TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00350-CV

Gerald R. Haddox and Sharon Haddox, Appellants

v.

Federal National Mortgage Association, Appellee

FROM THE COUNTY COURT AT LAW NO. 2 OF TRAVIS COUNTY
NO. C-1-CV-14-005024, HONORABLE ERIC SHEPPERD, JUDGE PRESIDING

MEMORANDUM OPINION

Appellants Gerald R. Haddox and Sharon Haddox filed this appeal from the trial court's judgment granting possession of property to appellee Federal National Mortgage Association ("Fannie Mae"). We affirm the trial court's judgment.

Factual and Procedural Background

The Haddoxes bought a house in 1999, obtaining a $184,320 loan from National Mortgagelink I, Ltd., a limited partnership, and signing a deed of trust in favor of National Mortgagelink. The deed of trust included a provision stating that if the property was foreclosed upon and the Haddoxes did not surrender possession, they would be tenants at sufferance.

In November 2006, the Texas Secretary of State cancelled National Mortgagelink's right to transact business. On May 28, 2010, Bryan Bly, attorney-in-fact for the Federal Deposit Insurance Corporation ("FDIC") as receiver for IndyMac Federal Bank, executed an "Affidavit of Lost Assignment," in which he averred that the FDIC as receiver for IndyMac was the owner and

holder of the Haddoxes' mortgage; that it had received the mortgage in a sale from National Mortgagelink but that its records did not contain a recorded or unrecorded instrument of assignment from National Mortgagelink; that Bly had concluded that the assignment was lost, misplaced, or destroyed; and that the FDIC as receiver for IndyMac duly and properly acquired and thereafter serviced the mortgage and was in possession of the note and all loan documents. That affidavit was filed in the public records on June 22, 2010, the same day that the FDIC filed a corporate assignment of the deed of trust naming OneWest Bank as successor and assignee of the loan.[1] The record does not indicate when National Mortgagelink assigned the loan to IndyMac.

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[1] The Haddoxes assert without citation to authority that the Affidavit of Lost Assignment was "fabricated" by the FDIC and "wholly insufficient" to show that the mortgage was assigned to IndyMac and that its only effect is to serve "as a judicial admission by FDIC that no assignment exists." However, other courts have noted the use of such affidavits in establishing the chain of title for property. *See, e.g.*, *Davis v. J.P. Morgan Chase Bank, N.A.*, No. 4:14-CV-169-A, 2014 U.S. Dist. LEXIS 84806, at *8-9 n.3 (N.D. Tex. June 23, 2014) (appellees asked court to take judicial notice of documents recorded in public records, including "'Affidavit of Lost Assignment' signed June 6, 2007, pertaining to the assignment of plaintiffs' note and deed of trust" from one mortgage company to another); *Chambers v. HSBC Bank USA NA*, No. 13-14451, 2014 U.S. Dist. LEXIS 50097, at *12-14 (E.D. Mich. Apr. 11, 2014) (discussing chain of title, which included affidavit of lost assignment); *Katulski v. CPCA Trust I*, No. 313790, 2015 Mich. App. LEXIS 84, at *16-17 & n.6 (Mich. Ct. App. Jan. 20, 2015) (affidavit of lost assignment considered as part of chain of title).

Further, section 192.007 provides that to assign "another action relating to an instrument that is filed, registered, or recorded" in the public records, a person "must file, register, or record another instrument relating to the action in the same manner as the original instrument," Tex. Loc. Gov't Code § 192.007(a), and the Haddoxes rely on that provision to argue that because the assignment from National Mortgagelink was not filed, the FDIC never owned the deed so as to transfer it to OneWest. However, section 192.007 "does not impose . . . a duty to record the assignment of the deed of trust." *Hudson v. JP Morgan Chase Bank, N.A.*, 541 Fed. App'x 380, 384 (5th Cir. 2013); *see Reinagel v. Deutsche Bank Nat'l Trust Co.*, 735 F.3d 220, 227 n.27 (5th Cir. 2013) (section 192.007 is "obscure provision [that] has never been cited in a state court decision and is best read as a procedural directive to county clerks, not as a prerequisite to the validity of assignments"); *Dallas Cty. v. MERSCORP, Inc.*, 2 F. Supp. 3d 938, 947 (N.D. Tex. 2014) (section 192.007 "provides no private right of action" and cannot be relied upon for declaratory judgment).

The Haddoxes defaulted on their loan, and in August 2011, Fannie Mae bought the property at a foreclosure sale conducted at the request of OneWest Bank. A substitute trustee's deed was recorded in the public records. Fannie Mae filed three earlier suits for forcible detainer against the Haddoxes in August 2011, August 2012, and November 2013, all of which were dismissed. In May 2014, Fannie Mae filed the current forcible detainer suit in the justice court. The Haddoxes filed a plea to the jurisdiction and motion to dismiss, asserting that Fannie Mae lacked standing, that res judicata barred the proceeding, and that limitations barred the proceeding. The justice court dismissed the proceeding, and Fannie Mae appealed to the trial court.

The Haddoxes again filed a plea to the jurisdiction and a motion to dismiss. They asserted that limitations barred Fannie Mae's claims and that any order in favor of Fannie Mae would be void because Fannie Mae, as successor to National Mortgagelink, had no right to judgment in Texas under the business organizations code. Fannie Mae countered that the Haddoxes were confusing the concepts of standing and capacity to sue. Fannie Mae further argued that suing for forcible detainer does not constitute "the transaction of business" under the business organizations code and that limitations did not bar the suit because the cause of action accrued in April 2014, when Fannie Mae made its most recent demand that the Haddoxes vacate the property. The trial court initially granted the Haddoxes' plea to the jurisdiction and motion to dismiss but later granted Fannie Mae's motion for new trial and, after a hearing, signed a judgment in favor of Fannie Mae, determining that Fannie Mae should have possession of the property.

Discussion

We review the trial court's judgment de novo, affording no deference to the court's ruling. *See Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). A forcible

detainer suit is intended to be a "speedy, simple, and inexpensive means to obtain immediate possession of property." *Marshall v. Housing Auth.*, 198 S.W.3d 782, 785 (Tex. 2006); *see Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 919 (Tex. 2013) (same). A person commits forcible detainer if he is a tenant by sufferance and refuses to surrender possession of property on written demand by the person entitled to possession of the property. Tex. Prop. Code § 24.002; *Kennedy v. Andover Place Apartments*, 203 S.W.3d 495, 497 (Tex. App.—Houston [14th Dist.] 2006, no pet.). "The only issue in a forcible detainer action is the right to actual possession of the premises." *Marshall*, 198 S.W.3d at 785; *see Puentes v. Fannie Mae*, 350 S.W.3d 732, 738 (Tex. App.—El Paso 2011, pet. dism'd) ("[A] forcible detainer suit asks one simple, and specific question: 'who has right to possess the property *now*?'"); *Rice v. Pinney*, 51 S.W.3d 705, 709 (Tex. App.—Dallas 2001, no pet.) ("To prevail in a forcible detainer action, a plaintiff is not required to prove title, but is only required to show sufficient evidence of ownership to demonstrate a superior right to immediate possession."). A forcible detainer judgment determines only the right to immediate possession, not the propriety of the foreclosure.[2] *Coinmach Corp.*, 417 S.W.3d at 919 (quoting *Marshall*, 198 S.W.3d at 785); *see Rice*, 51 S.W.3d at 709 ("where the right to immediate possession necessarily requires resolution of a title dispute, the justice court has no jurisdiction to enter a judgment").

[2] "A justice court and, on trial de novo, a county court have been given exclusive jurisdiction to decide the issue of immediate possession. That jurisdiction cannot be infringed upon as long as the court merely determines possession. Thus, it is only when the justice or county court *must* determine title issues that it is without jurisdiction to adjudicate a forcible detainer case." *Rice v. Pinney*, 51 S.W.3d 705, 713 (Tex. App.—Dallas 2001, no pet.) (citations omitted).

The Haddoxes assert that Fannie Mae lacks standing because it has no right to judgment in a Texas court under section 153.309 of the business organizations code. *See* Tex. Bus. Orgs. Code § 153.309(a).[3] They argue that when National Mortgagelink forfeited its right to transact business in Texas, National Mortgagelink and, therefore, Fannie Mae as a successor, was rendered incapable of maintaining suit. They further contend that Fannie Mae did not plead sufficient facts to show that it had an interest in the property or a landlord/tenant relationship with the Haddoxes. Finally, the Haddoxes assert that collateral estoppel bars this most recent forcible detainer suit because the case involves the same parties, the same property, and the same issues.

Collateral estoppel is an affirmative defense that is waived if not pled, *Domel v. City of Georgetown*, 6 S.W.3d 349, 353 (Tex. App.—Austin 1999, pet. denied), and the Haddoxes did not assert the defense of collateral estoppel in the trial court.[4] We overrule the Haddoxes' arguments related to collateral estoppel.

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[3] If a limited partnership forfeits its right to transact business, it "may not maintain an action, suit, or proceeding in a court of this state," and its successor or assignee "may not maintain an action, suit, or proceeding in a court of this state on a right, claim, or demand arising from the transaction of business by the limited partnership in this state." Tex. Bus. Orgs. Code § 153.309(a).

[4] In their amended answer and motion to dismiss, the Haddoxes asserted limitations as an affirmative defense and asserted that Fannie Mae lacked standing. They did not mention collateral estoppel. In their amended motion to dismiss, they referred to the fact that Fannie Mae had brought three earlier forcible detainer suits and asserted that the "current lawsuit is groundless" and that Fannie Mae could not cure its lack of standing, while acknowledging that res judicata does not apply in forcible detainer suits. *See Federal Home Loan Mortg. Corp. v. Pham*, 449 S.W.3d 230, 235-36 (Tex. App.—Houston [14th Dist.] 2014, no pet.) ("[A] new and independent cause of action for forcible detainer arises each time a person refuses to surrender possession of real property after a person entitled to possession of the property delivers a proper written notice to vacate. Accordingly, res judicata would not bar a second suit based on the commission of a subsequent forcible detainer.").

As for Fannie Mae's standing to bring the suit, we agree with Fannie Mae that the Haddoxes' argument is about Fannie Mae's capacity to sue, not standing. A party has standing when it has "a sufficient relationship with the lawsuit so as to have a 'justiciable interest' in its outcome, whereas the issue of capacity 'is conceived of as a procedural issue dealing with the personal qualifications of a party to litigate.'" *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005) (quoting 6A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice & Procedure: Civil 2D* § 1559, at 441 (2d ed. 1990)); *see also Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 55-56 (Tex. 2003) (failure to file assumed-name certificate or to pay corporate registration fee affected plaintiff's *capacity to sue* and did not render claim void). The Haddoxes do not argue that the mortgage and deed of trust were void or invalid, and indeed, section 153.309 provides that the forfeiture of a limited partnership's right to transact business in Texas does not impair the validity of a contract or an act of the limited partnership. Tex. Bus. Org. Code § 153.309(b)(1). Fannie Mae, as purchaser of the mortgage, had an interest in the mortgage sufficient to give it a justiciable interest in the suit. *See Lovato*, 171 S.W.3d at 848; *see also Sibley*, 111 S.W.3d at 55-56 (holding that failure to comply with Tex. Bus. & Com. Code § 36.25, which required limited partnership that operated under assumed name to file assumed name certificate and which had language similar to Tex. Bus. Orgs. Code § 153.309, did not render claim void and merely affected plaintiff's capacity to sue). Therefore, Fannie Mae had standing to bring the forcible detainer suit.

Assuming that the Haddoxes' argument was meant to attack Fannie Mae's *capacity* rather than standing, an argument contesting capacity is waived if not raised properly in the trial court, and must be raised in a verified plea "unless the truth of the matter appears of record." *Sibley*,

111 S.W.3d at 56. The Haddoxes raised their arguments about Fannie Mae's standing, which we will read as attacking Fannie Mae's capacity, in their answer and plea to the jurisdiction and their motion to dismiss, but neither document was verified. Thus, the issue of capacity was not properly raised.

Even if we overlook that concern, the Haddoxes did not establish that Fannie Mae lacked the capacity to bring this suit. First, the record does not reflect when National Mortgagelink assigned the deed to IndyMac, and thus we cannot tell the status of National Mortgagelink's right to transact business in Texas at the time the deed was assigned. Further, we agree with the analysis in *Hofrock v. Federal National Mortgage Association*, which held that the transfer of a deed did not fall within the definition of the "transaction of business." *See* No. A-13-CV-1013-LY, 2014 U.S. Dist. LEXIS 185344, at *16-18 (W.D. Tex. Mar. 18, 2014) (Lane, M.J.), *approved and accepted*, 2014 U.S. Dist. LEXIS 185345, at *3-4 (W.D. Tex. May 9, 2014) (Yeakel, J.).

Section 153.309 provides that if a limited partnership forfeits its right to transact business, it "may not maintain an action, suit, or proceeding in a court of this state," and its successor or assignee "may not maintain an action, suit, or proceeding in a court of this state on a right, claim, or demand arising from the transaction of business by the limited partnership in this state." Tex. Bus. Orgs. Code § 153.309(a). "Transaction of business" is not defined in chapter 153 or in the general definitions provided by the business organizations code. The *Hofrock* court therefore looked to other portions of the code, finding an answer in chapter 9, which governs foreign entities. *See* 2014 U.S. Dist. LEXIS 185344, at *17. Section 9.251 enumerates activities that do not constitute transaction of business, including the acquisition of "a mortgage or other security interest in real or personal property," "enforcing a right in property that secures a debt due the entity," and, "regarding

a debt secured by a mortgage or lien" on real property, "enforcing or adjusting a right or property securing the debt" or "taking an action necessary to preserve and protect the interest of the mortgagee in the security." Tex. Bus. Orgs. Code § 9.251(7), (8), (12).

The Haddoxes argue that *Hofrock* is not binding on this Court, that we should not give it precedential value, and that section 9.251 does not apply. Although section 9.251 is applicable specifically to chapter 9, we agree with the federal court that the definition is useful in light of the absence of a definition in chapter 153. *See also Bierwirth v. AH4R I TX, LLC*, No. 01-13-00459-CV, 2014 Tex. App. LEXIS 11925, at *6-7 (Tex. App.—Houston [1st Dist.] Oct. 30, 2014, no pet.) (mem. op.) (overruling argument that purchaser at foreclosure sale was barred from bringing forcible detainer suit by original lender's failure to register with secretary of state as required by Tex. Bus. Orgs. Code § 9.051(b)). And, although *Hofrock* is not binding on this Court, we believe it to be well-reasoned and based on sound logic. We hold that Fannie Mae's forcible detainer suit did not amount to the transaction of business subject to section 153.309.

The Haddoxes did not establish that Fannie Mae lacked standing or the capacity to bring the underlying lawsuit. Fannie Mae provided copies of the deed of trust, which provided for a tenant-at-sufferance/landlord relationship following a foreclosure sale, and the substitute trustee's deed, showing that it purchased the property at a foreclosure sale. Thus, the trial court had a basis to determine the issue of immediate possession without having to resolve any title issues. *See Schlichting v. Lehman Bros. Bank FSB*, 346 S.W.3d 196, 199 (Tex. App.—Dallas 2011, pet. dism'd) ("defects in the foreclosure process or with the purchaser's title to the property may not be considered in a forcible detainer action"); *see also Wilder v. Citicorp Trust Bank, F.S.B.*,

No. 03-13-00324-CV, 2014 Tex. App. LEXIS 2941, at *7 (Tex. App.—Austin Mar. 18, 2014, pet. dism'd w.o.j.) (mem. op.) (landlord-tenant relationship created by deed of trust provided independent basis to award immediate possession in forcible detainer suit without need to resolve title dispute).

Conclusion

Fannie Mae showed that it owns the property by virtue of a deed from the foreclosure sale, that the Haddoxes are tenants at sufferance, and that Fannie Mae has a superior right to immediate possession. *See Dormady v. Dinero Land & Cattle Co.,* 61 S.W.3d 555, 558 (Tex. App.—San Antonio 2001, pet. dism'd w.o.j.). Thus, the trial court properly found in favor of Fannie Mae in this forcible detainer proceeding. We affirm the trial court's judgment.

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David Puryear, Justice

Before Justices Puryear, Goodwin, and Field

Affirmed

Filed: May 6, 2016