

VACATE and DISMISS in Part, and REVERSE and REMAND; Opinion Filed March 14, 2018.



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

No. 05-16-01427-CV

**BASIL BROWN, Appellant
V.
ROBERT HAWKINS, Appellee**

**On Appeal from the County Court at Law No. 1
Kaufman County, Texas
Trial Court Cause No. 16C-0127**

MEMORANDUM OPINION

Before Justices Lang-Miers, Myers, and Boatright
Opinion by Justice Lang-Miers

Appellee Robert Hawkins filed a lawsuit for forcible entry and detainer, seeking possession of residential property in Forney, Texas, and unpaid rent from appellant Basil Brown. The justice court rendered judgment for Hawkins, and Brown appealed to county court. The county court dismissed Brown's appeal. Brown now appeals the county court's order of dismissal. We conclude that the issue of possession is moot, vacate the judgment of possession, and dismiss that portion of Brown's appeal. But because we conclude that the county court should not have dismissed Brown's appeal from the justice court, we reverse the remainder of the judgment and remand the case for the county court's consideration of Brown's appeal on issues other than possession.

BACKGROUND

On March 9, 2016, Brown and appellee Robert Hawkins signed an extension of Brown's residential lease on property in Forney. Effective May 1, 2016, the extension provided for monthly rent of \$1,430.00. The extension also provided that the lease would expire on April 30, 2017.

On May 25, 2016, Hawkins filed a forcible entry and detainer suit in justice court to evict and recover unpaid rent against Brown. *See* TEX. PROP. CODE ANN. § 24.0051 (West 2014). Trial was originally set for June 8, 2016, but was delayed twice by Brown's motions for recusal against two judges. Citing rule of civil procedure 502.4(e) that a party may seek a change of judge only once in a lawsuit, and rule 510.7(c) that an eviction case may not be postponed for more than seven days total, the justice court set a trial date of June 28, 2016, and denied Brown's additional motions for continuance. *See* TEX. R. CIV. P. 502.4(e) (in justice court proceeding, party may apply for venue change or change of judge "only one time in any given lawsuit"); TEX. R. CIV. P. 510.7(c) (trial in eviction case "must not be postponed for more than 7 days total unless both parties agree in writing"). A third judge, who had not been a subject of either recusal motion, presided over the trial.

The justice court rendered judgment for Hawkins on June 28, 2016, for possession of the premises, \$3,300.00 in back rent, and \$241.00 in court costs. The justice court's judgment also set the amount of an appeal bond for Brown at \$7,082.00.

On July 5, 2016, in the justice court, Brown filed a notice of appeal and a pauper's affidavit.¹ The record does not contain any challenge to Brown's affidavit in the justice court,

¹ The property code and the rules of civil procedure use different terms for a sworn document stating that a tenant is unable to afford costs of appeal or an appeal bond. The property code uses the term "pauper's affidavit." *See, e.g.,* TEX. PROP. CODE ANN. § 24.0052 (West 2014). The rules of civil procedure prior to September 1, 2016, referred to the document as a "sworn statement of inability to pay," and now refer to a "Statement of Inability to Afford Payment of Court Costs." *See, e.g.,* TEX. R. CIV. P. 510.9(c). We also note that the supreme court amended the rules regarding "Statements of Inability to Afford Payment of Court Costs" effective September 1, 2016. *See* Misc. Docket No. 16-9122 (Tex. Sup. Ct. Aug. 31, 2016). We refer to the rules in effect at the time Brown's affidavit was filed. And for consistency, we use the statutory term "pauper's affidavit" unless quoting or discussing a rule of civil procedure.

although Brown claims that a challenge was made, heard, and overruled. On July 6, the justice court notified Brown that he was required to pay an initial deposit of rent in the amount of \$1,295.00 into the court's registry. *See* TEX. PROP. CODE ANN. § 24.0053(a-1) (West Supp. 2017) (written notice of initial deposit of rent due shall be provided by justice court to tenant appealing by pauper's affidavit); § 24.0053(b) (tenant appealing by pauper's affidavit must pay rent during pendency of appeal). On July 13, 2016, Brown's appeal was transferred to county court and docketed there.

On July 18, 2016, the clerk of the county court filed a contest to Brown's pauper's affidavit "in accordance with Rule 145, Texas Rules of Civil Procedure." The clerk requested that the court "determine, after evidence presented, the ability of petitioner to pay costs of the Court." Also on July 18, Brown paid \$1,295.00 into the registry of the court, as required by the justice court's judgment.

On August 19, 2016, the county court held a hearing on Brown's pauper's affidavit. The county court initially concluded that Brown's affidavit was not timely. But on October 14, 2016, the county court held a second hearing on Brown's affidavit after concluding that the filing was timely. By order dated October 21, 2016, the court found that Brown was not indigent and was able to pay court costs. The court ordered Brown to pay \$249.00 in court costs and to post an appeal bond of \$7,082.00. In its order, the court expressly found that Brown has "sufficient income" and property that may be sold; Brown "is able to seek gainful employment"; Brown's "demeanor indicated an ability to pay"; "[t]he credibility of [Brown] and his affidavit was suspect"; Brown "was able to get money for a bond"; and "[c]ommunity property income is sufficient."

Brown did not pay the court costs, the appeal bond, or any subsequent monthly rent payments as they became due. By order dated November 29, 2016, the county court dismissed

Brown's appeal and reinstated the June 28, 2016 justice court judgment. Brown filed a notice of appeal of the November 29, 2016 dismissal order in this Court on December 6, 2016.

DISCUSSION

Brown raises five issues: (1) his appeal of the justice court's judgment, accompanied by his pauper's affidavit, was timely; (2) the Kaufman County Clerk's July 18, 2016 contest of Brown's pauper's affidavit was not timely; (3) a second contest to Brown's pauper's affidavit filed by the Kaufman County Clerk on October 21, 2016, was not timely; (4) the county court erred by ruling that Brown was not indigent; and (5) the county court's October 21, 2016, and November 29, 2016 orders are void. In addition to Brown's issues, Hawkins has filed a "motion to partially dismiss the appeal" on the issue of possession of the premises. And Brown filed, on February 14, 2018, a separate "motion to declare writ of possession void." We will address the parties' motions before turning to Brown's issues.

1. The parties' motions relating to possession

Hawkins seeks to dismiss Brown's appeal of the county court's judgment regarding possession of the premises. Hawkins's motion, supported by his affidavit, alleges that when Brown filed his appeal in this Court without superseding the trial court's judgment, Hawkins obtained a writ of possession that was executed on December 19, 2016. Hawkins also alleges that between June 28, 2016 and November 29, 2016, Brown made only one rent payment into the registry of the court, and made no rent payments to Hawkins. Hawkins subsequently sold the premises on March 16, 2017.

Brown seeks an order "declaring the Writ of Possession signed, and issued, by the Justice Court on December 2, 2016, wholly void." Brown's motion, also verified, confirms that the Kaufman County Constable's Office executed the writ of possession on December 19, 2016, and that Brown was evicted from the premises. Brown argues, however, that the justice court abused

its discretion by issuing the writ of possession after the time for doing so had expired. Consequently, he argues, the writ of possession was void.

We note that Brown attempts to add a new issue for this Court's review without seeking leave to file an amended or supplemental brief as required by rule 38.7 of the rules of appellate procedure. *See* TEX. R. APP. P. 38.7; *Ellis v. Renaissance on Turtle Creek Condominium Ass'n*, 426 S.W.3d 843, 850 n.4 (Tex. App.—Dallas 2014, pet. denied) (denying motion for leave to file amended brief). Although Brown is not represented by an attorney in this appeal and we construe pro se pleadings and briefs liberally, we also hold pro se litigants to the same standards as licensed attorneys and require them to comply with applicable rules of procedure. *In re N.E.B.*, 251 S.W.3d 211, 211 (Tex. App.—Dallas 2008, no pet.). To do otherwise would give a pro se litigant an unfair advantage over a litigant who is represented by counsel. *Id.*

But even if we considered the merits of Brown's motion, Brown has no right to current possession of the premises. "The only issue in a forcible detainer case is the right to actual possession of the premises." *Marshall v. Hous. Auth. of San Antonio*, 198 S.W.3d 782, 785 (Tex. 2006). If a tenant does not hold and assert a potentially meritorious claim of right to current, actual possession of the property, appellate relief from a judgment of possession for the landlord in a forcible detainer case is futile. *See id.* at 787.

The record reflects that Brown's lease of the premises from Hawkins expired on April 30, 2017.² Brown concedes that he has not been in possession of the premises since the December 19, 2016 execution of the justice court's December 2, 2016 writ of possession. Consequently, there was no live controversy between the parties as to the right of current possession after April 30, 2017. *Id.* We conclude that Brown's appeal is moot as to the portion of the trial court's judgment

² We also note that Brown failed to pay rent as it became due under the lease during the pendency of his appeal in county court, as required by the property code. *See* TEX. PROP. CODE ANN. § 24.0053(b) (tenant appealing by pauper's affidavit shall pay rent as it becomes due). Failure to pay rent during the appeal permits the county court to "immediately issue a writ of possession." *Id.* § 24.0054(b), (c); *see also* TEX. R. CIV. P. 510.9(c)(5)(ii), (iv) (court must issue writ of possession on showing that defendant has not paid designated amount of rent as it becomes due).

awarding possession of the premises to Hawkins. *See Hands of Healing Residential Treatment Ctr., Inc. v. Havenar*, No. 01-13-01064-CV, 2015 WL 4760211, at *3 (Tex. App.—Houston [1st Dist.] Aug. 13, 2015, no pet.) (mem. op.) (citing *Marshall*, 198 S.W.3d at 787). For these reasons, we grant Hawkins’s motion and deny Brown’s.

But an entire case becomes moot only if a controversy ceases to exist or the parties lack a legally cognizable interest in the outcome. *Id.* (citing *Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 642 (Tex. 2005)). For that reason, we consider Brown’s issues that do not relate to possession of the premises. *See id.*

2. Timeliness of appeal from justice court

In his first issue, Brown contends his appeal of the justice court’s judgment to county court was timely. The justice court rendered judgment on June 28, 2016. Brown was required to file a bond, make a cash deposit, or file a pauper’s affidavit in the justice court within five days after the judgment was signed. TEX. R. CIV. P. 510.9(a); *see also* TEX. PROP. CODE ANN. § 24.0052(a) (tenant in residential eviction suit may appeal by filing pauper’s affidavit “not later than the fifth day after the date the judgment is signed”). Five days after June 28, 2016, however, was a Sunday, followed by a legal holiday. Brown filed his pauper’s affidavit on the following day, July 5.

We agree with Brown that his appeal to county court was timely. *See* TEX. R. CIV. P. 4 (computation of time). The county court ultimately agreed as well, holding a second hearing after concluding that its initial finding of untimeliness was incorrect. Because the county court did not dismiss Brown’s appeal on the basis of untimeliness, Brown’s first issue does not identify an error by the county court that probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1(a) (standard for reversible error). We decide Brown’s first issue against him.

3. Contest to pauper's affidavit

We address Brown's second and fourth³ issues together. The county clerk's challenges to Brown's pauper's affidavit recited that they were made "[i]n accordance with Rule 145, Texas Rules of Civil Procedure." Hawkins's suit, however, was a forcible entry and detainer action brought under Chapter 24 of the Texas Property Code, "governed by rules 500–507 and 510 of Part V of the Rules of Civil Procedure." TEX. R. CIV. P. 500.3(d); *see also* TEX. PROP. CODE ANN. § 24.001–24.011 (West 2014 & Supp. 2017). Under rule 500.3(e), "the other Rules of Civil Procedure . . . do not apply" in justice court cases, with two exceptions not pertinent here. TEX. R. CIV. P. 500.3(e); *see also In re Heaven Sent Floor Care*, No. 05-15-01152-CV, 2016 WL 7230387, at *3 (Tex. App.—Dallas Dec. 14, 2016, pet. denied) (orig. proceeding) (rules 500–507, not other rules of civil procedure, apply in justice court cases).

Under rules 510.9(a) and 510.9(f), an appeal is perfected when a bond, cash deposit, or statement of inability to pay is filed within five days after the judgment is signed. TEX. R. CIV. P. 510.9(a), (f). Both rule 510 and property code section 24.0052 expressly provide for challenges to pauper's affidavits in the justice court. Rule 510.9 permits an opposing party to contest a statement of inability to pay within five days of receiving notice that the statement was filed. TEX. R. CIV. P. 510.9(c)(2); *see also* TEX. PROP. CODE ANN. § 24.0052(d) (permitting landlord to contest pauper's affidavit "on or before the fifth day after the date the affidavit is filed").

This contest to Brown's affidavit was initiated in county court, not justice court. The county clerk received notice of Brown's pauper's affidavit on July 13, 2016, when the appeal was docketed in the county court. *See* TEX. R. CIV. P. 510.10(b) (docketing of appeal from justice court). The clerk's July 18, 2016 contest was made within five days of this notice. But as we have

³ Brown's third issue challenges the timeliness of the clerk's October 21, 2016 contest to Brown's pauper's affidavit. Because the record does not reflect that the county court heard or ruled on this contest, we do not consider Brown's third issue further.

noted, rule 510.9 provides only for contests in justice court, with appeals to county court if the contest is sustained. TEX. R. CIV. P. 510.9(c)(2), (3). Rule 510.9(c)(2) provides that statements of inability to pay “may be contested as provided in Rule 502.3(d).” Rule 502.3(d) permits the judge to “examine the statement and conduct a hearing to determine [a party’s] ability to pay,” regardless of whether a party has filed a challenge. TEX. R. CIV. P. 502.3(d). As under rule 510.9, however, rule 502.3(d) provides for challenges in the justice court, not the county court. In sum, the rules applicable to Brown’s appeal of the justice court’s judgment do not provide for county court challenges to a pauper’s affidavit. *See In re Meredith*, No. 03-15-00029-CV, 2015 WL 1968007, at *3 (Tex. App.—Austin May 1, 2015, no pet.) (orig. proceeding) (county court abused discretion in refusing to accept pauper’s affidavit that was timely filed and unchallenged in justice court).

In his fourth issue, Brown argues the county court misapplied the law in ruling that he was not indigent. He contends there was no evidence in the record “that suggests that Appellant had any money whatsoever to pay any court fees or appeal bond.” Regardless of evidentiary support in the record, the rules applicable to Brown’s county court appeal do not provide for challenges to pauper’s affidavits, as we have discussed. Brown’s appeal was perfected upon the filing of his pauper’s affidavit. TEX. R. CIV. P. 510.9(f). The county court erred by determining that it lacked jurisdiction to consider Brown’s appeal, and we sustain Brown’s second and fourth issues to the extent they complain of that error.

4. Void judgment

In his fifth issue, Brown argues that the county court’s October 21 and November 29, 2016 orders were “void and unenforceable” because his pauper’s affidavit filed in the justice court was “conclusive as a matter of law and cannot be challenged by the Kaufman County Clerk.” He cites *Equitable General Insurance Co. v. Yates*, 684 S.W.2d 669, 671 (Tex. 1984), in support of his argument. We have addressed Brown’s argument about the clerk’s challenge in our previous

discussion. Further, although the court in *Equitable General* stated that “[a]n uncontested affidavit of inability to pay is conclusive as a matter of law,” and held that the trial court abused its discretion by conditioning its grant of new trial on the payment of costs by the indigent party, the court did not conclude that that trial court’s order was void. *See id.* at 671. Here, the county court ruled that it lacked jurisdiction to consider Brown’s appeal because Brown failed to pay costs of court and the appeal bond. The county court’s orders, although erroneous, are not void. We decide Brown’s fifth issue against him.

CONCLUSION AND DISPOSITION

Because Brown does not hold and assert a potentially meritorious claim of right to current, actual possession of the property, the issue of possession is moot. We vacate the portion of the judgment regarding possession of the property and dismiss that portion of the case as moot. *See Havenar*, 2015 WL 4760211, at *3.

The county court erred, however, by sustaining the contest to Brown’s pauper’s affidavit, dismissing Brown’s appeal for failure to pay costs, and reinstating the justice court’s judgment.⁴ We reverse the county court’s order of dismissal and remand the cause for consideration of Brown’s de novo appeal on issues other than possession. *See* TEX. R. APP. P. 44.3 (court of appeals must render judgment trial court should have rendered except when remand is necessary for further proceedings).

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/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

⁴ “It is well-settled that perfection of an appeal to county court from a justice court for trial de novo vacates and annuls the judgment of the justice court.” *Villalon v. Bank One*, 176 S.W.3d 66, 69–70 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (citing cases). “A county court cannot affirm or reverse the judgment of the justice court nor can it remand the cause to the justice court.” *Id.* at 70.



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

JUDGMENT

BASIL BROWN, Appellant

No. 05-16-01427-CV V.

ROBERT HAWKINS, Appellee

On Appeal from the County Court At Law
No. 1, Kaufman County, Texas

Trial Court Cause No. 16C-0127.

Opinion delivered by Justice Lang-Miers;

Justices Myers and Boatright, participating.

In accordance with this Court's opinion of this date, we **VACATE** the portion of the trial court's judgment regarding possession of the property and **DISMISS** that portion of the case as **MOOT**. In all other respects, the order of the trial court dismissing appellant Basil Brown's appeal is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this Court's opinion.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 14th day of March, 2018.