

Opinion filed October 5, 2017



In The
Eleventh Court of Appeals

No. 11-16-00161-CV

**SUE ANN SMITH AND SANDY SMITH
AND/OR ALL OCCUPANTS, Appellants**

V.

BANK OF AMERICA, N.A., Appellee

**On Appeal from the County Court at Law
Erath County, Texas
Trial Court Cause No. CV08340**

MEMORANDUM OPINION

Sue Ann and Sandy Smith appeal the county court at law's judgment in a forcible detainer action that awarded possession of the property to Bank of America, N.A. Sue Ann and Sandy assert that the county court did not have subject-matter jurisdiction. We vacate and dismiss.

I. Background Facts

On March 9, 2007, Sue Ann and Sandy executed a deed of trust to secure a loan for the property located at 1427 Wild Horse Lane in Stephenville, Texas. They financed this property through Worldwide Mortgage Company, who in turn assigned the note and deed of trust lien to Bank of America in August 2010. The record also indicates that Taylor, Bean & Whitaker Mortgage Corp. (TBW) became involved in servicing the note and that, in 2010, TBW was undergoing bankruptcy proceedings in Florida.

Bank of America foreclosed on this property on October 5, 2010, despite Sandy's claims that they never missed a payment. The original deed from the foreclosure sale indicated that TBW purchased the property, but a subsequent "corrective" deed indicated that Bank of America purchased the property at the foreclosure sale. Bank of America then filed a forcible detainer action in justice court, and the court entered a judgment of possession in Bank of America's favor in 2012. In 2013, Bank of America executed a writ of possession also granted to them by the justice court. However, the record indicates that Sandy reentered the property at some point after Bank of America executed the writ.

In 2014, Sandy filed a lawsuit against Bank of America in the United States District Court for the Southern District of Texas, Corpus Christi division, alleging a series of claims including wrongful foreclosure, trespass, suit to quiet title, and breach of contract. In 2015, Bank of America sought a second forcible detainer in justice court, which resulted in an agreed judgment. Sue Ann and Sandy appealed this agreed judgment to the county court, and that court also entered a judgment that Bank of America was entitled to possession of the property. Sue Ann and Sandy filed a motion for new trial, and the county court denied it. Following these events, Bank of America filed a second writ of possession, which was executed on June 10, 2016.

II. Analysis

In a single issue, Sue Ann and Sandy assert that the county court lacked subject-matter jurisdiction to determine possession because that issue could not be adjudicated until a court determined title to the property. *Mitchell v. Armstrong Capital Corp.*, 911 S.W.2d 169, 171 (Tex. App.—Houston [1st Dist.] 1995, writ denied). Sue Ann and Sandy contend that they contested title because the 2010 trustee’s deed to TBW was void because it was done in violation of the automatic stay that was triggered when TBW filed for bankruptcy in 2009. *See* 11 U.S.C. § 362(a); *Oles v. Curl*, 65 S.W.3d 129, 131 (Tex. App.—Amarillo 2001, no pet.). Finally, Sue Ann and Sandy assert that there was a title dispute because the requirements of Section 5.029 of the Texas Property Code were not met when Bank of America filed the corrective deed. *See* TEX. PROP. CODE ANN. § 5.029 (West 2014)

As a preliminary matter, Bank of America asserts that it is unnecessary to reach Sue Ann and Sandy’s claims because the possession issue is moot.¹ We agree.

As the Texas Supreme Court held in *Marshall*, an appeal concerning a court’s subject-matter jurisdiction to address an issue of possession becomes moot if the appealing party does not have a “potentially meritorious claim of right to current, actual possession” of the property. *Marshall v. Housing Auth. of San Antonio*, 198 S.W.3d 782, 787 (Tex. 2006). Since *Marshall*, several of our sister courts have found that an appeal is moot when the party no longer holds a meritorious claim to possession of the property. *See Brigandi v. Am. Mortgage Inv. Partners Fund I*

¹We note that the judgment awarded \$2,250.00 in damages to Bank of America, but Smith did not raise an issue on appeal as to that part of the judgment. Had Smith done so, then that part of her appeal would not have been moot. *See McElroy v. Teague Hous. Auth.*, No. 10-10-00009-CV, 2012 WL 149227, at *2 (Tex. App.—Waco Jan. 18, 2012, no pet.) (issues other than possession not moot; *Brown v. Apex Realty*, 349 S.W.3d 162, 164 (Tex. App.—Dallas 2011, pet. dismissed) (same); *see also Marshall*, 198 S.W.3d at 787 (mootness issue). However, because she raised no issues on the damages part of the judgment, the issue of damages is not before us.

Trust, No. 02-16-00444-CV, 2017 WL 1428726, at *4 (Tex. App.—Fort Worth Apr. 20, 2017, pet. dism'd) (mem. op.); *Guillen v. U.S. Bank, N.A.*, 494 S.W.3d 861, 866 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *Tchernowitz v. The Gardens at Clearwater*, No. 04-15-00716-CV, 2016 WL 6247008, at *3 (Tex. App.—San Antonio Oct. 26, 2016, no pet.) (mem. op.); *Nowlin v. Keaton*, No. 03-14-00608-CV, 2015 WL 3542895, at *3 (Tex. App.—Austin June 4, 2015, no pet.); *Holmes v. Al Jaafreh*, No. 10-11-00320-CV, 2013 WL 2399059, at *2 (Tex. App.—Waco May 30, 2013, no pet.) (mem. op.); *Stevenson v. Hous. Auth. of City of Austin (HACA)*, 385 S.W.3d 684, 687 (Tex. App.—El Paso 2012, no pet.). Bank of America contends that Sue Ann and Sandy's appeal is moot because they are no longer in possession of the property. While, the record does not precisely indicate whether Sue Ann or Sandy currently hold possession to the property, the record does indicate that Jerry Woodruff, a deputy sheriff, executed the second writ of possession on June 10, 2016.

After a county court has entered a final judgment in an eviction suit, the habitant may suspend enforcement of the judgment by posting a supersedeas bond within ten days of the judgment. PROP. CODE § 24.007. There is no evidence in the record that Sue Ann or Sandy posted a supersedeas bond within ten days of the date on which the county court entered its judgment. Moreover, the record affirmatively reflects that the writ of possession was executed after that ten-day period and that the property was turned over to a representative of Bank of America.

Sue Ann and Sandy do not have a meritorious claim because they are not in actual possession of the property and have not adduced evidence of a current right to possess the property. *See Marshall*, 198 S.W.3d at 787 (holding that controversy became moot because, tenant, who had vacated the apartment and whose lease had expired, no longer had a meritorious claim of possession in the apartment); *Wilhelm v. Fed. Nat'l Mortg. Ass'n*, 349 S.W.3d 766, 769 (Tex. App.—Houston

[14th Dist.] 2011, no pet.) (holding that, when a party failed to post a supersedeas bond and no longer maintained possession of the property, that party no longer had a meritorious claim of possession even though title to the property was being disputed in a separate lawsuit). “When the tenant no longer has a basis for claiming a right to possession, there is no live controversy between the parties as to the right of current possession, and the issue of possession is moot.” *Nowlin*, 2015 WL 3542895, at *2. As such, Sue Ann and Sandy no longer have a potentially meritorious claim to possession in the disputed property, and their issue on appeal is now moot. *Marshall*, 198 S.W.3d at 787.

III. *Conclusion*

We vacate the trial court’s judgment and dismiss this case as moot. *See Marshall*, 198 S.W.3d at 785.

MIKE WILLSON
JUSTICE

October 5, 2017

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.