments that a charging order was the exclusive remedy of a creditor.

[8]Before the hearing concluded, though, the trial court indicated disappointment that Stevens did not come forward with another offer.

In the meantime, Victor filed an original petition for bill of review and request for disclosure in the 261st Judicial District Court of Travis County in cause number D-1-GN-20-003056, on June 9, 2020. The crux of Victor's claim was that he had a meritorious defense to the underlying lawsuit that resulted in a $250,000.00 final judgment against him based on Dennis's alleged fraud. On June 30, 2020, SGN filed its supplement to the record in the receivership case in which it asked the trial court to "take judicial notice of the Bill of Review, specifically, the allegations of fraud with respect to the judgment obtained in the instant case." SGN also asked the trial court to "hold this matter in abeyance until the Bill of Review can be more thoroughly adjudicated, since it is a direct attack on the underlying judgment."[9]

In August 2020, the Receiver filed an amended and supplemental motion for authority to sell the receivership estate's interest in BP II and the Note and deed of trust against BP II. The amended and supplemental motion indicated that Stevens made a revised offer to purchase the Note (rather than compromise it) and to purchase the fifty percent interest in BP II.[10] On September 10, 2020, the trial court held a hearing on the amended and supplemental motion. At the hearing, Pugh announced his appearance "on behalf of SGN Investment Trust." The Receiver then informed the court of a new, higher offer to purchase the receivership estate's interest in BP II, the Note, and the deed of trust. After the Receiver concluded his remarks, the trial court asked, "[W]ho else would like to speak on this proposed sale?"

[9]On August 28, 2020, the 261st Judicial District Court of Travis County entered an order dismissing the first amended petition for bill of review with prejudice.

[10]The face value of the Note was $334,210.79; the revised offer was for $500,000.00. BP II was the owner of the Gonzales County property and Note secured by the Gonzales County property; it had no other material assets.

Pugh responded and affirmatively joined "in Victor Antolik's brief in opposition to this motion." Pugh went on to argue, "First and foremost, the court shouldn't grant this motion, even if it could, because what we're talking about is selling the interest of an entity whose sole asset is real property. And the real property in question has never been appraised."[11] Pugh further argued that "a creditor can only get at a debtor's LLC interest through a charging order. That is the sole and absolute remedy that a creditor can have against the debtor." Arguing further, Pugh claimed that Section 112.035(d) of the Trust Code provides that a creditor "can only get to the settlor's interest in a trust, and that's only if the settlor has an interest." Pugh concluded by asking the court not to approve the sale. He continued,

> And if the court disagrees and is of a mind to dispose [sic] my client, who is not a party to this lawsuit, of its interest, then I would simply ask the court to at least consider requiring the appraisal of the real property first so that we can ascertain whether or not this value makes sense.

In final conclusion, Pugh again asked that the trial court "not approve [the] sale at [that] time."

D. The Trial Court's Order Granting the Receiver's Motion

Following the hearing, the trial court entered its order granting the Receiver's amended and supplemental motion for authority to sell the receivership estate's interest in BP II and in the Note and deed of trust against BP II (the Sale Order).[12] The Sale Order specifically found as follows:

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[11]Pugh acknowledged, though, that they had been "using the Appraisal District's estimated value in this instance."

[12]The trial court's order stated,

> The Receiver served the Motion on the following parties: Judgment Creditor – Dennis Antolik; Judgment Debtor and Defendant – Victor Antolik; Don Fillman, "Trustee" of the "SGN Investment Trust"; James M. Miller, Substitute Trustee under the Deed of Trust relating to the Property, and [BP II].

> (i) there has been due and sufficient notice of the Motion, (ii) the relief sought by the Receiver in the Motion is well taken, (iii) any property of the SGN Investment Trust held for the benefit of Judgment Debtor and Defendant Victor Antolik is not exempt under Chapters 41 and/or 42 of the Texas Property Code, or otherwise under Texas law, (iv) any property of the SGN Investment Trust held for the benefit of its settlor and sole present beneficiary, Judgment Debtor and Defendant Victor Antolik, is property of the Receivership Estate and is subject to the Receiver's power of sale, (v) the Receiver has exercised reasonable business judgment in negotiating the sale and prosecuting the Motion, (vi) the Receiver and Purchaser, Scott A. Stevens, have acted in good faith, (vii) the sale being approved hereby was the result of arms-length negotiations and represents the highest and best available offer for the assets being sold, (viii) it is in the best interests of the receivership estate for the Receiver, on behalf of the Judgment Debtor and Defendant Victor Antolik, to enter into the transactions approved in this Order pursuant to the authority granted under the Receivership Order, and (ix) the Motion should be granted.

E. The Receiver's Sale of SGN's Interest in BP II

Following the entry of the Sale Order, Victor and SGN (Appellants) filed a joint notice of appeal. In December 2020, the Receiver filed a motion to dismiss the appeal as moot, claiming, "No party to the Antolik Matter sought or obtained a stay of the Sale Order." The Receiver further claimed that, as a result, "[t]he Receiver and other third parties have acted in accordance with and in consummation of the transactions authorized and approved by the Sale Order. Those actions and the consummation of the transactions authorized and approved by the Sale Order render this appeal moot under applicable law." The consummation of the transactions authorized by the Sale Order resulted in a transfer of BP II's fifty-percent-membership interest, held for Victor's benefit by SGN, to Stevens; a transfer and assignment of the Note to Stevens; and an assignment of the deed of trust to Stevens. As required by the Sale Order, the purchase price for the transactions was $500,000.00. Those funds were advanced to Stevens by Guaranty Bank. Stevens thereafter released the deed of trust lien on the assets of BP II, and as part of financing

the purchase price paid by Stevens, Guaranty Bank recorded a new lien on the property held by BP II.[13]

Appellants filed a response to the motion to dismiss, claiming that (1) the Receiver sold assets that belonged to SGN over which Victor had no control, (2) the trial court did not have jurisdiction over SGN, and, as a result, (3) the trial court's order was void and the Trust's due process rights had been violated. This Court denied the motion to dismiss and directed the parties to address the issue of mootness in their respective appellate briefs.

F. This Appeal

On appeal, Appellants claim that the trial court erred in granting (1) the Receiver authority to sell more than the settlor's interest in an irrevocable spendthrift trust to satisfy a judgment creditor, contrary to Section 112.035(d) of the Texas Property Code, (2) the Receiver authority to sell a membership interest in an LLC owned by an irrevocable spendthrift trust to satisfy a judgment creditor, contrary to Section 101.112 of the Texas Business Organizations Code, and (3) the Receiver's motion to sell the assets of a non-party irrevocable spendthrift trust when neither the trust nor any of its trustees were parties to the proceeding. Appellants,

[13]The appendix to the motion to dismiss, verified by the declaration of Mercer pursuant to Section 132.001 of the Texas Civil Practice and Remedies Code, included the following documents:

- Order Requiring Turnover and Appointing Receiver, filed June 26, 2019;
- Order Granting Receiver's Amended and Supplemental Motion for Authority To Sell Receivership Estate's (I) Interest in Bucephalas Partners II, LLC and (II) Promissory Note and Deed Of Trust Against Bucephalas Partners II, LLC, filed September 10, 2020;
- Assignment of the fifty percent membership interest in BP II, held for Victor's benefit by SGN, to Scott A. Stevens;
- Allonge with attached promissory note to Scott A. Stevens evidencing transfer and assignment of the promissory note to Stevens;
- Recorded Assignment of Deed of Trust to Scott A. Stevens to secure payment of the promissory note;
- Recorded Release of Lien executed by Scott A. Stevens following the Assignment of Deed of Trust; and
- Guaranty Bank Deed of Trust.

therefore, ask this Court to declare the trial court's order void based on lack of jurisdiction over SGN.

The Receiver and Dennis Antolik (Appellees)[14] filed a single brief in which they claim that (1) this appeal is moot because the transaction contemplated by the Sale Order has taken place, (2) the Sale Order complied with Texas law, and (3) the Trustee participated in the hearings that led to the Sale Order.

II. Appellant's Claim that the Sale Order is Void Is Not Moot

Because the question of mootness implicates this Court's subject-matter jurisdiction, which is essential to our power to decide this case, we address it first. *See State v. Naylor*, 466 S.W.3d 783, 791–92 (Tex. 2015) (citing *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553–54 (Tex. 2000)); *Feist v. Gutierrez*, No. 03-18-00474-CV, 2019 WL 3436996, at *1 (Tex. App.—Austin July 31, 2019, no pet.) (mem. op.) ("courts have no jurisdiction to decide moot cases"). "Mootness occurs when events make it impossible for the court to grant the relief requested or otherwise 'affect the parties' rights or interests.'" *Feist*, 2019 WL 3436996, at *1 (quoting *State ex rel. Best v. Harper*, 562 S.W.3d 1, 6 (Tex. 2018) (quoting *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 162 (Tex. 2012))). The question of mootness is reviewed de novo. *John Gannon, Inc. v. Tex. Dep't of Transp.*, No. 03-18-00696-CV, 2020 WL 6018646, at *4 (Tex. App.—Austin Oct. 9, 2020, no pet.) (mem. op.).

It is undisputed that Appellants did not seek a stay of the Sale Order, file a supersedeas bond, or otherwise suspend the enforcement of the Sale Order. The sale about which appellants

[14]Although Dennis is the named appellee in the style of the appeal, the Receiver is the real party in interest.

complain has therefore been consummated. As a result, Appellees claim that this appeal is moot and should be dismissed. Yet, mootness is not always a zero-sum game; it is possible that certain appellate issues can be moot without mooting the entire appeal. *See generally Aaron v. Aaron*, No. 14-10-00765-CV, 2012 WL 273766, at *5 (Tex. App.—Houston [14th Dist.] Jan. 31, 2012, no pet.) (mem. op.) (while sale of property during pendency of appeal mooted certain issues, other appellate issues were unaffected). In this case, appellants claim that, in addition to their substantive claims regarding the propriety of the sale to Stevens, the trial court did not have jurisdiction over SGN and that, as a result, the Sale Order is void.

"An order is void when a court has no power or jurisdiction to render it." *Urbish v. 127th Judicial Dist. Court*, 708 S.W.2d 429, 431 (Tex. 1986) (orig. proceeding). "In no case shall judgment be rendered against any defendant unless upon service, or acceptance or waiver of process, or upon an appearance." *Mapco, Inc. v. Carter*, 817 S.W.2d 686, 687 (Tex. 1991) (citing TEX. R. CIV. P. 124). "A judgment is void . . . 'when it is apparent that the court rendering judgment had no jurisdiction [over] the parties . . . .'" *In re D.S.*, 602 S.W.3d 504, 512 (Tex. 2020). Although we do not have jurisdiction "to address the merits of appeals from void orders or judgments," we do "have jurisdiction . . . to determine" whether an "order or judgment underlying the appeal is void and make appropriate orders based on that determination." *Freedom Commc'ns, Inc. v. Coronado*, 372 S.W.3d 621, 623 (Tex. 2012) (per curiam). The entirety of this appeal is, therefore, not moot as appellees suggest. *See id*.; *see also Lee v. Lee*, 528 S.W.3d 201, 209 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (appeal is not moot

when the parties continue to have live controversy for which appellate relief is potentially available).

III. The Sale Order Is Not Void Because the Trial Court Had Jurisdiction Over SGN

"Texas law is clear that in all suits 'by or against a trustee and *all proceedings concerning trusts*,' the trustee is a necessary party to the action." *Tomlinson v. Khoury*, No. 01-19-00183-CV, 2020 WL 6277305, at *6 (Tex. App.—Houston [1st Dist.] Oct. 27, 2020, no pet.) (mem. op.) (emphasis added) (quoting TEX. PROP. CODE ANN. §§ 115.001(a), 115.011(b)(4)); *see Ray Malooly Tr. v. Juhl*, 186 S.W.3d 568, 570 (Tex. 2006) (per curiam) ("The general rule in Texas (and elsewhere) has long been that suits against a trust must be brought against its legal representative, the trustee."); *In re Estate of Webb*, 266 S.W.3d 544, 548 (Tex. App.—Fort Worth 2008, pet. denied) ("The Texas Trust Code provides that in an action by or against a trustee and in all proceedings concerning trusts, the trustee is a necessary party if a trustee is serving at the time the action is filed.").

The Appellants rely on *Khoury* in support of their claim that, because the trustee was not added as a party, the trustee's due process rights were violated. *See Khoury*, 2020 WL 6277305, at *6 ("[W]here the trustee is not properly before the court as a result of service, acceptance, waiver of process, or an appearance, Texas courts have invalidated orders that grant relief against a trust."). In *Khoury*, the judgment creditor moved the trial court to modify the trial court's turnover order after discovering a spendthrift trust of which Tomlinson was the trustee and a beneficiary and asked the trial court to invalidate the trust. *Id.* at *2. The trial court invalidated the spendthrift trust and ordered Tomlinson, in his individual capacity, to turn over all trust

assets, even though neither the trust nor its trustee were parties to the turnover proceedings and were not judgment debtors. *Id.* at *1. On appeal, Tomlinson argued that the trial court never obtained jurisdiction over the trust and, as a result, claimed that the turnover order invalidating the trust and requiring turnover of the trust assets was void. *Id.* at *4. The appellate court agreed and concluded that "the trial court lacked jurisdiction over the Trust and thus erroneously invalidated the Trust, and erroneously required the turnover of Trust assets." *Id.* at *8. The record in *Khoury* was clear that Tomlinson, in his capacity as trustee, was never before the trial court.

In this case, however, the question is whether SGN generally appeared before the trial court, thereby imbuing the court with personal jurisdiction over SGN.[15] "Whether personal jurisdiction exists is a question of law that we review de novo." *J.O. v. Tex. Dep't of Family & Protective Servs.*, 604 S.W.3d 182, 187 (Tex. App.—Austin 2020, no pet.).

"[A] party enters a general appearance when it (1) invokes the judgment of the court on any question other than the court's jurisdiction, (2) recognizes by its acts that an action is properly pending, or (3) seeks affirmative action from the court." *Schoendienst v. Haug*, 399 S.W.3d 313, 317 (Tex. App.—Austin 2013, no pet.) (quoting *Exito Elecs. Co. v. Trejo*, 142 S.W.3d 302, 304 (Tex. 2004) (per curiam) (citing *Dawson-Austin v. Austin*, 968 S.W.2d 319, 322 (Tex. 1998)); *see* TEX. R. CIV. P. 120 (providing that defendant may, in person or by attorney, enter appearance in open court and that this appearance "shall have the same force and effect as if the citation had been duly issued and served as provided by law").

[15]For purposes of this discussion, we assume, but do not decide, that the trial court entered relief against SGN.

Here, as previously outlined, SGN was represented by Pugh at the May 14, 2020, hearing and at the September 10, 2020, hearing. At each of those hearings, SGN presented argument to the trial court and otherwise actively participated. SGN invoked the judgment of the court when it affirmatively asked the court not to approve the sale and to at least consider requiring the appraisal of the real property. SGN sought affirmative action from the court when it filed its supplement to the record on June 30, 2020, and asked the court to take judicial notice of the bill of review and to hold the issue of the sale in abeyance until the bill of review was adjudicated. Finally, in accordance with Rule 120 of the Texas Rules of Civil Procedure, SGN's appearance in open court (by Pugh) was noted by the court upon its docket and entered in the minutes. *See* TEX. R. CIV. P. 120. The trial court's docket entry for May 14, 2020, indicated the appearance of "Adam Pugh, Atty for Trustee." The trial court's docket entry for September 10, 2020, likewise reflected Pugh's appearance on behalf of the "Trust."

This record clearly reflects that SGN was given an opportunity to participate in the post-judgment proceedings that resulted in the Sale Order, that it indeed participated in those proceedings, and that it invoked the judgment of the trial court and sought affirmative action from the trial court. We, therefore, conclude that SGN generally appeared before the trial court and was subject to the jurisdiction of the trial court. *See Mays v. Perkins*, 927 S.W.2d 222, 225 (Tex. App.—Houston [1st Dist.] 1996, no writ).

IV. Appellants' Remaining Complaints Regarding the Propriety of the Sale Order Are Moot

We now turn to two discrete issues that the Receiver claims have been mooted by the sale of the subject property: (1) whether the trial court erred in granting the Receiver authority to sell

more than the settlor's interest in an irrevocable spendthrift trust, contrary to Section 112.035(d),[16] and (2) whether the trial court erred in granting the Receiver authority to sell a

[16]Section 112.035(d) of the Texas Property Code provides:

> (d) If the settlor is also a beneficiary of the trust, a provision restraining the voluntary or involuntary transfer of the settlor's beneficial interest does not prevent the settlor's creditors from satisfying claims from the settlor's interest in the trust estate.

TEX. PROP. CODE ANN. § 112.035(d). In the trial court the Receiver claimed and on appeal the Receiver claims that, because Victor was both the settlor and the beneficiary of SGN, SGN was a self-settled trust that fell within the parameter of Section 112.035(d) of the Texas Property Code. *See Bank of Dallas v. Republic Nat'l Bank of Dallas*, 540 S.W.2d 499, 500–02 (Tex. App.—Waco 1976, writ ref'd n.r.e.) (discretionary spendthrift trust defeated by self-settling); *Glass v. Carpenter*, 330 S.W.2d 530, 533 (Tex. App.—San Antonio 1959, writ ref'd n.r.e.) ("[O]ne cannot settle upon himself a spendthrift or other protective trust, or purchase such a trust from another, which will be effective to protect either the income or the corpus against the claims of his creditors, or to free it from his own power of alienation."); *see also In re Shurley*, 115 F.3d 333, 337 (5th Cir. 1997) (beneficiary's interest in spendthrift trust is not subject to creditors' claims under Texas law unless settlor creates the trust and makes himself beneficiary because debtor should not be able to "have his cake and eat it too"). The terms of the SGN trust, the Receiver points out, permit the trustee to distribute the whole of the corpus of the trust to Victor.

Conversely, Victor claims that SGN does not fall within the purview of Section 112.035(d) because, in 2007, the Texas Legislature amended the statute to clarify that it was only the settlor's interest that could be reached by a creditor when the settlor was also the beneficiary of a spendthrift trust. Victor cites no caselaw in support of this assertion. The following are the pertinent 2007 amendments to Section 112.035(d):

> (d) If the settlor is also a beneficiary of the trust, a provision restraining the voluntary or involuntary transfer of *the settlor's* [~~his~~] beneficial interest does not prevent *the settlor's* [~~his~~] creditors from satisfying claims from *the settlor's* [~~his~~] interest in the trust estate.

Act of May 16, 2007, 80th Leg., R.S., ch. 451, § 4, Tex. Gen. Laws 801, 802 (eff. Sept. 1, 2007) (additions italicized). Victor claims that the foregoing revisions effected a fundamental change in the law resulting in a creditor's limited recourse to reach only the settlor's interest in a self-settled trust. Victor then claims that, because the settlor of SGN (Victor) retained no interest in its assets, the Receiver was not permitted to sell those assets. At trial, the Receiver presented the trial court with the 2008 Legislative Council Drafting Manual, which "indicates that one of its guiding principles was to remove masculine pronouns and to replace them with the status of the actor." The Receiver also claims that Victor's argument is unsupported by any change in relevant case law since 2007. *See In re Cyr*, 602 B.R. 315, 333 (Bankr. W.D. Tex. 2019) ("Therefore, while spendthrift trusts are enforceable under Texas law, to the extent a beneficiary also contributes property to such trust, the assets contributed by the beneficiary-settlor are deemed 'self-settled' and subject to the claims of creditors.") (citing *Shurley*, 115 F.3d at 338). The trial court rejected Victor's argument. Because we hold that Appellant's complaints are moot, we do not reach the merits of those arguments.

membership interest owned by an irrevocable spendthrift trust, contrary to Section 101.112 of the Texas Business Organizations Code.[17]

"A case becomes moot if a controversy ceases to exist between the parties at any stage of the proceedings, including the appeal." *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005) (orig. proceeding); *see Fry Sons Ranch, Inc. v. Fry*, No. 03-19-00684-CV, 2020 WL 6685772, at *1 (Tex. App.—Austin Nov. 13, 2020) (mem. op.) ("Put simply, a case is moot when the court's action on the merits cannot affect the parties' rights or interests." (quoting *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 162 (Tex. 2012))). "An appellate court is prohibited from deciding moot controversies." *Fry*, 2020 WL 6685772, at *1 (citing *Nat'l Coll. Athletic Ass'n v. Jones*, 1 S.W.3d 83, 86 (Tex. 1999)). We, therefore, examine the question of whether appellee's merits claims have been mooted by the sale.

In support of his contention that such claims have been mooted, the Receiver relies on *Shaw v. Allied Finance Co.*, 319 S.W.2d 820, 821–22 (Tex. App.—Fort Worth 1958, no writ) (per curiam), among other authorities. *Shaw* involved a suit for debt and mortgage foreclosure.

[17]Section 101.112(d) states, "The entry of a charging order is the exclusive remedy by which a judgment creditor of a member or of any other owner of a membership interest may satisfy a judgment out of the judgment debtor's membership interest." TEX. BUS. ORGS. CODE ANN. § 101.112(d). Victor claims, under that provision, the Receiver's sole remedy (assuming the trust is disregarded) was to obtain a charging order against his membership interest in BP II. The Receiver maintains that Section 101.112 does not apply because the Receiver is not a judgment creditor. Instead, as a Receiver, he stands in the shoes of the judgment debtor, Victor, and was empowered by the Receivership Order to sell Victor's non-exempt membership interests. Although the Receivership Order—signed on June 26, 2019—specifically referenced the ability to sell membership interests, the Receiver points out that such order was not appealed. The trial court was of the opinion that "the time to object to the receiver's ability to make this sale was at the time of [the Receiver's] appointment and what was in the order appointing him . . . ." *See Fortenberry v. Cavanaugh*, No. 03-07-00310-CV, 2008 WL 4997568, at *24 (Tex. App.—Austin Nov. 26, 2008, pet. denied) (mem. op.) (receivership order must be appealed within twenty days from entry of order); *see In re Davis*, 418 S.W.3d 684, 688 n.1, 689 (Tex. App.—Texarkana 2012, no pet.) (appellate court did not have jurisdiction to consider complaints regarding order appointing receiver after deadline to file accelerated appeal had passed).

Id. at 821. The order appointing a receiver empowered the receiver to sell a certain vehicle. *Id.* After the debtor perfected an appeal of the receivership order, the receiver sold the vehicle and placed the proceeds in the receivership estate. *Id.* The appellate court pointed out that no supersedeas bond was filed and that "[t]here was no 'stay' order sought or secured as would be requisite under our procedure." *Id.* The appellate court further stated, "The sale was completed and the receiver's report thereof has been filed of record and approved, and said receiver now holds the proceeds of said sale for disposition according to future orders of the lower court." *Id.* The court continued, "The automobile has now passed into the hands of person or persons unknown, and we have no way of ascertaining by the record the identity of the holder of the title thereto." *Id.* In concluding that it would "be futile" to address the question of whether the trial court should have granted injunctive relief and that such question was moot, the court recognized,

> The appellant can derive no benefit from the judgment of this court. The object of the order has been attained. The order has been executed and its force spent. There is no redress which this court can give to the appellant, even if we thought the order appointing the receiver was erroneous. The purchaser is in possession of the mortgaged premises. The sale has been confirmed by the Chancellor. We are powerless to change the existing status. Under the facts, a judgment of this court would be an empty and profitless act.

Id. at 822 (quoting *Macklin Essex Park Realty Co.*, 1927, 101 N.J. Eq. 776, 139 A. 32 (citing C.J.S., Appeal and Error § 1362, p. 447)).

Here, as in *Shaw*, the sale was ordered and consummated. Unrelated third parties, including Guaranty Bank and Stevens, acted in reliance upon the Receiver's authority, and the Receiver is in possession of the proceeds of the sale and has accounted to the trial court for those

proceeds. This course of events leads us to conclude that appellee's merits issues have been mooted by the sale. Additional authority in support of this conclusion includes *Estate Land Co. v. Wiese*, 546 S.W.3d 322, 325 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) ("Because appellants did not seek an emergency stay, supersedeas bond, or otherwise suspend the enforcement of the trial court's post-judgment orders, the sale of the property at issue was completed and, as such, the issues in this case must be dismissed as moot."); *Bass v. Bass*, No. 05-15-01362-CV, 2016 WL 1703007, at *1 (Tex. App.—Dallas Apr. 27, 2016, pet. denied) (mem. op.) ("Because the property that was the subject of the appealed interlocutory order appointing a receiver has been sold, the appeal from that order is now moot."); *Aaron v. Aaron*, No. 14-10-00765-CV, 2012 WL 273766, at *5 (Tex. App.—Houston [14th Dist.] Jan. 31, 2012, no pet.) (mem. op.) (parties sold property while appeal pending rendering issues moot); *Foster v. Foster*, 583 S.W.2d 868, 870 (Tex. App.—Tyler 1979, no writ) (question of whether trial court erred in ordering unsecured debts paid from proceeds of homestead moot in light of sale of subject property); and *State v. Jackson*, 101 S.W.2d 346, 347 (Tex. App.—Austin 1937, no writ) (per curiam) (appeal dismissed when property was already sold by receiver).

Yet, Appellants claim that this case is different from those cited above because the "issues before this court do not necessarily request relief dependent on possession of the property and are not rendered moot by Receiver Appellee's wrongful sale of the Realty." Appellants contend that the transactions could be reversed and undone. In support of this assertion, appellants cite to *Lee v. Lee*, 528 S.W.3d 201 (Tex. App.—Houston [14th Dist.] 2017, pet. denied). In that case, the parties entered into a settlement agreement, and in accordance with that

agreement, one of the parties conveyed his interests in two properties to a trust. *Id.* at 209. The conveying party also signed a promissory note and made the first payment of the cash portion of the settlement. Further, the receiver filed a satisfaction of the judgment. *Id.* These facts, the court held, did not render the appeal moot because the record did not indicate "that anything [had] been done that [could not] be undone, or that the parties' dispute about the settlement [had] ceased to be a live controversy." *Id.* at 210. The court reasoned, "[T]he promissory note can be rescinded; money paid can be refunded; and a 'satisfaction of judgment' can be set aside." *Id.* at 209.

We are not persuaded that the case before us is in line with *Lee.* In *Lee*, the settlement agreement was an agreement between the two litigants. Likewise, one party had conveyed his interests in certain property to a testamentary trust of which he and the other litigant were beneficiaries. *Id.* at 205, 207. That same party executed a promissory note to the other party and had made a payment toward the cash portion of the settlement agreement. *Id.* at 207. The only third party involved in those transactions was the testamentary trust, of which both litigants were beneficiaries. In this case, however, two third parties were involved, including Guaranty Bank, who loaned money to Stevens and executed a deed of trust to secure its lien on BP II. Those transactions, unlike those described in *Lee*, cannot simply be undone and are more akin to the situation described in *Shaw*.

Other cases upon which appellants rely in support of their assertion that their merits claims are not moot are distinguished from this one because those cases rely on an exception to the mootness rule that "recognizes that a sale of property that forms the basis of the litigation

will not render moot such issues related to separate claims for damages that do not depend on possession of the property." *Dominquez v. Dominquez*, 583 SW.3d 365, 371 (Tex. App.—El Paso 2019, pet. denied). In *Dominquez*, for example, the appellant raised three issues regarding (1) the damage award, (2) the trial court's failure to issue written findings of fact and conclusions of law, and (3) tortious interference with a contract, which were not rendered moot by the sale of the property at issue. *Id.*; *see also Kyle v. Strasburger*, 522 S.W.3d 461, 466–67 (Tex. 2017) (per curiam) (sale of property at issue in appeal did not render appellant's claims to declare lien and special warranty deed invalid where invalidity of those documents provided basis for several of appellant's remaining claims involving fraud, Texas Finance Code violations, and Texas Deceptive Trade Practices Act violations); *River & Beach Land Corp. v. O'Donnell*, 632 S.W.2d 885, 888 (Tex. App.—Corpus Christi 1982, no pet.) (property foreclosure did not render appellant's issues regarding money damages moot); *Medrano v. Hinojosa*, No. 04-14-00913-CV, 2016 WL 3085935, at *2–3 (Tex. App.—San Antonio June 1, 2016, no pet.) (mem. op.) (even though real property at issue on appeal had been foreclosed, appellant's challenges to evidentiary rulings were not moot as they would affect claims for breach of contract, fraud, and unjust enrichment). Here, appellants do not present any "stand apart" issues, nor do they attempt to explain how this case is in line with any of the foregoing cases. We, therefore, conclude that appellants' complaints regarding the propriety of the sale order are moot.

V. Conclusion

Although the trial court had jurisdiction over SGN, therefore causing it to be subject to the Sale Order, we dismiss the appellant's complaints regarding the propriety of the Sale Order as moot.

Ralph K. Burgess
Justice

Date Submitted: March 24, 2021
Date Decided: May 7, 2021