



NUMBER 13-16-00592-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

IN RE PLAINSCAPITAL BANK

On Petition for Writ of Mandamus.

MEMORANDUM OPINION

**Before Chief Justice Valdez and Justices Rodriguez and Benavides
Memorandum Opinion by Chief Justice Valdez ¹**

Real parties in interest Blanca E. Gonzalez, Jose S. Rodriguez, and ODP Management, L.L.C. originally brought suit against PlainsCapital Bank (PCB) for attempted wrongful foreclosure on three tracts of real property which secured a commercial loan held by the real parties.² By agreement, PCB did not foreclose on the

¹ See TEX. R. APP. P. 52.8(d) (“When granting relief, the court must hand down an opinion as in any other case,” but when “denying relief, the court may hand down an opinion but is not required to do so.”); TEX. R. APP. P. 47.4 (distinguishing opinions and memorandum opinions).

² This original proceeding arises from trial court cause number C-7751-14-C in the 139th District Court of Hidalgo County, Texas, and the respondent is the Honorable J.R. “Bobby” Flores. See TEX. R. APP. P. 52.2.

property. The real parties subsequently filed a motion requesting the trial court to approve the sale of one of the three tracts of property and to require PCB to release its lien on that tract. After a non-evidentiary hearing, the trial court approved the sale, required PCB to release its lien on the tract, and allowed the real parties to pay the net proceeds of the sale to PCB in partial payment on the commercial loan.

By petition for writ of mandamus, PCB contends that the trial court's orders granting the real parties' requested relief are void because there is no live justiciable controversy between the parties and thus, the trial court lacks jurisdiction. PCB further contends that the trial court abused its discretion in ordering it to release its lien on the real property without any basis in law or fact and without reference to any rules or guiding principles. We conditionally grant the petition for writ of mandamus, in part, and deny it, in part, as stated herein.

I. BACKGROUND

On October 3, 2014, the real parties in interest filed suit against PCB for wrongful foreclosure. Their petition stated that they had received notice that PCB intended to foreclose on three tracts of property in Hidalgo County that were the collateral for a commercial loan obtained by the real parties. The real parties alleged that they were not behind on their loan payments and had otherwise complied with their obligations under the commercial note. The real parties sought a temporary restraining order and a temporary injunction preventing PCB from foreclosing on the properties. That same day, the trial court granted a temporary restraining order in favor of the real parties in interest.

Counsel for PCB subsequently spoke with counsel for the real parties and agreed to remove the properties from foreclosure proceedings. The case then languished without

further activity for almost two years. On September 13, 2016, the real parties filed a “Notice of Sale and Request for Partial Release of Lien” in the trial court. This pleading stated that PCB did not foreclose on the properties and that there had been no other activity in the case since the trial court originally granted the real parties’ request for a temporary restraining order. According to this pleading, the real parties were in the process of trying to sell one of the tracts of property that served as collateral for the promissory note and proposed to pay PCB the sales price, less closing costs, after the sale, to reduce their indebtedness on the note. The real parties stated that the three tracts at issue were “still technically the subject of a pending lawsuit in this honorable court” and requested that the court approve the sale of one of the tracts, allow the real parties to tender the proceeds to PCB in reduction of the note, and order PCB to release its lien on Tract II “only for the purpose of closing the transaction.”

PCB filed a response to this notice arguing that there was no statutory or common law authority for the relief requested and that the requested relief would effectively rewrite the contract between the parties. PCB’s response stated that it had not foreclosed on the properties and that there is no cause of action for attempted wrongful foreclosure.

After a non-evidentiary hearing, by order signed on September 29, 2016, the trial court granted the real parties’ requested relief. The trial court’s order (1) allowed the real parties in interest to sell one tract of property; (2) approved the tender of 100% of the sales proceeds to PCB in reduction of the amount that the real parties owe PCB on the commercial loan; and (3) ordered PCB to release its lien on the subject tract “only for the purpose of closing the transaction.”

PCB subsequently filed a motion for reconsideration of this order and a motion to dismiss the case for lack of subject matter jurisdiction based on the lack of a justiciable issue. The motion to dismiss urged that, alternatively, even if the court possessed subject matter jurisdiction, the real parties' allegations against PCB failed to state a claim.

The real parties thereafter filed a "First Amended Petition, Notice of Sale, and Request for Partial Release of Lien." This first amended petition affirms that PCB did not foreclose on the properties and generally reiterates the real parties' previous requests regarding the sale of one tract of the property and release of the lien for that tract. This pleading asserts a cause of action for breach of contract based on the attempted foreclosure that precipitated this case occurring in 2014. The real parties alleged that PCB breached its contract with them when it attempted to foreclose and accelerate the promissory note, and they further asserted that real parties were damaged because they had to hire counsel and file suit "in order to protect their interest." They sought damages in the amount of "at least" \$6,000 in attorney's fees.

Under the "breach of contract" heading in the first amended petition, the real parties also alleged that "PCB is now threatening to withhold its release under the argument that there are outstanding IRS liens." According to the real parties, the liens are "resolved" and "are not violations of the note and any effort to foreclose based on liens that the [real parties] voluntarily disclosed and resolved to effectuate the sale is a direct violation of the promissory note and the temporary injunction that is in place through the trial of this case." The real parties thus sought actual damages of "at least" \$631,000 based on PCB's "conduct in refusing to release the lien and in attempting to foreclose again."

The first amended petition also includes a claim for “wrongful foreclosure” and “violation of [the] temporary injunction.” The real parties alleged that PCB induced any “technical” default in the terms of the note and that PCB wrongfully accelerated the maturity of the note. The petition states that, “[h]aving lost an injunction hearing and with a temporary injunction still in place, PCB now seeks to again accelerate and foreclose on grounds that are not a breach of the promissory note and which it knows have been remedied.”

In the “damages” section of the first amended petition, the real parties sought: (1) to compel PCB to comply with the sale of the property as “already approved” and find PCB in violation of the injunction in place and stop any foreclosure efforts; (2) loss of \$631,000 for “breach of contract and failure to comply with this Court’s order”; (3) loss of credit; (4) attorney’s fees; (5) mental anguish damages; (6) exemplary damages; (7) prejudgment and post-judgment interest; and (8) “all actual damages” to be incurred in the future.

On October 21, 2016, without further hearing, the trial court issued an “Amended Order Granting [the real parties’] Notice of Sale and Request for Partial Release of Lien.” The amended order differs from the original order only in one respect: it changes the tender of “100% of the sales proceeds” to PCB from the sale to the tender of “100% of the net proceeds” to PCB from the sale.

This original proceeding ensued. By two issues, PCB contends: (1) the trial court lacked jurisdiction to enter an order compelling it to release a lien on certain real property without any live justiciable controversy between the parties; and (2) the trial court abused its discretion by entering an order compelling PCB to release a lien on certain real

property without any basis in law or fact, and without reference to any rules or guiding principles. This Court requested and received a response to the petition for writ of mandamus from the real parties in interest. The real parties generally allege that the lawsuit remains in effect, “[s]o long as the lawsuit exists the case is ripe, not moot and the court’s jurisdiction remains intact,” and “there is a justiciable controversy that has arisen again with [PCB’s] renewed effort to foreclose in 2016.” The real parties allege that PCB’s breach “is now the refusal to allow the [real parties] to sell property and pay the note off in part as provided for in the note[s].” This Court has also received a reply to the response from PCB.

II. STANDARD FOR MANDAMUS REVIEW

Mandamus is an extraordinary remedy. *In re H.E.B. Grocery Co.*, 492 S.W.3d 300, 302 (Tex. 2016) (orig. proceeding) (per curiam). Mandamus relief is proper to correct a clear abuse of discretion when there is no adequate remedy by appeal. *In re Christus Santa Rosa Health Sys.*, 492 S.W.3d 276, 279 (Tex. 2016) (orig. proceeding). The relator bears the burden of proving both of these requirements. *In re H.E.B. Grocery Co.*, 492 S.W.3d at 302; *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). An abuse of discretion occurs when a trial court’s ruling is arbitrary and unreasonable, or is made without regard for guiding legal principles or supporting evidence. *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 712 (Tex. 2016) (orig. proceeding); *Ford Motor Co. v. Garcia*, 363 S.W.3d 573, 578 (Tex. 2012). We determine the adequacy of an appellate remedy by balancing the benefits of mandamus review against the detriments. *In re Essex Ins. Co.*, 450 S.W.3d 524, 528 (Tex. 2014) (orig. proceeding); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding).

In this case, PCB contends that the trial court's orders are void. Mandamus relief is proper when the trial court issues a void order, and the relator need not demonstrate that there is no adequate remedy by appeal. See *In re Sw. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding); *In re Flores*, 111 S.W.3d 817, 818 (Tex. App.—Houston [1st Dist.] 2003, orig. proceeding) (per curiam). PCB further contends that it lacks an adequate remedy by appeal to contest the trial court's orders because, absent mandamus relief, the property will be sold and its security interest in the tract will be extinguished. In this regard, an appeal is inadequate when the parties are in danger of permanently losing substantial rights. *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 211 (Tex. 2004) (orig. proceeding) (per curiam). Such a danger arises when, for example, the appellate court would not be able to cure the trial court's alleged error. See *id.*

III. ANALYSIS

By its first issue, PCB contends that the trial court lacks jurisdiction over this case. PCB argues that: (1) there was no justiciable controversy between the parties at the time of the trial court's orders; (2) the real parties lacked standing to request a release of lien because there has been no wrongful foreclosure; and (3) the real parties' claims for wrongful foreclosure are moot. PCB argues, in sum, that the real parties lack a cause of action for wrongful foreclosure because it did not foreclose, thus their "extraneous" request for a release of PCB's lien could not be considered by the trial court without subject matter jurisdiction over a specific cause of action.

Subject matter jurisdiction is essential to "a court's power to decide a case." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553–54 (Tex. 2000). A court acting without such power commits fundamental error that we may review for the first time on appeal.

Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 443–44 (Tex. 1993). Subject matter jurisdiction presents a question of law that we review de novo. *Tex. Dep't of Transp. v. A.P.I. Pipe & Supply, L.L.C.*, 397 S.W.3d 162, 166 (Tex. 2013).

When reviewing a trial court's ruling on a plea to the jurisdiction, we begin our analysis with the plaintiff's live pleadings and determine whether the facts alleged affirmatively demonstrate the trial court's jurisdiction to hear the cause. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). We construe the plaintiff's pleadings liberally, taking all factual assertions as true, and look to the plaintiff's intent. *Id.* If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency, and the plaintiff should be afforded an opportunity to amend. *Westbrook v. Penley*, 231 S.W.3d 389, 395 (Tex. 2007); *Miranda*, 133 S.W.3d at 226–227. If, however, the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to re-plead. *Cnty. of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002); *Miranda*, 133 S.W.3d at 227; *In re Metro. Transit Auth.*, 334 S.W.3d 806, 810 (Tex. App.—Houston [1st Dist.] 2011, no pet.). We may consider evidence that the parties have submitted and must do so when necessary to resolve the jurisdictional issues. *Bland Indep. Sch. Dist.*, 34 S.W.3d at 555. The ultimate inquiry is whether the particular facts presented affirmatively demonstrate a claim within the trial court's subject matter jurisdiction. *Bacon v. Tex. Historical Comm'n*, 411 S.W.3d 161, 171 (Tex. App.—Austin 2013, no pet.).

In this case, PCB's arguments focus on the justiciability doctrines which prevent Texas courts from issuing advisory opinions or from granting court access to persons

lacking any actual, concrete injury. *Tex. Quarter Horse Ass'n v. Am. Legion Dep't of Tex.*, 496 S.W.3d 175, 179–80 (Tex. App.—Austin 2016, no pet.); see *Tex. Ass'n of Bus.*, 852 S.W.2d at 444–45. To constitute a justiciable controversy, there must exist a real and substantial controversy involving a genuine conflict of tangible interests and not merely a theoretical dispute. *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995). Under the ripeness doctrine, courts should consider whether, at the time a lawsuit is filed, the facts are sufficiently developed so that an injury has occurred or is likely to occur, rather than being contingent or remote. *Tex. Quarter Horse Ass'n*, 496 S.W.3d at 179–80; see *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851–52 (Tex. 2000). Under the mootness doctrine, a justiciable controversy exists between the parties at the time the case arose, but the live controversy ceases because of subsequent events. *Tex. Quarter Horse Ass'n*, 496 S.W.3d at 179–80; see *Matthews v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 418 (Tex. 2016). A justiciable controversy ceases and the case becomes moot when the issues presented are no longer “live” or the parties lack a legally cognizable interest in the outcome. *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001)

In contrast, the standing doctrine focuses on whether a particular party “has a sufficient relationship with the lawsuit so as to have a ‘justiciable interest’ in its outcome.” *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005). Standing is a component of subject matter jurisdiction. *State v. Naylor*, 466 S.W.3d 783, 787 (Tex. 2015); *Tex. Ass'n of Bus.*, 852 S.W.2d at 444. The standing doctrine requires (1) that there be a “real controversy between the parties” and (2) that the controversy “will be actually determined by the judicial declaration sought.” *Nootsie, Ltd. v. Williamson Cty.*

Appraisal Dist., 925 S.W.2d 659, 662 (Tex. 1996) (quoting *Tex. Air Control Bd.*, 852 S.W.2d at 446).

When the trial court issued its original order on September 29, 2016 allowing the real parties to sell the property and requiring PCB to release its lien, the sole cause of action before the court was the real parties' claim for attempted wrongful foreclosure. When the trial court issued its amended order on October 21, 2016, the real parties' first amended petition alleged that PCB breached its contract with the real parties by attempting to foreclose in the past, by presently threatening to foreclose, and by wrongfully threatening to refuse to release its lien.

In Texas, "[t]he elements of a wrongful foreclosure claim are: (1) a defect in the foreclosure sale proceedings; (2) a grossly inadequate selling price; and (3) a causal connection between the defect and the grossly inadequate selling price." *Sauceda v. GMAC Mortg. Corp.*, 268 S.W.3d 135, 139 (Tex. App.—Corpus Christi 2008, no pet.). However, there is no cause of action in Texas for attempted wrongful foreclosure. *EverBank, N.A. v. Seederger Ventures, Inc.*, 499 S.W.3d 534, 544 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *Wieler v. United Sav. Ass'n of Tex., FSB*, 887 S.W.2d 155, 159 n.2 (Tex. App.—Texarkana 1994), *writ denied sub nom. United Sav. Ass'n of Tex. v. Wieler*, 907 S.W.2d 454 (Tex. 1995); *Peterson v. Black*, 980 S.W.2d 818, 823 (Tex. App.—San Antonio 1998, no writ) (stating that where the mortgagor's possession is undisturbed, the mortgagor has suffered no compensable damage in action for wrongful foreclosure); *Diversified, Inc. v. Gibraltar Sav. Ass'n*, 762 S.W.2d 620, 623 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (explaining that the remedies for wrongful foreclosure must follow a foreclosure); *Port City State Bank v. Leyco Constr. Co.*, 561

S.W.2d 546, 547 (Tex. Civ. App.—Beaumont 1977, no writ) (noting the lack of “authority supporting the existence of a cause of action for ‘attempted wrongful foreclosure’”).³ Moreover, the fact that there was not a foreclosure renders a claim for wrongful foreclosure moot. See *Johnson v. Wells Fargo Bank, N.A.*, 999 F.Supp.2d 919, 932 (N.D. Tex. 2014) (order) (dismissing the plaintiff’s claim for wrongful foreclosure because no foreclosure had occurred at the time the plaintiff filed suit); see also *Walton v. Wells Fargo Bank, N.A.*, No. CIV.A. H-10-2875, 2011 WL 3882276, at *7 (S.D. Tex. Sept. 2, 2011) (mem. op. & order).

The gravamen of the real parties’ lawsuit is attempted wrongful foreclosure, and the record before this Court fails to show that PCB has foreclosed on the real parties’ property. Because Texas does not recognize a cause of action for attempted wrongful foreclosure, the real parties have not suffered a compensable injury in connection with their claims that PCB breached its contract with them by attempting to foreclose in the past and by threatening foreclosure at the present time. See *EverBank*, 499 S.W.3d at 544; *Wieler*, 887 S.W.2d at 159 n.2; *Peterson*, 980 S.W.2d at 823; *Diversified*, 762 S.W.2d at 623; *Port City State Bank*, 561 S.W.2d at 547. Accordingly, the trial court lacked jurisdiction over these alleged causes of action. See, e.g. *Johnson*, 999 F.Supp.2d at 932.

³ See also *Davis v. Countrywide Home Loans, Inc.*, 1 F.Supp.3d 638, 642 n.3 (S.D. Tex. 2014) (“Plaintiff’s claim must be one for declaratory relief because an attempted wrongful foreclosure claim is not recognized under Texas law and a traditional wrongful foreclosure claim would not be ripe when plaintiff retains possession of the home.”); *Anderson v. Baxter, Schwartz & Shapiro, LLP*, No. 2012 WL 50622, at *4 (Tex. App.—Houston [14th Dist.] Jan. 10, 2012, no pet.) (mem. op.) (stating that attempted wrongful foreclosure is not recognized as a cause of action in Texas); *Ayers v. Aurora Loan Servs.*, 787 F.Supp.2d 451, 454 (E.D. Tex. 2011) (order) (“Plaintiff has not alleged an actual violation of the Texas Property Code because no foreclosure sale has occurred.”); *Biggers v. BAC Home Loans Servicing, LP*, 767 F.Supp.2d 725, 729 (N.D. Tex. 2011) (noting Texas courts have yet to recognize claim for “attempted wrongful foreclosure”).

The real parties have alleged one remaining potential cause of action in their amended petition under which they argue that PCB has breached its contract by wrongfully threatening to refuse to release its lien. They assert that PCB is continuing to withhold its release of lien in violation of the trial court's "injunctive relief" and the promissory note. We note that the trial court issued a temporary restraining order and not a temporary injunction.⁴ Based upon the record before us, the real parties' request for a temporary injunction was never heard by the trial court. The real parties appear to be cognizant of this because they refer in their briefing to an "implied injunction." Moreover, the real parties point to no language in the promissory note, or elsewhere, supporting their argument that PCB has breached its contract by refusing to release its lien on part of the property at issue. We further note that the real parties assert that PCB is "threatening" to refuse to release its lien, which would appear to make any alleged cause of action premature. However, construing the real parties' pleadings liberally, we conclude that their pleadings are insufficient to establish jurisdiction, but do not affirmatively demonstrate an incurable defect. See *Westbrook*, 231 S.W.3d at 395; *Miranda*, 133 S.W.3d at 226–227. Accordingly, based on this record, we conclude that the real parties should be afforded an opportunity to amend their pleadings to show that a justiciable controversy currently exists between the parties.

In sum, we sustain PCB's first issue to the extent that the trial court premised its exercise of jurisdiction on the claims of attempted wrongful foreclosure, which were the only claims before the trial court at the time of its initial order and were extant claims in

⁴ The temporary restraining order at issue stated that it would "continue in force and effect until further order of the Court or until it expires by operation of law." See TEX. R. CIV. P. 680 ("Every temporary restraining order . . . shall expire by its terms within such time after signing, not to exceed fourteen days.").

the real parties' pleadings at the time of the amended order. The trial court lacks jurisdiction to hear the real parties' attempted wrongful foreclosure claims. However, we overrule PCB's first issue to the extent that the real parties should be allowed the opportunity to re-plead with regard to their additional claims concerning PCB's refusal to release its lien.

We now turn to PCB's second issue. By its second issue, PCB asserts that the trial court abused its discretion by entering an order compelling PCB to release a lien on real property "without any basis in law or fact, and without reference to any rules or guiding principles." A trial court abuses its discretion by ruling (1) arbitrarily, unreasonably, or without regard to guiding legal principles; or (2) without supporting evidence. See *Ford Motor Co. v. Garcia*, 363 S.W.3d 573, 578 (Tex. 2012); *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998).

PCB alleges multiple violations of procedure with regard to the trial court's amended order including setting the request for hearing with less than two days of notice, see TEX. R. CIV. P. 21, and signing an amended order submitted by the real parties without a motion and without affording PCB notice and the opportunity to respond. See *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84 (1988). PCB also contends that the trial court abused its discretion in substance because it is essentially "re-writing" the terms of the contract between the parties and there is no authority for the proposition that PCB should be required to release its lien. See *Royal Indem. Co. v. Marshall*, 388 S.W.2d 176, 181 (Tex. 1965) ("Courts cannot make new contracts between the parties, but must enforce the contracts as written."); *In re Rains*, 473 S.W.3d 461, 469 (Tex. App.—Amarillo 2015, orig. proceeding) (stating that a court does not have the "inherent authority to modify or

rewrite [an] agreement on behalf of the parties”). PCB further argues that the trial court’s ruling was unsupported by any evidence. See *Ford Motor Co.*, 363 S.W.3d at 578.

We have already determined that the real parties should be afforded an opportunity to re-plead to demonstrate that the trial court has subject matter jurisdiction over the underlying matter. Accordingly, we need not address PCB’s second issue further in this original proceeding. See TEX. R. APP. P. 47.1; *id.* R. 47.4. We are confident that the trial court will apply the foregoing principles in any further hearing that may be had in this case.

IV. CONCLUSION

The Court, having examined and fully considered the petition for writ of mandamus, the response, the reply, and the applicable law, is of the opinion that PCB has, in part, shown itself entitled to the relief sought. Accordingly, we lift the stay previously imposed in this case. See TEX. R. APP. P. 52.10(b) (“Unless vacated or modified, an order granting temporary relief is effective until the case is finally decided.”). We conditionally grant the petition for writ of mandamus, in part, insofar as we direct the trial court to vacate the order and amended order granting the real parties’ notice of sale and request for partial release of lien. We deny the petition for writ of mandamus, in part, regarding PCB’s request to compel the trial court to dismiss the underlying suit for lack of subject matter jurisdiction on the pleadings as they exist at this time. See TEX. R. APP. P. 52.8(a). Our writ will issue only if the trial court fails to comply.

ROGELIO VALDEZ
Chief Justice

Delivered and filed this
27th day of March, 2017.