

Conditionally GRANT; and Opinion Filed November 21, 2016.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-16-00965-CV

IN RE BETTIE PRIESTER AND JOHN PRIESTER, JR., Relators

**Original Proceeding from the 429th Judicial District Court
Collin County, Texas
Trial Court Cause No. 429-04751-2014**

MEMORANDUM OPINION

Before Chief Justice Wright and Justices Lang and Brown
Opinion by Justice Brown

Before the Court is relators' motion for rehearing. We grant the motion for rehearing and conditionally grant relators' petition for writ of mandamus.

Procedural History

This case involves an expedited foreclosure action under rules 735 and 736 of the Texas Rules of Civil Procedure. TEX. R. CIV. P. 735, 736. Rules 735 and 736 provide for the expedited issuance of orders allowing for foreclosure on certain liens listed in Rule 735. TEX. R. CIV. P. 735, 736. On March 15, 2016, real party in interest Deutsche Bank obtained a Rule 736 order for expedited foreclosure of relators' home in trial court cause number 429-04751-2014. Deutsche Bank scheduled the foreclosure for June 7, 2016.

Rule 736 also provides the respondent with the means to abate and vacate a foreclosure order issued under these rules by (1) timely filing a separate, original proceeding putting in issue any matter related to the origination, servicing, or enforcement of the loan agreement, contract,

or lien sought to be foreclosed, and (2) timely-filing a motion to vacate the foreclosure order. TEX. R. CIV. P. 736.11(a), (c). On June 6, 2016, relators filed an independent lawsuit pursuant to Rule 736.11(a) challenging foreclosure, which was docketed as cause number 380-02404-2016 in the 380th Judicial District Court of Collin County, Texas.¹ The next day, relators filed in the original cause number 429-04751-2014 a motion to vacate the expedited foreclosure order per Rule 736.11(c).

In the motion to vacate, relators argued that the trial court had a mandatory duty to sign an order vacating the expedited foreclosure order because relators had met the requirements of Rule 736.11 by timely-filed the independent lawsuit challenging foreclosure and the motion to vacate the expedited foreclosure order. When the trial court did not sign an order vacating the expedited foreclosure order, relators sought mandamus relief. This Court dismissed relators' first petition for writ of mandamus because relators had not asked the trial court to rule on their motion to vacate the expedited foreclosure order, the trial court had not refused to rule, and the trial court had not yet been given a reasonable time to rule. *See In re Priester*, No. 05-16-00737-CV, 2016 WL 3703192 (Tex. App.—Dallas July 12, 2016, orig. proceeding). On July 12, 2016 and July 13, 2016, relators filed letters with the trial court asking the trial court to sign an order vacating the expedited foreclosure order. Relators filed the current original proceeding on August 12, 2016.

In this proceeding, relators ask the Court to issue a writ directing the trial court to sign an order vacating the expedited foreclosure order. We denied the petition as moot because the trial court signed an order denying the motion to vacate the day before relators filed the petition² and,

¹ The district clerk subsequently transferred the case to the 429th Judicial District Court to correct a clerical error and docketed the new case as cause number 429-02404-2016.

² When relators filed the current petition on August 12, 2016, the trial court's on-line docket sheet showed no order had been signed and relators did not include a signed order in the mandamus record. But the trial court had

by signing an order, the trial court performed the task relators asked this Court to order it to perform — to sign an order on the motion to vacate.

On rehearing, relators contend the petition is not moot because they argued in the petition that the trial court was required to grant the motion to vacate and, instead, denied the motion. Relators construe their petition as requesting this Court to order the trial court to not only rule on their motion to vacate the expedited foreclosure order but to also rule in a specific way (i.e., to grant their motion and vacate the order permitting expedited foreclosure). Citing Rule 736.11(e), the real party in interest, Deutsche Bank, contends the trial court properly denied relators' motion to vacate as a sanction for filing a groundless pleading meant only to delay the foreclosure.

Mandamus Standard

To be entitled to mandamus relief, a relator must show both that the trial court has clearly abused its discretion and that relator has no adequate appellate remedy. *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). A court abuses its discretion if it refuses to perform a ministerial act, clearly fails to correctly analyze or apply the law, or reaches an arbitrary or unreasonable decision. *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992) (orig. proceeding). Relators are without an adequate appellate remedy because the granting or denial of a Rule 736 lien foreclosure application may not be appealed. TEX. R. CIV. P. 736.8(c); *In re Dominguez*, 416 S.W.3d 700, 708 (Tex. App.—El Paso 2013, orig. proceeding).

Applicable Law

Rule 736 provides the procedure to obtain a court order allowing expedited foreclosure of certain liens, including the home equity loan at issue here. TEX. R. CIV. P. 735.1, 736.1–736.10. Rule 736.11 then gives the respondent (i.e., the party against whom the foreclosure order is

signed an order on August 11, 2016. The Court ordered relators to provide it with a copy of the order in a supplemental record, and relators supplemented the mandamus record accordingly.

sought or entered) a procedure for staying and vacating the expedited foreclosure order or staying and dismissing the Rule 736 proceeding. TEX. R. CIV. P. 736.11. Under that rule, the expedited foreclosure order or the Rule 736 proceeding is automatically stayed if the respondent files an independent lawsuit contesting the lender's right to foreclose. TEX. R. CIV. P. 736.11(a). After filing the independent lawsuit, Rule 736.11(c) gives respondent the means to obtain an order vacating the Rule 736 expedited foreclosure order (or dismissing the Rule 736 proceeding):

(c) Within ten days of filing suit, the respondent must file a motion and proposed order to dismiss or vacate with the clerk of the court in which the application was filed giving notice that respondent has filed an original proceeding contesting the right to foreclose in a court of competent jurisdiction. If no order has been signed, the court must dismiss a pending proceeding. If an order has been signed, the court must vacate the Rule 736 order.

TEX. R. CIV. P. 736.11(c).

Analysis

When relators filed this original proceeding, the arguments were not fully developed and the full record was not before the Court. On rehearing, relators clarified their position and arguments, and Deutsche Bank's response brief provided the Court with a more complete factual background and procedural history. Deutsche Bank also completed the record by providing the Court with Deutsche Bank's filings in opposition to relators' motion to vacate the expedited foreclosure order in the trial court, which relators had neglected to include in the mandamus record. By liberally construing the petition and taking into account the motion for rehearing, we have determined that relators now seek a writ ordering the trial court to grant the motion to vacate and not simply a writ directing the trial court to rule. In light of the more developed record and clarified arguments, we are now able to make a determination on the merits of relators' arguments, namely, whether the trial court had a mandatory duty to grant relators' motion to vacate the expedited foreclosure order.

I. The language of Rule 736.11(c) is mandatory

In statutory construction, it is assumed that the ordinary meaning of the words used expresses the legislative intent. *Inwood North Homeowners Ass’n. Inc. v. Meier*, 625 S.W.2d 742, 743 (Tex. App.—Houston [1st Dist.] 1981, no writ). Rule 736.11(c) plainly states what the court “must” do when a respondent files a Rule 736.11(c) motion to vacate a Rule 736 expedited foreclosure order:

If no order has been signed, the court must dismiss a pending proceeding. If an order has been signed, the court must vacate the Rule 736 order.

TEX. R. CIV. P. 736.11(c). Use of the term “must” shows a legislative intent that the actions are mandatory. *See Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) (“While Texas courts have not interpreted ‘must’ as often as ‘shall,’ both terms are generally recognized as mandatory, creating a duty or obligation.”); *see also Filmstrips & Slides, Inc. v. Dallas Cent. Appraisal Dist.*, 806 S.W.2d 289, 290–91 (Tex. App.—Dallas 1991, no writ) (“The ordinary meaning of “shall” or “must” is a mandatory effect.”) (citing *Harris County Appraisal Dist. v. Consol. Capital Properties IV*, 795 S.W.2d 39, 41 (Tex. App.—Amarillo 1990, writ denied)).

Applying these standards, we hold that the plain language of Rule 736.11(c) creates a mandatory duty to dismiss a pending Rule 736 proceeding or vacate the Rule 736 order if the respondent meets the requirements of rule 736.11(c) by timely-filing both the Rule 736.11(a) independent action and the Rule 736.11(c) motion to vacate. *See, e.g., In re Dominguez*, 416 S.W.3d at 704 (holding that “the statutory language concerning automatic abatement and dismissal is mandatory” and “a trial court is required to dismiss an abated Rule 736 proceeding and is without discretion to act otherwise.”); *see also Boren v. U.S. Nat. Bank Ass’n*, 807 F.3d 99, 102, n. 1 (5th Cir. 2015) (noting that “the same automatic stay and dismissal procedures remain in effect” in the 2012 amendments to Rule 736); *Murphy v. HSBC Bank USA*, 95 F. Supp. 3d 1025, 1028 (S.D. Tex. 2015) (holding that Rule 736.11(c) requires the clerk to dismiss the

Rule 736 proceeding or vacate the Rule 736 order if the respondent timely files a motion under Rule 736.11(c)).

II. The trial court abused its discretion by denying relators' motion to vacate.

Relators fulfilled the requirements of Rule 736.11(a) on June 6, 2016 by timely-filing a separate, original proceeding in the 380th Judicial District Court of Collin County. By filing the separate proceeding, the Rule 736 expedited foreclosure order was automatically stayed pursuant to Rule 736.11(a). Relators then timely-filed a Rule 736.11(c) motion to vacate the expedited foreclosure order. Relators met the requirements of Rule 736.11 and, as such, the trial court had a mandatory duty to grant the motion and vacate the expedited foreclosure order. The trial court abused its discretion by denying the motion to vacate.

Deutsche Bank argues the motion to vacate was properly denied as a sanction under Rule 736.11(e), which permits the trial court to “enforce the Rule 736 process” through Chapters 9 and 10 of the civil practice and remedies code. TEX. R. CIV. P. 736.11(e). We reject that argument.

First, the record does not support a determination that the trial court denied relators' motion to vacate as a sanction. Deutsche Bank moved to strike relators' motion to vacate and for sanctions, but the trial court did not strike the motion or issue a sanctions order. Instead, the court denied the motion to vacate and made no ruling on the motion to strike or the motion for sanctions. As such, even assuming denial would have been appropriate as a sanction under Rule 736.11(e), the record fails to show that the court denied relators' motion as a sanction here.

Second, Rule 736.11(e) does not allow a trial court to disregard its mandatory duty to vacate a Rule 736 expedited foreclosure order even if it determines that the respondent's Rule 736.11(a) lawsuit was frivolous, groundless, or filed simply to delay the foreclosure. Deutsche Bank provides no authority supporting the proposition that a trial court may deny a timely-filed

motion to vacate that has met the requirements of the rule and we have found none. If rule 736.11(e) intended to override the mandatory vacatur or dismissal required by subdivision (c), then the statute would state that the court is not required to vacate or dismiss if it determines the independent lawsuit was frivolous, groundless, and/or filed for purposes of delay. Moreover, denying the motion to vacate goes beyond the scope of Chapter 10 sanctions, which are limited to what is sufficient to deter repetition of the sanctionable conduct. TEX. CIV. PRAC. & REM. CODE 10.004(b).

Similarly, a denial of a timely Rule 736.11(c) motion to vacate is not a sanction contemplated by Chapter 9, which permits a court to sanction a party by striking a pleading or the offending portion of the pleading. TEX. CIV. PRAC. & REM. CODE § 9.011(e). In the Rule 736 context, however, the originating court is not the court in which Chapter 9 sanctions could be assessed against the respondent because any sanctionable conduct would occur with the filing of the independent lawsuit under Rule 736.11(a), not in filing the Rule 736.11(c) motion to vacate notifying the original court that the respondent has filed an independent lawsuit challenging the foreclosure order. While the court in which the independent lawsuit was filed can sanction the plaintiff for filing a frivolous pleading, the originating court may take only one action in the face of a timely-filed and complete Rule 736.11(c) motion — to grant the motion and vacate the expedited foreclosure order. Here, the originating court denied the Rule 736.11(c) motion. That was an abuse of discretion.

Conclusion

For these reasons, we hold that the trial court had a mandatory duty to grant relators' Rule 736.11(c) motion to vacate the expedited foreclosure order and to vacate that order. The trial court abused its discretion by denying the motion to vacate. Accordingly, we grant relators' motion for rehearing, vacate our prior opinion and substitute this as our opinion, conditionally

grant the petition for writ of mandamus, and direct the trial court to render an order vacating the court's August 11, 2016 order denying relator's motion, granting relators' June 7, 2016 motion to vacate, and vacating the March 15, 2016 expedited foreclosure order. The writ will issue only if the trial court fails to issue the order and notify the parties as directed herein within 14 days of the date of this opinion. Since we assume the trial court will comply with this opinion, we direct our clerk not to issue the writ of mandamus unless information is received that the district court has not so complied.

Writ of mandamus conditionally granted.

/s/Ada Brown/
ADA BROWN
JUSTICE

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