NUMBER 13-17-00021-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

IN RE PLAINSCAPITAL BANK AND MIKE L. MOLAK

On Petition for Writ of Mandamus.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Benavides and Hinojosa
Memorandum Opinion by Justice Hinojosa[1]

Relators PlainsCapital Bank (PCB) and Mike L. Molak filed a petition for writ of mandamus seeking to compel the trial court to (1) grant their motion to abate the underlying lawsuit in Cameron County based on the dominant jurisdiction of a case previously filed in Bexar County, and (2) grant their motion to transfer venue from

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

Cameron County to Bexar County.[2] Concluding that the Bexar County court has dominant jurisdiction, we conditionally grant the petition for writ of mandamus.

I. BACKGROUND

On August 2, 2016, PCB filed suit against Cantera-Parkway Development, SA, LP (Cantera); Alberto Berlanga Bolado, individually (Berlanga); GMC General Partner, LLC; Fernando Alejandro Cano Martinez, individually; GMC SA de CV; and Materiales y Construcciones Villa De Aguayo, SA de CV in trial court cause number 2016CI12887 in the 150th Judicial District Court of Bexar County, Texas. In this lawsuit, PCB sought to collect on a note executed by Cantera and guaranties on the note executed by the other defendants. PCB's petition alleged that jurisdiction and venue was proper in Bexar County "because Defendant Cantera Parkway is a Texas limited partnership with its principal and registered address in Bexar County, Texas. The real property which secures the herein described Note is located in Bexar County, Texas."

According to PCB's petition, the defendants defaulted in paying the note, PCB "has accelerated the debt according to the terms of the note," and there "is currently due the sum of $3,975,779.43, principal, plus accrued interest as provided for in the note." Under the title "Forfeiture Action," the petition also alleged:

> [T]he note is secured by a deed of trust covering certain real property described therein (the "Property") comprised of approximately 46.175 acres located in Bexar County, Texas. On May 12, 2012, the United States government filed a Verified Complaint for Forfeiture, in Civil Action No. SA-12-CV-0508-XR, styled *United States of America v. A 46.175 Acre Tract of Land, More or Less* (the "Forfeiture Action"), effectively taking over jurisdiction of the Property. On May 23, 2016, in the Forfeiture Action the Court signed an order (the "Sale Order") that provided that, among other things, upon the sale of the Property, the United States would receive $1

[2] This original proceeding arises from trial court cause number 2016-DCL-05590 in the 197th District Court of Cameron County, Texas, and the respondent is the Honorable Migdalia Lopez. *See* TEX. R. APP. P. 52.2.

> million (referred to in the Sale Order as the "Substitute Res"), and that Plaintiff, [PCB] would receive "payment in full." Defendants have disputed the amount provided to them by [PCB] as "payment in full". Therefore, [PCB] requests the Court in this case determine the proper amount representing "payment in full" due to [PCB] from Defendants, and grant judgment to [PCB] as requested herein below.

PCB also sought a temporary injunction whereby, after the property was sold and after the United States received its payment, "the undisputed portion of the remaining net proceeds" would be paid to PCB, and "the remaining portion of the net proceeds," which PCB termed the "Disputed Res," would be held in the registry of the court until final judgment. In its prayer for relief, PCB asked for judgment "to receive the Disputed Res," $3,975,779.43 as the principal amount due on the note; accrued and unpaid interest, post-judgment interest, attorney's fees, and costs of court.

On August 23, 2016, Cantera filed suit against PCB and Molak, PCB's representative, in the 197th District Court of Cameron County in trial court cause number 2016-DCL-05590. Cantera's original petition and its third and fourth amended petitions, contain substantially identical recitations of facts, stating in pertinent part as follows:

> 10. In February of 2006, [Cantera] purchased a 46.175 Acre Tract of land situated in Bexar County, Texas . . . . The property was financed through a financing agreement with First National Bank in February of 2006 and the note was renewed in December of 2008 . . . . [PCB] is the successor in interest to the Federal Deposit Insurance Corporation, as Receiver for First National, Edinburg, Texas . . . . On information and [belief], [PCB] purchased the note in question from the Federal Deposit and Insurance Corporation for "cents on the dollar", i.e., for a significantly discounted amount.
>
> 11. At the time of the renewal of the financing agreement with First National Bank, or shortly thereafter, complete ownership and interest in [Cantera] was acquired by [Berlanga]. [Berlanga] began development of the property in question with the intention of developing the property as a commercial development in a rapidly developing part of Bexar County. The property in question has an undeveloped value of over twenty million dollars ($20,000,000).

12. Prior to the acquisition of [Cantera] by [Berlanga], the predecessors in interest of said company had significant difficulties in complying with the terms of the financing agreement with First National Bank. Notwithstanding these problems and delays in payment, a custom and practice developed between the predecessors in interest and First National Bank which allowed the note to remain in effect without being declared in default as long as, within a reasonable time, [Cantera] would become in compliance with the terms of the note. This agreement developed the custom and practice of the parties [which] was never rescinded by Defendants.

13. On or about May 22, 2012, said real property was seized by the United States of America in a seizure proceeding brought in Bexar County in the United States District Court for the Western District of Texas. . . .

14. Prior to the seizure by the United States of America, [Cantera], through its new owners, complied with all the terms of the original and renewed financing agreement with [PCB].

15. As a result of the seizure proceeding, [Cantera] was unable to develop said property and generate the necessary income that a property with such a large note would require. Notwithstanding the lack of income, [Cantera] continued to timely make payments on the note in question until February of 2015, at which time [Cantera] fell behind on one quarterly payment.

16. Even though federal law required the Federal District Court to authorize the acceleration of the note and declaration of default by [PCB], [PCB and Molak] illegally issued notice of default and acceleration of the note and sought foreclosure of the property. Because [PCB and Molak] had failed to obtain leave of court to declare the note in default and to accelerate the note, the [f]ederal court denied [PCB's] numerous attempts to foreclose on the property in question. [Cantera] remained in compliance with the terms of the note in question after the Federal District Court allowed it to "catch-up" with the . . . payment that it had failed to pay in time. As a result of [PCB and Molak's] failure to seek leave from the federal court to declare the note in default and accelerate the note and under the long custom and practice developed between [Cantera] and [PCB and Molak] regarding occasional late payments, the note financing the property in question is not in default.

17. On May 23, 2016, four years after it was started, the seizure proceeding was resolved pursuant to an agreement reached with the United States . . . . The agreement made it clear that:

a. [Cantera] was not involved in any criminal activity and

b. [Cantera] was permitted to sell the property.

18. [Molak] has illegally directed the attorneys for [PCB] to declare the note in default and accelerate the note, even though a federal court notified him through his attorneys that it had improperly declared the note in default and accelerated it and even though, pursuant to the customs and practice that the parties have long engaged in with respect to occasional late payments on the note, the note was in fact never in default. On information and belief, [Molak] has sought to declare the note in default, accelerate it and foreclose on the property so that he can sell the property at huge windfall for [PCB]. [PCB] has been paid millions of dollars in excess of the cost that it incurred in purchasing the note from the Federal Deposit Insurance Corporation and has lost nothing as a result of the one late payment made in February of 2015.

19. [PCB and Molak's] attempt to wrongfully foreclose on [Cantera's] property is illegal, fraudulent, in violation of the agreement between the Parties and a violation of state law.

20. [Cantera] has entered into an agreement with the United States of America with respect to the seizure proceedings. This agreement allows [Cantera] to sell the property and upon the sale to pay the United States of America the sum of one million dollars, after the amounts [owed] to [PCB] under the note are paid. The balance of the proceeds of the sale will be paid to . . . any lien holder and finally to [Cantera], after all lien holders and the United States of America receives their money under the settlement agreement. Although a contract for the sale of the property in question has been executed with a third party, [PCB] is threatening to interfere with the sale of the property by insisting in the payment to it of a grossly inflated payoff amount on the note based upon its assertion that it is entitled to accelerated interest amounts that it alleges it is owed as if the note had been legally declared in default and accelerated over a year and a half ago. The amounts that it is requesting, which includes interest at the default rate of 18 percent and attorney's fees in the amount of approximately $129,000.00 above what it is entitled exceeds the amounts owed by [Cantera] by over a million dollars and relies on its illegal and improper declaration of default and illegal acceleration on the note. Such action on the part of [PCB and Molak] is nothing short of extortion, fraudulent and in violation of [Cantera's] rights under the financing agreement and state law.

In Cantera's third amended petition, filed on October 26, 2016, Cantera pleaded causes of action for breach of contract, deceptive trade practices, common law fraud, fraud in a real estate transaction, negligence, and abuse of process. It also sought declaratory relief

to establish the amount owed to PCB from the sale of the property and sought temporary and permanent injunctions preventing PCB from accelerating the loan or foreclosing on the property. In Cantera's fourth amended petition, filed on October 31, 2016, Cantera pleaded the same facts and causes of action, but omitted its request for temporary and permanent injunctions.[3]

On August 30, 2016, PCB and Molak filed a motion to transfer venue in the Cameron County action alleging that Cantera's causes of action necessarily constituted an "action for recovery of real property or an estate or interest in real property," or "to remove encumbrances from the title to real property," or "to quiet title to real property," and thus venue was mandatory in "the county in which all or part of the property is located." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.011 (West, Westlaw through 2017 1st C.S.). PCB and Molak sought to transfer venue to Bexar County as the county in which the real property securing the note was located. Cantera filed a response to the motion to transfer venue contending that PCB's cause of action did not fall within the scope of the statutory provision regarding mandatory venue for real property. Cantera argued instead that venue was proper in Cameron County because that is where the contract was entered and performance was required. *See id.* § 15.035 (West, Westlaw through 2017 1st C.S.) (pertaining to venue regarding contracts in writing); TEX. BUS. & COM. CODE ANN. § 17.56 (West, Westlaw through 2017 1st C.S.) (stating that actions under the deceptive trade practices act shall be governed by Chapter 15 of the civil

[3] PCB urges us to consider the third amended petition as the live petition for purposes of our review; while Cantera argues that the fourth amended petition was the live pleading under consideration. The hearing on the motion to transfer venue was held on October 26, 2016; the third amended petition was filed that same day; the fourth amended petition was filed on October 31, 2016; and the hearing on the plea in abatement was held on December 13, 2016. We need not address this issue because the difference between the two pleadings is not material to our analysis. *See* TEX. R. APP. P. 47.1, 47.4.

practice and remedies code regarding venue, except as provided by article 5.06-1(8) of the insurance code). After a non-evidentiary hearing held on October 26, 2016, the trial court denied PCB's motion to transfer venue by order signed on November 20, 2016.

Thereafter, on November 22, 2016, PCB and Molak filed a motion to abate the Cameron County lawsuit on grounds that the Bexar County court had dominant jurisdiction. They asserted that the lawsuits were inherently interrelated and involved the same parties and issues, and thus the first-filed lawsuit should proceed and the Cameron County court should "abstain and abate the action." PCB and Molak alleged that they had "attempted in good faith to serve Cantera in the Bexar County Suit, but Cantera has intentionally evaded service of process." They supported their motion to abate with a file-stamped copy of the Bexar County petition, the promissory note, the guaranty agreements, and an affidavit detailing PCB and Molak's belief that Berlanga and Jose Joaquin Alfredo Vila, the registered agent for Cantera, were "intentionally evading and avoiding service." The affidavit recounts the events regarding PCB's attempted service on Cantera and attaches the Bexar County court's November 18, 2016 order granting PCB's motion for substituted service on Cantera.

On December 12, 2016, Cantera filed a response to PCB's motion to abate. Cantera argued that the Cameron County suit was not inherently interrelated to the Bexar County suit, and that even if it were, then Cameron County had dominant jurisdiction because venue was not proper in Bexar County. Cantera further alleged that dominant jurisdiction principles did not apply in this case because PCB lacked a bona fide intent to prosecute the Bexar County case and PCB had engaged in inequitable conduct, "stripping dominant jurisdiction from the Bexar County court." Cantera supported its response with

an affidavit by Rolando L. Rios, counsel for Cantera. The affidavit provided that: the judge in the federal forfeiture proceedings had stayed those proceedings "until the case was dismissed [in] November of 2016"; PCB attempted numerous times to accelerate and foreclose on the property but "the federal judge told them [it] could not until the seizure proceeding was over"; the federal court denied PCB's request to foreclose in May 2016 and "even suggested that the Bank was trying to sabotage the sale so [it] could foreclose and take the property"; PCB filed the Bexar County suit in "clear" violation of federal law and the federal court's stay order; after PCB filed the Bexar County suit "it became clear" that PCB "was attempting to sabotage the sale"; "the filing of the lawsuit had an impact on [the] ability to sell the property at fair market value"; and while Cantera "was following the direction of the federal court by not filing [its] claims here in Cameron County, after [PCB] violated the direction of the federal court, Cantera decided to file [its] claims in an effort to avoid any prejudice."

On December 16, 2016, PCB and Molak filed a verified reply brief in support of their motion to abate. They reiterated their arguments pertaining to dominant jurisdiction and argued, inter alia, that they had not engaged in inequitable conduct. PCB asserted that there was no order issued in the criminal forfeiture proceeding that precluded it from accelerating the note and calling it due, and that it "was only precluded from foreclosing on the property," which it did not do. PCB pointed out that the federal court did not sanction or criticize PCB for filing the Bexar County action, and even "held that it did not have jurisdiction to determine the amount due on the note," stating that the issue would have to be determined in state court. According to PCB:

> The federal court never took jurisdiction over the acceleration issue, and even stated the following: [PCB] has "the law on [its] side that the loan has

> been accelerated and so there is nothing we can do about that." . . . . In addition, on two other occasions, on November 16, 2015, and on September 13, 2016, the court declined to accept jurisdiction or rule on, the acceleration issue. In fact, the federal court requested the parties to brief the issue of whether the court had the jurisdiction to determine [PCB's] payoff amount, including the acceleration issue. With the federal court making the above statements and rulings, clearly [PCB] did not violate any federal court order in accelerating the note. In any event, even if [PCB] did something inequitable via the federal court proceedings, which it did not do, that did not prevent or delay Cantera from filing this suit.

(Internal citations omitted).

After a non-evidentiary hearing held on December 13, 2016, the trial court denied PCB's motion to abate by order signed on December 16, 2016. The trial court's order states that it found that "two suits involving the same subject matter" were filed in Bexar County and Cameron County, Texas and the lawsuit filed in Cameron County was the lawsuit with dominant jurisdiction.

This original proceeding ensued. By two issues, PCB and Molak contend that the trial court abused its discretion in denying their motion to abate and motion to transfer venue and that they lack an adequate remedy by law to address these issues. This Court requested and received a response to the petition for writ of mandamus from Cantera. *See* TEX. R. APP. P. 52.4. Further, PCB and Molak filed a reply brief in support of their petition for writ of mandamus, Cantera filed a sur-reply, and PCB and Molak filed a response to Cantera's sur-reply.

We note that both PCB and Molak, and Cantera, have filed records containing documents that were not presented to the trial court for its consideration in determining the matters at issue. Cantera, for example, urges us to take judicial notice of those

documents which are ancillary in nature to the merits of this dispute.[4] It is axiomatic that an appellate court reviews the actions of the trial court based on the record before the court at the time it makes its ruling. *See Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 556 (Tex. 1990) (orig. proceeding); *Sabine OffShore Serv., Inc. v. City of Port Arthur*, 595 S.W.2d 840, 841 (Tex. 1979) (orig. proceeding); *Hudson v. Aceves*, 516 S.W.3d 529, 539–40 (Tex. App.—Corpus Christi 2016, no pet.) (combined app. & orig. proceeding); *In re Taylor*, 113 S.W.3d 385, 392 (Tex. App.—Houston [1st Dist.] 2003, orig. proceeding). Our review here is based on the record that was before the trial court.

II. STANDARD FOR MANDAMUS REVIEW

To obtain relief by writ of mandamus, a relator must establish that an underlying order is void or a clear abuse of discretion and that no adequate appellate remedy exists. *In re Nationwide Ins. Co. of Am*., 494 S.W.3d 708, 712 (Tex. 2016) (orig. proceeding); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992) (orig. proceeding). Under this standard of review, we defer to the trial court's factual determinations that are supported by evidence, but we review the trial court's legal determinations de novo. *See In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009) (orig. proceeding). An abuse of

[4] An appellate court may take judicial notice of a relevant fact that is "either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." TEX. R. EVID. 201(b); *Freedom Commc'ns, Inc. v. Coronado*, 372 S.W.3d 621, 623 (Tex. 2012). Generally, appellate courts take judicial notice of facts outside the record only to determine jurisdiction or to resolve matters ancillary to decisions which are mandated by law. *In re Estate of Hemsley*, 460 S.W.3d 629, 638–39 (Tex. App.—El Paso 2014, pet. denied); *In re R.A*., 417 S.W.3d 569, 576 (Tex. App.—El Paso 2013, no pet.); *SEI Bus. Sys., Inc. v. Bank One Tex., N.A.*, 803 S.W.2d 838, 841 (Tex. App.—Dallas 1991, no writ). Appellate courts are reluctant to take judicial notice of matters which go to the merits of a dispute. *In re Estate of Hemsley*, 460 S.W.3d at 638–39; *In re R.A*., 417 S.W.3d at 576; *SEI Bus. Sys*., 803 S.W.2d at 841. Further, though appellate courts may take judicial notice in certain circumstances, they generally do not take judicial notice of documents that were not before the trial court when the trial court made its challenged ruling. *See FinServ Cas. Corp. v. Transamerica Life Ins. Co.*, 523 S.W.3d 129, 147–48 (Tex. App.—Houston [14th Dist.] Oct. 20, 2016, pet. denied); *SEI Bus. Sys., Inc*., 803 S.W.2d at 841.

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*, 494 S.W.3d at 712; *Ford Motor Co. v. Garcia*, 363 S.W.3d 573, 578 (Tex. 2012). A trial court abuses its discretion when it fails to analyze or apply the law correctly or apply the law correctly to the facts. *In re Nationwide*, 494 S.W.3d at 712; *In re H.E.B. Grocery Co.*, 492 S.W.3d 300, 302 (Tex. 2016) (orig. proceeding) (per curiam). "This principle applies even when the law is unsettled." *In re J.B. Hunt Transport, Inc.*, 492 S.W.3d 287, 294 (Tex. 2016) (orig. proceeding). A trial court abuses its discretion concerning factual matters if the record establishes that the trial court could have reached only one conclusion. *Walker*, 827 S.W.2d at 841.

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 at 136. In deciding whether the benefits of mandamus outweigh the detriments, we weigh the public and private interests involved in the case, and we look to the facts involved in each case to determine the adequacy of an appeal. *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 313 (Tex. 2010) (orig. proceeding); *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 469 (Tex. 2008) (orig. proceeding); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d at 136–37. A relator need not establish that that there is an inadequate remedy by appeal regarding a plea in abatement in a case involving dominant jurisdiction and instead need only establish that the trial court abused its discretion to demonstrate entitlement to mandamus relief. *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d at 298–300 (Tex. 2016) (orig.

proceeding) (per curiam) (footnotes omitted); *see also In re Red Dot Bldg. Sys., Inc.*, 504 S.W.3d 320, 322 (Tex. 2016) (orig. proceeding).

III. Principles of Dominant Jurisdiction

"In instances where inherently interrelated suits are pending in two counties, and venue is proper in either county, the court in which suit was first filed acquires dominant jurisdiction." *In re Red Dot Bldg. Sys., Inc.*, 504 S.W.3d at 322; *see In re J.B. Hunt Transp., Inc.*, 492 S.W.3d at 294; *Gonzalez v. Reliant Energy, Inc.*, 159 S.W.3d 615, 622 (Tex. 2005); *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988), *overruled on other grounds, In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287. In these circumstances, the general rule is that the court in the second action must abate the suit. *In re Red Dot Bldg. Sys., Inc.*, 504 S.W.3d at 322; *In re J.B. Hunt Transp. Inc.*, 492 S.W.3d at 294; *Wyatt*, 760 S.W.2d at 247. The reasons for abatement include conservation of judicial resources, avoidance of delay, and "comity, convenience, and the necessity for an orderly procedure in the trial of contested issues." *Perry v. Del Rio*, 66 S.W.3d 239, 252 (Tex. 2001) (orig. proceeding) (quoting *Wyatt*, 760 S.W.2d at 248); *see In re J.B. Hunt Transp. Inc.*, 492 S.W.3d at 294; *see also Dodd v. Evergreen Nat'l Constr., L.L.C.*, No. 01-16-00974-CV, 2017 WL 2645041, at *4 (Tex. App.—Houston [1st Dist.] June 20, 2017, no pet.) (mem. op.). "A further justification is simple fairness: in a race to the courthouse, the winner's suit should have dominant jurisdiction." *Perry*, 66 S.W.3d at 252; *see In re King*, 478 S.W.3d 930, 933 (Tex. App.—Dallas 2015, orig. proceeding). "The default rule thus tilts the playing field in favor of according dominant jurisdiction to the court in which suit is first filed." *In re J.B. Hunt Transp., Inc*., 492 S.W.3d at 294 (footnotes and internal quotations omitted); *see Mayfield v. Peek*, No. 08-15-00018-CV, __ S.W.2d __, __, 2017

WL 769879, at *9 (Tex. App.—El Paso Feb. 28, 2017, no pet.). "As long as the forum is a proper one, it is the plaintiff's privilege to choose the forum," and a defendant is "simply not at liberty to decline to do battle in the forum chosen by the plaintiff." *Wyatt*, 760 S.W.2d at 248; *see In re Amoco Fed. Credit Union*, 506 S.W.3d 178, 184 (Tex. App.—Tyler 2016, orig. proceeding). We conduct our dominant jurisdiction analysis under the deferential abuse of discretion standard. *In re J.B. Hunt Transp., Inc*., 492 S.W.3d at 293.

IV. DOMINANT JURISDICTION ANALYSIS

We turn to the arguments pertaining to dominant jurisdiction. PCB contends that the Bexar County suit was filed first; it is still pending; the controversies in the two cases are the same or the first-filed suit could be amended to include all the claims and parties; and no exceptions to the Bexar County court's dominant jurisdiction apply in this case. In response, Cantera raises several arguments in support of a conclusion that the Bexar County case lacks dominant jurisdiction because the cases are not inherently interrelated. Cantera further urges that both the "equitable estoppel" and "bona fide intention to prosecute" exceptions to the dominant jurisdiction doctrine apply here. Finally, Cantera argues that fact issues preclude mandamus relief.

A. Inherent Interrelationship

In its response to PCB's motion to abate, Cantera argued that the Cameron County lawsuit was not inherently interrelated to the Bexar County suit. Cantera contends that PCB "filed its Bexar County lawsuit before [Cantera's] claims accrued," therefore, Cantera's claims in the Cameron County case are permissive, not compulsory counterclaims. Cantera thus asserts that the cases are not inherently interrelated

because its claims in Cameron County are not compulsory counterclaims that must be asserted in the Bexar County lawsuit.

In determining whether an inherent interrelationship exists between two lawsuits, "courts should be guided by the rule governing persons to be joined if feasible and the compulsory counterclaim rule." *Wyatt,* 760 S.W.2d at 247; *see* TEX. R. CIV. P. 39, 97(a); *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d at 292. Texas Rule of Civil Procedure 97(a), regarding compulsory counterclaims, provides:

> A pleading shall state as a counterclaim any claim within the jurisdiction of the court, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction; provided, however, that a judgment based upon a settlement or compromise of a claim of one party to the transaction or occurrence prior to a disposition on the merits shall not operate as a bar to the continuation or assertion of the claims of any other party to the transaction or occurrence unless the latter has consented in writing that said judgment shall operate as a bar.

TEX. R. CIV. P. 97(a). A counterclaim is compulsory if, in addition to Rule 97(a)'s other requirements, it was not the subject of a pending action when the original suit was commenced. *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d at 293. "The compulsory counterclaim rule is a means of bringing all logically related claims into a single litigation, through precluding a later assertion of omitted claims." *White v. Rupard*, 788 S.W.2d 175, 178 (Tex. App.—Houston [14th Dist.] 1990, writ denied). "A counterclaim is logically related to the opposing party's claim where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and courts." *Id.*; *see also Dodd*, 2017 WL 2645041, at *4; *In re Second St. Props., L.L.C.*, No. 14-16-00390-CV, 2016 WL 7436649, at *3 (Tex. App.—Houston [14th Dist.] Dec. 22, 2016, orig.

proceeding) (mem. op.). "The logical relationship test is met when the same facts, which may or may not be disputed, are significant and logically relevant to both claims." *Moore v. First Fin. Resolution Enters., Inc.*, 277 S.W.3d 510, 516 (Tex. App.—Dallas 2009, no pet.).

We examine whether there is an inherent interrelationship between the subject matters of the two lawsuits. *Wyatt*, 760 S.W.2d at 247; *see also* TEX. R. CIV. P. 39 (stating the rule regarding the joinder of persons needed for "just adjudication"); *Id.* R. 97(a) (delineating the compulsory counterclaim rule). If such an inherent interrelationship exists, we then proceed to assess dominant jurisdiction. *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d at 292. To determine whether there is an inherent interrelationship, we consider whether: (1) the Bexar County suit commenced first; (2) the Bexar County suit is still pending; (3) the Bexar County suit does include or could be amended to include all the parties; and (4) the controversies are the same or the Bexar County suit could be amended to include all of the claims. *See Wyatt*, 760 S.W.2d at 247*; In re Amoco Fed. Credit Union*, 506 S.W.3d at 187; *In re King*, 478 S.W.3d at 933; *In re ExxonMobil Prod. Co.*, 340 S.W.3d 852, 856 (Tex. App.—San Antonio 2011, orig. proceeding).

The Bexar County suit was commenced first and is still pending. *See Wyatt*, 760 S.W.2d at 247*; In re Amoco Fed. Credit Union*, 506 S.W.3d at 187. The original petition in Bexar County includes all the parties in the Cameron County case, except for Molak. *See Wyatt*, 760 S.W.2d at 247*; In re Amoco Fed. Credit Union*, 506 S.W.3d at 187. Cantera does not contend that its suit could not be amended to include Molak. "It is not required that the exact issues and all the parties be included in the first action before the second is filed, provided that the claim in the first suit may be amended to bring in all

necessary and proper parties and issues." *Wyatt*, 760 S.W.2d at 247; *see also French v. Gilbert*, No. 01–07–00186–CV, 2008 WL 5003740, at *6 (Tex. App.—Houston [1st Dist.] Nov. 26, 2008, orig. proceeding) (mem. op.) (stating that abatement is mandatory "even when there is not already a complete unity of issues and parties between the suits"). Where the parties fundamentally disagree is on the fourth requirement for finding an inherent interrelationship between the Bexar County case and the Cameron County case—whether the controversies in the two suits are the same. *See Wyatt*, 760 S.W.2d at 247*; In re Amoco Fed. Credit Union*, 506 S.W.3d at 187.

Both lawsuits present the same threshold issues: whether PCB properly accelerated the note, declared it in default, and attempted foreclosure. The claims and defenses in both suits arise from and relate to the same set of agreements and transactions. *See*, *e.g.*, *In re Red Dot Bldg. Sys., Inc.*, 504 S.W.3d at 323 ("The two suits are inherently interrelated in that they involve a dispute between the same two contracting parties over whether Red Dot performed its contractual obligations and is therefore entitled to recover full payment under the contract."). Both lawsuits seek answers regarding these issues and the amount of the deficiency owed by Cantera to PCB under the note. Further, wrongful foreclosure and related claims have been held to be compulsory counterclaims to lawsuits seeking deficiencies under a note. *Williams v. Nat'l Mortg. Co.*, 903 S.W.2d 398, 403 (Tex. App.—Dallas 1995, writ denied); *see also Lamar Sav. Ass'n v. White*, 731 S.W.2d 715, 717 (Tex. App.—Houston [1st Dist.] 1987, no writ) (stating that a borrower's alleged causes of action for breach of contract and tortious interference regarding an extension of a promissory note were compulsory counterclaims to the lender's previously filed foreclosure action); *Robinson v. Lufkin Fed. Sav. & Loan*

Ass'n, No. 09-96-113 CV, 1997 WL 335171, at *1 (Tex. App.—Beaumont June 19, 1997, writ denied) (mem. op.) (discussing foreclosure as a compulsory counterclaim). Separate trials of these claims and issues would involve a substantial duplication of effort and time by the parties and courts, and separate trials of these claims could lead to conflicting determinations on these matters. *See White*, 788 S.W.2d at 178; *see also In re Second St. Props. L.L.C.*, 2016 WL 7436649, at *4.

Cantera contends that there is no inherent interrelation between the two cases because its claims in the Cameron County case were not mature at the time PCB filed its Bexar County suit. Under the compulsory counterclaim rule, the claim must be mature and owned by the pleader when it files its answer. *See* TEX. R. CIV. P. 97(a); *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 207 (Tex. 1999), *Hill v. Tx-An Anesthesia Mgmt., L.L.P.*, 443 S.W.3d 416, 427 (Tex. App.—Dallas 2014, no pet.). A claim is mature when it has accrued. *See Ingersoll–Rand, Co.*, 997 S.W.2d at 207; *Pagosa Oil & Gas, L.L.C. v. Marrs & Smith P'ship*, 323 S.W.3d 203, 216 (Tex. App.—El Paso 2010, pet. denied). Here, Cantera argues that its claims in this case arise from PCB's actions which occurred after PCB filed suit in Bexar County. According to Cantera, it was negotiating the sale of the property securing the note in "July through November 2016," and PCB "harmed [Cantera's] bargaining power by filing suit in violation of the federal stay order" during this time.

We disagree with Cantera's contention. Cantera's factual allegations against PCB as stated in its pleadings are founded on PCB's alleged wrongful acceleration on the loan and its attempts to foreclose on the property. These allegations and Cantera's related causes of action were all mature when PCB filed its lawsuit in Bexar County. Cantera's

pleadings do not base its causes of action on PCB's lawsuit or reference PCB's lawsuit. Further, Cantera fails to explain why the Bexar County suit could not be amended to include its claims against PCB.[5] *See Wyatt*, 760 S.W.2d at 247; *In re Coronado Energy E & P Co., L.L.C.*, 341 S.W.3d 479, 482 (Tex. App.—San Antonio 2011, orig. proceeding).

Based on the foregoing, we conclude that the subject matter of the Bexar County and Cameron County lawsuits are inherently interrelated. *See In re J.B. Hunt Transp., Inc.*, 492 S.W.3d at 292.

B. Venue

In its response to PCB and Molak's motion to abate, Cantera contends that venue is not proper in the Bexar County case and thus the Bexar County court does not possess dominant jurisdiction. The concept of dominant jurisdiction is only applicable if venue is proper in the county in which the suit was first filed. *Gonzalez*, 159 S.W.3d at 622; *Bonacci v. Bonacci*, 420 S.W.3d 294, 298 (Tex. App.—El Paso 2013, pet. denied). Cantera argues that PCB bases its claim to venue on mandatory venue for real property and PCB's case does not involve a claim regarding real property. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.011. According to Cantera, this venue provision applies only when

[5] Further, Cantera's argument misconstrues the standards by which a trial court determines whether abatement is mandatory under a claim of dominant jurisdiction. In making the required determination regarding whether an inherent interrelationship exists between two cases, the trial court "should be *guided* by the rule governing persons to be joined if feasible and the compulsory counterclaim rule." *Wyatt*, 760 S.W.2d at 247 (emphasis added). The term "guided" does not indicate that all elements of the compulsory counterclaim rule must be met for an inherent interrelationship to exist between two cases. *See Hopkins v. NCNB Tex. Nat'l Bank*, 822 S.W.2d 353, 355 (Tex. App.—Fort Worth 1992, no writ) ("We reject appellants' argument that there can be no inherent interrelationship unless the second suit alleges a compulsory counterclaim to the first."); *Chem-Gas Engineers, Inc. v. Tex. Asphalt & Ref. Co.*, 398 S.W.2d 143, 144–45 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.) (affirming abatement even though necessary ground for claim in second suit to be considered compulsory counterclaim was not met); *see also French v. Gilbert*, No. 01-07-00186-CV, 2008 WL 5003740, at *6–7 (Tex. App.—Houston [1st Dist.] Nov. 26, 2008, no pet.) (mem. op.) (stating that the compulsory counterclaim rule "does not establish that a trial court abuses its discretion if it finds that there is an inherent interrelationship between two suits when one or more elements of the compulsory counterclaim rule are not met as to the claim in the second suit").

a suit directly involves a question of title to land, or where a court's judgment would have some effect on an interest in realty. *See*, *e.g.*, *Maranatha Temple, Inc. v. Enter. Products Co.*, 833 S.W.2d 736, 738 (Tex. App.—Houston [1st Dist.] 1992, writ denied); *Stiba v. Bowers*, 756 S.W.2d 835, 839 (Tex. App.—Corpus Christi 1988, no writ); *Bracewell v. Fair*, 638 S.W.2d 612, 615 (Tex. App.—Houston [1st Dist.] 1982, no writ). Cantera argues that PCB's lawsuit seeks recovery on a promissory note and foreclosure of security, rather than the recovery of land or an interest in land. *See Nat'l Advert. Co. v. Am. Bank of Waco*, 622 S.W.2d 483, 484–85 (Tex. App.—Waco 1981, no writ).

Cantera's argument fails to consider that PCB raised multiple grounds supporting venue in Bexar County. As stated previously, in its original petition in Bexar County, PCB premised venue in Bexar County on grounds that Cantera was a Texas limited partnership with its principal and registered address in Bexar County and because the real property which secured the loan was in Bexar County. In its reply to Cantera's response to the motion to abate, PCB further alleged that when Cantera filed its answer in Bexar County it did not specifically deny PCB's pleaded venue facts, and accordingly, they are taken as true. *See* TEX. R. CIV. P. 87(3)(a).

Under the general venue statute, venue would be proper in Bexar County as the county of Cantera's principal office. *See*, *e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a) (West, Westlaw through 2017 1st C.S.); *Fleming v. Ahumada*, 193 S.W.3d 704, 712 (Tex. App.—Corpus Christi 2006, no pet.); *Madera Prod. Co. v. Atlantic Richfield Co*., 107 S.W.3d 652, 657 (Tex. App.—Texarkana 2003, pet. denied). We conclude that Bexar

County was a proper venue for PCB's lawsuit insofar as it was the county of Cantera's principal office.[6]

Based on the foregoing, we conclude that the Bexar County court possessed dominant jurisdiction.

V. DOMINANT JURISDICTION EXCEPTIONS

There are exceptions to the general rule that the first-filed suit acquires dominant jurisdiction. *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d at 294; *Wyatt*, 760 S.W.2d at 248. Exceptions to this "first-filed" rule may apply when its justifications fail, such as when the first court does not have the full matter before it, when conferring dominant jurisdiction on the first court will delay or even prevent a prompt and full adjudication, or "when the race to the courthouse was unfairly run." *Perry*, 66 S.W.3d at 252. These exceptions include: (1) conduct by a party that estops it from asserting prior active jurisdiction; (2) lack of persons to be joined if feasible, or the power to bring them before the court; and (3) lack of intent to prosecute the first lawsuit. *Wyatt*, 760 S.W.2d at 248.

A. Inequitable Conduct

Cantera's response to the motion to abate raised the inequitable conduct exception to the dominant jurisdiction rule. Cantera argued that:

> [PCB] engaged in inequitable conduct by filing a lawsuit that was prohibited by a federal court. While the property securing the note involved in this case was under seizure in federal court, [PCB and Molak] attempted numerous times to lift the stay imposed in that case and declare [Cantera]

[6] Further, even if this were not so, PCB also contends that Cantera's counterclaim must be filed in the venue of the main action. Texas Civil Practice and Remedies Code Section 15.062 provides that "[v]enue of the main action shall establish venue of a counterclaim, cross claim, or third-party claim properly joined under the Texas Rules of Civil Procedure or any applicable statute." TEX. CIV. PRAC. & REM. CODE ANN. § 15.062(a) (West, Westlaw through 2017 1st C.S.). Thus, because Cantera's claims are counterclaims to the Bexar County lawsuit, venue was determined by the main action in Bexar County. *See Wyatt*, 760 S.W.2d at 248; *In re Cty. of Galveston*, 211 S.W.3d 879, 882 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding); *see also In re Perryman*, No. 14–13–00131–CV, 2013 WL 1384914, at *2 (Tex. App.—Houston [14th Dist.] Apr. 4, 2013, orig. proceeding) (mem. op.).

> in default and accelerate the note. . . . These efforts to declare the note in default and to accelerate the note were undertaken by [PCB] even after it was shown that [PCB and Molak] were current in the obligations regarding the note. The federal court rejected every one of [PCB and Molak's] attempts. The court told [PCB and Molak] that they are barred by federal statute from seeking to declare the note in default, accelerate, and foreclose. . . . Nonetheless, ignoring the Federal Court's orders denying them the right to take such actions, [PCB] improperly filed suit in Bexar County seeking to declare the note in default and to accelerate. Remarkably, [PCB and Molak] made a strategic, albeit completely improper decision, to *ignore* the Federal Court's directives, in order to attempt to sabotage on-going efforts to sell the property in question so that they could obtain the valuable property for pennies on the dollar, and in order to secure first filing status before [Cantera's] claims against them matured. . . . This is inequitable conduct that reaches the level of predatory, and it allowed them to improperly manipulate the legal system to [Cantera's] great harm. Accordingly, this Court has dominant jurisdiction because the inequitable conduct exception applies.

A party can be estopped from asserting the dominant jurisdiction of the first court if the party engaged in inequitable conduct and the party filing the second suit was prejudiced by the inequitable conduct. *In re J. B. Hunt Transp., Inc.*, 492 S.W.3d at 294–95. This inequitable conduct exception provides that "the plaintiff in the first suit may be guilty of such inequitable conduct as will estop him from relying on that suit to abate a subsequent proceeding brought by his adversary." *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974) (orig. proceeding). The purpose of this exception is to prevent a first-filer from unjustly claiming dominant jurisdiction in the first court when that priority was obtained through underhanded means. *See Perry*, 66 S.W.3d at 252 ("The first-filed rule admits of exceptions when its justifications fail, as when . . . the race to the courthouse was unfairly run."). This exception is satisfied when there is a fact issue regarding whether the first-filers were guilty of fraud and deceit. *In re J. B. Hunt Transp., Inc.*, 492 S.W.3d at 294–95; *see Wheeler v. Williams*, 312 S.W.2d 221, 228 (Tex. 1958) (holding that this exception was not satisfied where the party opposed to abatement "failed to raise

any fact issues" as to bad faith and fraud); *V. D. Anderson Co. v. Young*, 101 S.W.2d 798, 799 (Tex. 1937) (concluding that the inequitable conduct exception applied because there was a fact issue as to whether the first-filers were "guilty of certain acts of fraud and deceit" that caused the second-filer to delay filing the second suit). Courts have found inequitable conduct that satisfies this exception in a variety of factual situations:

> Texas courts have found parties guilty of inequitable conduct and applied the estoppel exception to the first-filed rule when the plaintiffs in the first-filed suit (1) filed suit merely to obtain priority, without a bona fide intention to prosecute the suit; or (2) prevented their adversaries from filing the subsequent suits more promptly by fraudulently representing that they would settle. Courts have also found inequitable conduct when the plaintiffs in the first-filed suit affirmatively represented to the court in the second-filed suit that it had jurisdiction . . . or manipulated the courts by sitting in silence while sister courts issued conflicting orders regarding the same subject matter.

Hiles v. Arnie & Co., P.C., 402 S.W.3d 820, 825–26 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (citations omitted); *see Curtis*, 511 S.W.2d at 267 (describing an allegation that first-filers "prevented their adversaries from filing the subsequent suits more promptly by fraudulently representing that they would settle"); *Johnson v. Avery*, 414 S.W.2d 441, 442–43 (Tex. 1966) (concluding that the evidence supported allegations that the party who had first filed suit fraudulently induced opposing counsel to delay filing suit); *Russell v. Taylor*, 49 S.W.2d 733, 737–38 (Tex. 1932) (considering that an affidavit stating that a first-filer did not intend to issue process and prosecute the suit created a fact issue where the plaintiff in the first-filed action instructed the clerk not to issue citation unless directed to do so); *see also In re CTMI, L.L.C.*, No. 05-16-01078-CV, 2016 WL 7163830, at *2–3 (Tex. App.—Dallas Dec. 8, 2016, orig. proceeding) (mem. op.).

Fundamentally, we disagree with Cantera's allegation that the inequitable conduct exception to dominant jurisdiction applies in this case. The Texas Supreme Court has

stated that "establishing inequitable conduct alone is insufficient" because the inequitable conduct exception is a remedy for the second-filer "who is delayed—that is, prejudiced—by inequitable conduct. If there is no prejudice and no allegation of prejudice, then there is no harm to remedy." *In re J.B. Hunt Transp*. *Inc.*, 492 S.W.3d at 294–95; *see In re CTMI, L.L.C.*, 2016 WL 7163830, at *3. In *J.B. Hunt*, the real parties never argued that the inequitable conduct caused them to delay filing suit, but instead argued that the relator's conduct was "designed to hinder" the real parties' efforts to file suit. *In re J.B. Hunt Transp*. *Inc.*, 492 S.W.3d at 294–95

In this case, Cantera has alleged that PCB and Molak have committed multiple instances of alleged inequitable conduct.[7] Even assuming for purposes of this opinion that some of these actions are inequitable,[8] the exception does not apply here because Cantera has not alleged that any of these actions delayed Cantera in filing suit. In other words, the alleged instances of inequitable conduct do not support a finding that PCB's conduct prevented or delayed Cantera from filing suit in Cameron County before PCB filed suit in Bexar County. In fact, Cantera has alleged that its claims were not ripe until

[7] We note that Cantera principally urges that PCB filed suit in violation of a stay order issued in the forfeiture proceeding. Based on the record provided, Cantera filed a motion requesting that the forfeiture court determine the amount required to pay off PCB's loan on August 2, 2016, the same day that PCB filed the Bexar County action. On August 8, 2016, the forfeiture court ordered "all interested parties" to submit briefing on whether that court had jurisdiction over the matter of the amount of the loan payoff. The record is devoid of any indication that the forfeiture court considered Cantera's lawsuit to be in violation of the stay.

[8] *See generally Tex. Beef and Cattle Co. v. Green*, 921 S.W.2d 203, 211 (Tex. 1996) (stating that a party may do whatever it has a legal right to do with impunity regardless of motive, even where exercising that legal right in a legal way results in damage to another); *Sweezy Const., Inc. v. Murray*, 915 S.W.2d 527, 532 (Tex. App.—Corpus Christi 1995, no writ) ("We believe that the type of misconduct necessary to invoke as an exception to the general rule of dominant jurisdiction must in some manner involve or circumvent the choice of forum, and not merely go to the merits of the underlying lawsuit. There is no indication in the present case that Sweezy made the allegedly false claims specifically in order to obtain venue of the present lawsuit in Hidalgo County."); *see also In re CTMI, LLC*, No. 05-16-01078-CV, 2016 WL 7163830, at *4 (Tex. App.—Dallas Dec. 8, 2016, orig. proceeding) ("A desire to protect one's own interests is not the same as a desire to harm or hamper another party's attempts to protect its interests, nor is it evidence of a desire to circumvent the choice of forum.").

after PCB filed suit in Bexar County. In its response to the motion to abate, Cantera expressly argues that "Plaintiff's claims in this case involve Defendants' behavior committed after Defendants filed their Bexar County suit." This contention is inconsistent with any argument that PCB inequitably delayed Cantera in filing its suit. As such, that conduct was insufficient as a matter of law to support denial of the plea in abatement. *In re J.B. Hunt Transp.*, *Inc.*, 492 S.W.3d at 294–95; *see In re CTMI, L.L.C.*, 2016 WL 7163830, at *3.

Cantera further contends that the trial court acquired dominant jurisdiction when it made a factual determination that the estoppel exception applied in this case. While the trial court did not make express findings to this effect, Cantera contends that the findings are implied because it pleaded the estoppel exception, produced evidence regarding the exception, and the trial court denied the plea in abatement. Alternatively, in support of this issue, Cantera contends that questions of fact regarding PCB's alleged inequitable conduct preclude mandamus relief.

Cantera's arguments are premised on the concept that "[w]hen raised, estoppel is a fact issue that must be determined by the second court in which the plea in abatement is filed." *Hiles*, 402 S.W.3d at 826; *see Curtis*, 511 S.W.2d at 267; *In re Henry*, 274 S.W.3d at 191; *In re Guerra & Moore, L.L.P.*, 35 S.W.3d 210, 219 (Tex. App.—Corpus Christi 2000, orig. proceeding); *see also Hartley v. Coker*, 843 S.W.2d 743, 747 (Tex. App.—Corpus Christi 1992, no writ) ("If a plea in abatement is filed alleging that a different court has dominant jurisdiction, the second court has jurisdiction to determine disputed questions of fact relating to which court has dominant jurisdiction."); *Parr v. Hamilton*, 437 S.W.2d 29, 31 (Tex. Civ. App.—Corpus Christi 1968, no writ) ("The question of good faith,

fraud and conduct of a party relating to the matter of estoppel is a fact issue that must be finally determined by the court hearing the plea in abatement."). In these cases, the party opposing the plea in abatement contested the plea by filing a reply or other response alleging the existence of facts that would estop the party seeking abatement from relying on the prior pending action. *See Curtis*, 511 S.W.2d at 267.

Nevertheless, it is abundantly clear that estoppel, or the lack thereof, can be determined as a matter of law. *See*, *e.g.*, *In re J.B. Hunt Transp*., *Inc.*, 492 S.W.3d at 294–95 (stating that "the facts in this case do not satisfy the legal standards for the exceptions to the first filed rule" to apply); *see also Curtis*, 511 S.W.2d at 268 ("We hold here, as a matter of law, that there was no want of diligence shown on the part of the father sufficient to raise an issue of estoppel so as to defeat his plea in abatement."); *Wheeler*, 312 S.W.2d at 228 (observing that the contest to the plea in abatement did not raise any fact issues which, if proven, would deprive the first court of prior active jurisdiction). This is because the facts alleged must "satisfy the legal standards for the exceptions to the first-filed rule" to apply. *In re J.B. Hunt Transp*., 492 S.W.3d at 298.

Here, none of the alleged facts support a conclusion that any inequitable conduct on PCB's part delayed Cantera from filing suit. Any alleged factual determination that the trial court may have made regarding an exception to the first-filed rule was not supported by the evidence. *See In re Labatt Food Serv., L.P.*, 279 S.W.3d at 643. Or, stated otherwise, the trial court abused its discretion when it failed to apply the law correctly to the facts alleged in this suit. *See In re H.E.B. Grocery Co.*, 492 S.W.3d at 302. Accordingly, we conclude that the inequitable conduct exception does not apply in this case. Further, to the extent that Cantera urges that disputed facts bar mandamus relief,

see In re Angelini, 186 S.W.3d 558, 560 (Tex. 2006) (orig. proceeding), we have taken Cantera's allegations as true for purposes of this original proceeding. We also note that the parties here primarily dispute the interpretation and effect of the facts alleged, rather than the material facts themselves.

B. Bona Fide Intention

Cantera further argues that the bona fide intention exception to dominant jurisdiction applies in this case. In its response to the motion to abate, Cantera contended that PCB lacked a bona fide intention to prosecute the Bexar County lawsuit:

> In the Bexar County suit, [PCB and Molak] waited four months to serve citation. This wait is inexcusable because [they] were parties this whole time in the federal forfeiture proceedings with [Cantera] and also aggressively prosecuted their defenses in this case for weeks before alternative service was completed in this case. They knew how to get ahold of [Cantera]. They had [Cantera's] address. In fact, [Cantera] specifically provided [PCB and Molak] with their address shortly after they moved—at the request of [PCB and Molak]! Notwithstanding that, [PCB and Molak] apparently sought to accomplish service at an address that [Cantera] had notified [PCB and Molak] they no longer used. Contrary to [PCB and Molak's] claim that [Cantera] evaded service, [PCB and Molak] never attempted service on [Cantera] at the address that they gave [PCB and Molak]. As discussed above, it is clear that [PCB and Molak] were just going through the motions, if even that. Because [PCB and Molak] have exhibited a lack of good faith intent to prosecute the Bexar County case, the Bexar County court does not have dominant jurisdiction and this Court should deny [PCB and Molak's] motion [for] abatement.

Cantera's contention that PCB had knowledge of its address was based on a form notification sent on June 27, 2016 from the "deposit support manager" at PCB to Cantera as its "valued customer" sent after the United States Post Office had notified PCB that Cantera's address had changed. The record does not indicate when Cantera returned the form notification to PCB with its new address written on the form. While the record suggests that Cantera notified the bank deposit manager of the change of address at the

end of June, there is nothing in the record suggesting that it changed its address with the secretary of state or that it notified counsel for PCB in connection with the underlying lawsuits.

A party's lack of intent to prosecute a suit deprives the first court of dominant jurisdiction. *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d at 295–96; *Wyatt*, 760 S.W.2d at 248. This exception is satisfied when the first-filer filed suit merely to obtain priority, without a bona fide intention to prosecute the suit. *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d at 295–96. The Texas Supreme Court has held that "the mere physical filing of the petition is not sufficient" to establish the requisite intent. *V. D. Anderson Co.*, 101 S.W.2d at 800–01; *see In re J.B. Hunt Transp., Inc.*, 492 S.W.3d at 295. Rather, the first-filer must exhibit "actual diligence" thereafter in serving citation and "otherwise prosecuting" the suit." *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d at 295 (quoting *Reed v. Reed*, 311 S.W.2d 628, 631 (Tex. 1958)).[9]

Courts have considered whether various periods of delay in service satisfy this exception. *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d at 296 (concluding that the exception was not satisfied where first-filer attempted to obtain a waiver of personal service and threatened to obtain a temporary restraining order because such were "quintessential acts of prosecuting a suit"); *Curtis*, 511 S.W.2d at 267–68 (holding that the exception was not satisfied where a first-filer delayed twenty-six days before procuring and serving a

[9] While the Texas Supreme Court has established clear burdens of proof regarding diligence in the service of process when a plaintiff serves suit beyond the statute of limitations, it has established no such burdens regarding diligence in the context of a dominant jurisdiction analysis. *See In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287, 297 (Tex. 2016) (orig. proceeding) (assuming, without deciding, that the party seeking abatement had the burden to "explain the delay and the attempts at service"); *see also Rojas v. CitiMortgage, Inc.*, No. 13-16-00257-CV, 2017 WL 4054397, at *5 (Tex. App.—Corpus Christi Sept. 14, 2017, no pet.) (mem. op.) ("[O]ur supreme court has suggested that it remains an open question whether [such] burdens apply in the context of a plea in abatement.").

citation); *Reed*, 311 S.W.2d at 631 (concluding that the exception was satisfied where the first filer delayed fifteen months in requesting a citation for service of process); *McAlister v. McAlister*, 75 S.W.3d 481, 486 (Tex. App.—San Antonio 2002, pet. denied) (concluding that a three-month delay in obtaining service did not satisfy the exception where the parties were attempting settlement); *S. Cty. Mut. Ins. Co. v. Ochoa*, 19 S.W.3d 452, 462 (Tex. App.—Corpus Christi 2000, no pet.) (op. on reh'g) (collecting cases and stating that "[c]ourts have consistently held that unexplained delays of five and six months in procuring issuance and service of citation constitute a lack of due diligence as a matter of law").

PCB filed the Bexar County suit on August 2, 2016 and ultimately obtained orders allowing substituted service on Cantera and GMC on November 18, 2016. PCB's motion to abate includes an affidavit from the process server who attempted to serve Cantera. The process server stated that he obtained the papers for service on Cantera on August 18, 2016 and attempted service on Cantera's registered agent, Vila, on four occasions from September 1, 2016 through September 3, 2016. The process server's affidavit provided that a woman at Vila's address "confirmed this to be his house," but told the process server that "he was out of town and didn't know when he'd be back or how to contact him."

An affidavit from PCB's counsel averred that the agent for process also attempted to serve citation on Vila at Cantera's registered address, but that address was "unoccupied and appeared to be abandoned." By affidavit, PCB's counsel stated that he believed Vila was "intentionally evading and avoiding service." In support of this argument, PCB's counsel stated that after it filed a copy of PCB's Bexar County petition

as an exhibit in the federal forfeiture pleading, neither Berlanga nor Vila appeared at any hearing in the federal forfeiture case which "leads the undersigned to be convinced that both [Berlanga] and Vila are actively evading and avoiding service of process in the Bexar County Case." In discussing its efforts to serve Cantera, counsel for PCB conceded that "efforts to serve the citations in the Bexar County Suit were suspended for a time awaiting the closing of the sale of the Property, in order that the parties may be able to resolve their differences amicably without resort to further litigation and additional expense once the Property sale was closed."

Our analysis here is again governed by the Texas Supreme Court. "First, intending to secure a favorable venue is not impermissible." *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d at 296. This exception is "only" satisfied when the race to the courthouse is not followed by a bona fide intent to prosecute the suit. *See id.* "When the first-filer is actually progressing through attempts to complete service of process and discovery matters," these actions exhibit a bona fide intent to prosecute the suit. *Id.* at 297. In this case, it appears that there was an approximately two week delay before the process server received the papers for service, an additional two week delay before service was attempted four times in September, and a little over a two month delay before PCB obtained an order allowing substituted service.

We conclude that the facts in this case do not satisfy the legal standard for the bona fide exception to the first-filed rule to apply. *See id.* First, the alleged period of delay, which comprises approximately three and one half months, is not excessive compared to other cases. *See McAlister,* 75 S.W.3d at 486; *S. Cty. Mut. Ins. Co.*, 19 S.W.3d at 462. Second, during this time, PCB attempted service on Cantera four times,

engaged in settlement negotiations, and ultimately obtained substituted service. These facts indicate a bona fide intent to prosecute. *See In re J.B. Hunt Transp., Inc.*, 492 S.W.3d at 296; *McAlister,* 75 S.W.3d at 486. In fact, obtaining substituted service is a "quintessential" act of prosecuting a lawsuit. *See In re J.B. Hunt Transp., Inc.*, 492 S.W.3d at 296. We would further note that here, PCB has presented argument and evidence which suggests that the equities should favor it, rather than Cantera, because of the allegations pertaining to Cantera's evasion of service. In any event, we conclude that there was no want of diligence shown on the part of PCB sufficient to raise a fact issue regarding its bona fide intent to prosecute the Bexar County case. *See Curtis*, 511 S.W.2d at 268.[10]

VI. CONCLUSION

Because the Bexar County and Cameron County suits are inherently interrelated, and venue is proper in either county, the court in which suit was first filed, Bexar County, acquired dominant jurisdiction. *See In re Red Dot Bldg. Sys., Inc.*, 504 S.W.3d at 322; *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d at 294. Further, we have carefully examined the exceptions to the first-filed rule and conclude that they do not apply here. *See In re J.B. Hunt Transp., Inc.*, 492 S.W.3d at 294. Accordingly, the trial court erred in failing to grant the motion to abate the Cameron County case. Having reached this conclusion, we need

[10] In the trial court, Cantera argued that PCB and Molak's delay in filing their motion to abate defeated dominant jurisdiction in Bexar County. Cantera does not reiterate this argument in this original proceeding, and we need not address it here. Nevertheless, we note that approximately three months elapsed from the inception of the underlying lawsuit until PCB and Molak filed their motion to abate. Cantera does not allege that it suffered any specific harm or prejudice because this alleged delay, and during this period, PCB and Molak pursued their motion to transfer venue. Under these circumstances, PCB and Molak timely asserted their dominant jurisdiction argument. *See*, *e.g.*, *In re La.-Pac. Corp.*, 112 S.W.3d 185, 189–90 (Tex. App.—Beaumont 2003, orig. proceeding); *In re Luby's Cafeterias, Inc.*, 979 S.W.2d 813, 817 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding); *see also* TEX. R. CIV. P. 86(1); *Exito Elecs. Co. v. Trejo*, 142 S.W.3d 302, 305 (Tex. 2004).

not address PCB and Molak's remaining issue pertaining to venue. *See* TEX. R. APP. P. 47.1; *id.* R. 47.4.

The Court, having examined and fully considered the petition for writ of mandamus, the response, the record, and the additional briefing provided by the parties, is of the opinion that PCB and Molak have met their burden to obtain mandamus relief. 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 mandamus relief and direct the trial court to grant PCB and Molak's motion to abate. We are confident that the trial court will promptly comply and our writ will issue only if it does not.

LETICIA HINOJOSA
Justice

Delivered and filed this
8th day of June, 2018.