AFFIRM; and Opinion Filed February 21, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00272-CV

NEIL ALBRECHT AND SHELIA ALBRECHT, Appellants
V.
THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, AS TRUSTEE FOR CWABS, INC., ASSET-BACKED CERTIFICATES, SERIES 2005-17, Appellee

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On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-04096

MEMORANDUM OPINION

Before Justices Lang, Fillmore, and Schenck
Opinion by Justice Fillmore

Alleging Neil and Shelia Albrecht had defaulted on their home equity loan, the Bank of New York Mellon f/k/a Bank of New York (BONY), as Trustee for CWABS, Inc., Asset-Backed Certificates, Series 2005-17, obtained an order pursuant to rule of civil procedure 736 authorizing it to foreclose on the loan. The Albrechts filed this separate, original proceeding to stay and dismiss the foreclosure order. *See* TEX. R. CIV. P. 736.11. BONY filed a counterclaim for breach of contract and requested an order authorizing it to foreclose on the loan. The trial court granted BONY's motion for summary judgment, found the Albrechts had defaulted on the home equity loan and were indebted to BONY in the amount of $284,786.09, and authorized BONY to sell the

real property encumbered by a lien securing the Albrechts' home equity loan at a foreclosure sale in satisfaction of the judgment.

The Albrechts appealed, contending in their first two issues that the trial court's judgment is either void or voidable because the trial court "accept[ed] the case" after it had lost plenary power over the parties and the subject matter of the dispute. In their third issue, the Albrechts assert the trial court erred by granting BONY's motion for summary judgment three days before the case was scheduled to go to trial, and the timing of the judgment was "so late, as to be unreasonable and harsh and in violation of Amendments #14 and # 5 of the United States Constitution."

We conclude the trial court had jurisdiction over the case and signed the judgment while having plenary power to do so, and that, by failing to comply with the briefing requirements of our appellate rules after receiving notice of the deficiency and an opportunity to cure, the Albrechts waived any complaint about the trial court's granting BONY's motion for summary judgment shortly before the scheduled trial date. We affirm the trial court's judgment.

Background[1]

On October 26, 2005, the Albrechts obtained a home equity loan from Countrywide Home Loans, Inc., and executed a home equity note in the principal amount of $188,000. The note was secured by a Texas Home Equity Security Instrument (First Lien) encumbering the Albrechts' home at 10535 Pagewood Drive, Dallas, Texas (the Property). Ultimately, BONY became the owner and holder of the home equity note and assignee of rights under the security instrument.

[1] The Albrechts' original brief failed to set out a statement of facts as required by rule of appellate procedure 38.1(g). *See* TEX. R. APP. P. 38.1(g). After this Court notified the Albrechts of this and other deficiencies in the brief, the Albrechts filed a "Response to the Court's Request for Additional Information to Comply with the Rules of the Court and T.R.A.P." The "Statement of Facts with Record References" contained in this response consists of a list of events that allegedly occurred in this case and in prior litigation between the parties, and contains references to attachments to the Albrechts' original brief, but no references to the appellate record. Therefore, the facts set out in this opinion were gleaned by the Court from the parties' pleadings in the trial court. A number of the documents referenced by the parties in those pleadings are not in the appellate record. However, because the Albrechts and BONY do not dispute the litigation history between the parties, we assume the facts are as the parties presented them to the trial court.

The Albrechts defaulted on the note, and on January 1, 2013, BONY filed an application under rule of civil procedure 736,[2] seeking an expedited foreclosure of the home equity loan (the first proceeding). The first proceeding, Cause Number DC-13-00023, was filed in the 134th Judicial District Court. On April 16, 2014, the trial court dismissed the first proceeding for want of prosecution.

On December 23, 2014, BONY filed a second application under rule of civil procedure 736 seeking to foreclose on the home equity loan (the second proceeding). The second proceeding, Cause Number DC-14-14867, was filed in the 68th Judicial District Court, and was also dismissed for want of prosecution.

BONY filed a third application under rule of civil procedure 736 on October 16, 2016, seeking to foreclose on the home equity loan (the third proceeding). The third proceeding, Cause Number DC-15-12699, was filed in the 44th Judicial District Court. The 44th Judicial District Court declined to accept the case, and the third proceeding was transferred to the 134th Judicial District Court.[3] On April 1, 2016, the trial court signed a "Home Equity Foreclosure Order," authorizing BONY to sell the Property at a foreclosure sale.

The Albrechts filed this case under rule of civil procedure 736.11, seeking to stay and dismiss the foreclosure order rendered in the third proceeding. The Albrechts asserted the trial court did not have jurisdiction to hear the third proceeding because it had lost plenary power over the first proceeding. The Albrechts also asserted BONY was made whole after being "bailed out"

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[2] Texas Rule of Civil Procedure 736 provides the procedure to obtain a court order allowing expedited foreclosure of certain liens, including a lien securing a home equity loan. *In re Priester*, No. 05-16-00965-CV, 2016 WL 7010583, at *2 (Tex. App.—Dallas Nov. 21, 2016, orig. proceeding) (mem. op.); *see also* TEX. R. CIV. P. 735.1(a).

[3] Dallas County Local Rule 1.06 provides:

> Whenever any pending case is so related to another case previously filed in or disposed of by another Court of Dallas County having subject matter jurisdiction that a transfer of the later case to such other Court would facilitate orderly and efficient disposition of the litigation, the Judge of the Court in which the earlier case is or was pending may, upon notice to all affected parties and Courts, transfer the later case to such Court.

See http://www.dallascounty.org/department/districtclerk/media/New_LocalRules_for_CivilCourt.pdf (last visited on January 23, 2018).

under the Emergency Economic Act of 2008, and due to this accord and satisfaction, BONY should take nothing from the Albrechts. BONY answered, asserted a counterclaim for breach of contract, and requested a judgment allowing the Property to be sold at a foreclosure sale. On May 16, 2016, the trial court notified the parties the case was set for trial on February 13, 2017.

On December 9, 2016, BONY moved for summary judgment on both its counterclaim and the Albrechts' claim BONY should take nothing based on an accord and satisfaction on grounds the trial court had jurisdiction over the foreclosure proceedings, "accord and satisfaction" was an affirmative defense to a breach of contract claim and not an independent cause of action, and the summary judgment evidence established as a matter of law that BONY was entitled to judgment on its breach of contract claim. After hearing BONY's motion on January 10, 2017, the trial court allowed the parties an additional thirty days in which to file supplemental briefing. On February 10, 2017, the trial court signed a "Judicial Foreclosure Judgment" in which it granted BONY's motion for summary judgment, found the Albrechts had defaulted on the home equity loan and were indebted to BONY in the amount of $284,786.09, and authorized BONY to sell the Property at a foreclosure sale in satisfaction of the judgment.

The Albrechts appealed the trial court's judgment. On October 23, 2017, this Court sent written notice to the Albrechts that their brief did not satisfy the minimum requirements of the Texas Rules of Appellate Procedure. That notice specifically advised the Albrechts their brief was deficient because:

(1) the table of contents did not indicate the subject matter of each issue or point, or group of issues or points;

(2) it did not contain an index of authorities arranged alphabetically and indicating the pages of the brief where the authorities were cited;

(3) it did not contain a concise statement of the case, the course of proceedings, and the trial court's disposition of the case supported by record references;

(4) it did not contain a concise statement of the facts supported by record references;

(5) the argument did not contain appropriate citations to authorities;

(6) the argument did not contain appropriate citations to the record; and

(7) it did not contain a proper certificate of compliance.

We informed the Albrechts that a failure to file an amended brief that complied with the rules of appellate procedure could result in the dismissal of this appeal without further notice.

We initially gave the Albrechts ten days to correct the specified deficiencies. On October 30, 2017, the Albrechts filed a motion for extension of time to file a reply to BONY's brief and to respond to this Court's notice of deficiencies in their brief. We granted the motion, and ordered the Albrechts to file a reply brief and correct deficiencies in their original brief by December 1, 2017. The Albrechts filed a motion on November 29, 2017, requesting an additional ten days to file their reply brief and correct the deficiencies in their original brief. We granted that motion, and the Albrechts filed a "Response to the Court's Request for Additional Information to Comply with the Rules of the Court and T.R.A.P." on December 14, 2017, but did not file a reply brief.

Jurisdiction

Although, as discussed in more detail below, the Albrechts' filings in this Court fail to comply with the Texas Rules of Appellate Procedure, they assert in their first two issues that the trial court did not have jurisdiction to sign the Judicial Foreclosure Judgment because it lost plenary power after dismissing the first proceeding for want of prosecution.[4] Even if not raised by the parties, we are duty-bound to determine our jurisdiction. *In re City of Dallas*, 501 S.W.3d 71,

[4] This is an appeal from the trial court's judgment in an independent suit filed by the Albrechts under rule of civil procedure 736.11, seeking to stay and dismiss the foreclosure order signed in the third proceeding. If the Albrechts met the requirements of rule 736.11 by timely-filing both the independent action pursuant to rule 736.11(a) and a motion to vacate the foreclosure order pursuant to rule 736.11(c), the trial court had a mandatory duty to dismiss the third proceeding. *See In re Priester*, 2016 WL 7010583, at *3. The appellate record does not contain an order dismissing the foreclosure judgment in the third proceeding. However, because the trial court granted BONY's motion for summary judgment on its breach of contract claim and signed the Judgment of Judicial Foreclosure in this proceeding, we will construe appellants' argument as attacking the trial court's jurisdiction to rule on BONY's counterclaim for breach of contract.

73 (Tex. 2016) (orig. proceeding) (per curiam); *M.O. Dental Lab. v. Rape*, 139 S.W.3d 671, 673 (Tex. 2004) (per curiam) ("[W]e are obligated to review *sua sponte* issues affecting jurisdiction."). If the trial court did not have jurisdiction to rule on BONY's counterclaim for breach of contract, we do not have jurisdiction over this appeal. *See Pearson v. State*, 315 S.W.2d 935, 938 (Tex. 1958) (appellate court's jurisdiction "as to the merits of a case extends no further than that of the court from which the appeal is taken"); *Wallace v. Wallace*, No. 05-17-00447-CV, 2017 WL 4479653, at *3 (Tex. App.—Dallas Oct. 9. 2017, no pet.) (mem. op).

The trial court's order dismissing the first proceeding for want of prosecution does not state that the dismissal was without prejudice. However, unless otherwise indicated in the order, we presume a dismissal for want of prosecution was without prejudice. *Barnes v. Deadrick*, 464 S.W.3d 48, 54 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *see also Christensen v. Chase Bank USA, N.A.*, 304 S.W.3d 548, 553 (Tex. App.—Dallas 2009, pet. denied) ("The general rule is that a dismissal for want of prosecution is without prejudice to refiling."). A dismissal for want of prosecution without prejudice to its refiling places the parties in the position they were in prior to filing the action "just as if the suit had never been brought." *Barnes*, 464 S.W.3d at 54 (quoting *In re Hughes*, 770 S.W.2d 635, 637 (Tex. App.—Houston [1st Dist.] 1989, no pet.)). Accordingly, a party may refile a case that has been dismissed for want of prosecution. *Rizk v. Mayad*, 603 S.W.2d 773, 775 (Tex. 1980) ("[A] litigant may refile an action that has been dismissed for want of prosecution, since the merits of such an action remain undecided."); *Christensen*, 304 S.W.3d at 554.

Absent the filing of a motion to reinstate, the trial court lost plenary power over the first proceeding thirty days after that case was dismissed for want of prosecution. *See* TEX. R. CIV. P. 165a(3), 329b(d); *In re Haloftis*, No. 05-16-01047-CV, 2016 WL 5401516, at *1 (Tex. App.—Dallas Sept. 27, 2016, orig. proceeding) (mem. op.). After it lost plenary power, the trial court

could not render a judgment in the first proceeding. *See Gentry v. Siemens Fin. Servs., Inc.*, No. 14-17-00602-CV, 2017 WL 6045360, at *2 (Tex. App.—Houston [14th Dist.] Dec. 7, 2017, no pet. h.) (mem. op.) ("Generally, a trial court lacks power to act in a case after plenary power expires."); *see also State ex rel. Latty v. Owens*, 907 W.S.2d 484, 486 (Tex. 1995) (per curiam) (judicial action taken after the court's plenary power has expired is a nullity). The trial court's loss of plenary power over the first proceeding, however, did not preclude BONY from refiling either the second or third proceedings or from seeking a judgment in this action allowing it to sell the Property at a foreclosure sale. *See Rizk*, 603 S.W.2d at 775; *Christensen*, 304 S.W.3d at 554. Accordingly, the trial court had jurisdiction to sign the Judicial Foreclosure Judgment, and signed the judgment while it had plenary power. We resolve the Albrechts' first two issues against them.

Ruling on BONY's Motion for Summary Judgment

Relating to their third issue, the Albrechts contended in their original brief that the trial court erred:

> [I]n signing its Order one business day, prior to Trial. When it had nine (9) months, in which to review the matter. We claim this to be unreasonable, arbitrary, a denial of a fair trial, a denial of the right to present evidence showing the Banks had been paid, a denial of the right to show the credits and off-sets which would be due to the Albrechts, all of which are claims of record.

As noted above, this issue was not supported by a statement of facts with appropriate citations to the appellate record. Further, the Albrechts' entire argument in their brief consisted of:

> The Record clearly shows that Appellees [sic] were given more than ample opportunity, multiple times, to make their case on the merits, in a trial. Through "conscious indifference," or otherwise, they chose not to do so. The Texas courts have a very long history of, "Enough is enough." [Hence Res Judicata et al] The Appellees [sic] have YET to make their case in an actual trial, or contested hearing. The documents, attached hereto, in the Appendix of this Brief, not only demonstrates [sic] the cavalier attitude of the Appellee, but also a behavior that verges on a smug indifference to justice.

The Albrechts did not support this argument with citations to supporting authority or to the appellate record.

The Albrechts filed a "Response to the Court's Request for Additional Information to Comply with the Rules of the Court and T.R.A.P." in which they asserted no issues, but attempted to respond to the deficiencies in the original brief that had been noted by the Court. As relevant to the third issue raised in their original brief, the Albrechts argued in their response that they filed this case:

> b) . . . [I]n order to obtain a ruling on Appellant's [sic] Defense of Accord and Satisfaction; that is, The Appellee Banks [sic] had already been paid (reimbursed) through the Federal Government's "Bailout" program, which arose from Appellee's being Trustee for CWABS, Inc. which was the Asset-Backed Certificates Series mortgage fiasco. Even the Appellee's own cover to its Briefs and in its pleadings indicate such status. Pursuant to TRCP 198.1, Appellants sent Requests for Admissions. One of such Requests ask Appellees [sic] to Admit that they [sic], in fact, had been bailed out, for Appellant's [sic] home at 10535 Pagewood, Dallas, Texas.
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> c) Appellees [sic] DID NOT ANSWER the Admissions Request; and pursuant to TRCP 198.2(c) the Appellees [sic] have Admitted that they were reimbursed.
>
> d) Accordingly Appellant's [sic] owe NOTHING to Appellees [sic].

This argument is not supported by any citations to the appellate record. Further, the only legal authority cited by the Albrechts was rule of civil procedure 198.2(c), relating to the consequences of failing to timely respond to requests for admissions. *See* TEX. R. APP. P. 198.2(c) (if party failed to timely serve response to request for admissions, request is considered admitted without necessity of court order). The Albrechts failed to explain how this authority related to their complaint about the timing of the trial court's ruling on BONY's motion for summary judgment.

The Texas Rules of Appellate Procedure control the required contents and organization of an appellant's brief. *See* TEX. R. APP. P. 38.1; *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 880 (Tex. 2010). Under those rules, an appellant's brief must concisely state all issues or points presented for review and, among other things, "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). Briefs are meant to acquaint the Court with the issues in a case and to present argument

that will enable the Court to decide the case. TEX. R. APP. P. 38.9. Accordingly, we construe briefing rules liberally in an effort to ascertain the real basis of appeal, *Manney & Co. v. Tex. Reserve Life Ins. Co.*, 407 S.W.2d 345, 349 (Tex. Civ. App.—Dallas 1966, no writ).; *see also Bertaud v. Wolner Indus.*, No. 05-15-00620-CV, 2017 WL 1360197, at *2 (Tex. App.—Dallas Apr. 12, 2017, pet. dism'd) (mem. op.). Substantial compliance with the briefing rules is generally sufficient. TEX. R. APP. P. 38.9.

If, after reviewing an appellant's brief, we determine there is a formal defect in the appellant's briefing because the appellant has flagrantly failed to acquaint the Court with the issues in the case and present argument that will enable us to decide the case, we may require a brief to be amended. TEX. R. APP. P. 38.9(a). If an amended brief is filed that remains non-compliant, we may strike the brief, prohibit the party from filing another, and proceed as if the party had failed to file a brief. *Id.* If the Court determines the brief is substantively defective because the case has not been properly presented, or the law and authorities have not been properly cited, we may postpone submission, require additional briefing, and make any other order necessary for a satisfactory submission of the case. TEX. R. APP. P. 38.9(b). Further, after giving ten days' notice to the parties, we may dismiss an appeal because the appellant has failed to comply with a requirement of the rules of appellate procedure, an order from the Court, or a notice from the clerk requiring a response or other action within a specified time. TEX. R. APP. P. 42.3(c). "When an appellant submits a brief from which we cannot identify the legal arguments and issues, the brief must be corrected to permit a satisfactory submission of the case before we resolve the appeal." *Bertaud*, 2017 WL 1360197, at *2. Where the briefing defect has been noted, and the party has been given an opportunity to cure but fails to do so, we may resolve the case as necessary. TEX. R. APP. P. 44.3.

The Albrechts had the burden to present and discuss their assertions of error in compliance with the appellate briefing rules. *See* TEX. R. APP. P. 38.1. Because the Albrechts failed to do so in their original brief, we instructed them to file an amended brief correcting the deficiencies in their original brief. Rather than filing an amended brief that corrected the deficiencies, the Albrechts filed a five page "Response to the Court's Request for Additional Information to Comply with the Rules of the Court and T.R.A.P." that they apparently intended for this Court to read in conjunction with their original brief. However, neither the Albrechts' original deficient brief nor their response intended to correct the deficiencies provides any discussion or legal analysis of why the trial court erred by granting BONY's motion for summary judgment shortly before the scheduled trial date, or contains citations to legal authorities or the record in support of that issue. *See* TEX. R. APP. P. 38.1(i). "An issue on appeal unsupported by argument or citation to any legal authority presents nothing for the court to review." *Strange v. Cont'l Cas. Co.*, 126 S.W.3d 676, 678 (Tex. App.—Dallas 2004, pet. denied). We may not speculate as to the substance of the issues the Albrechts may be trying to raise with their arguments and may not make their arguments for them. *Id.* Further, we have no duty or right to perform an independent review of the record and the applicable law to determine if the trial court erred. *Id.*

We are reluctant to decide an issue on the basis of briefing waiver, as the rules express a clear preference for resolution on the merits where possible. But where, as here, the party has been notified of procedural and substantive deficiencies in a brief and fails to correct them so as to remit a satisfactory submission of the complaint, we are presented with only the presumption of correctness of the underlying judgment. *See Burley v. Bexar Cnty.*, No. 04-16-00596-CV, 2017 WL 2124486, at *1 (Tex. App.—San Antonio May 17, 2017, no pet.) (mem. op.) ("We must presume the trial court's judgment is valid and correct unless the record demonstrates otherwise."). Accordingly, we resolve the Albrechts' third issue against them.

We affirm the trial court's judgment.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

NEIL ALBRECHT AND SHELIA ALBRECHT, Appellants

No. 05-17-00272-CV V.

THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, AS TRUSTEE FOR CWABS, INC., ASSET-BACKED CERTIFICATES, SERIES 2005-17, Appellee

On Appeal from the 134th Judicial District Court, Dallas County, Texas,
Trial Court Cause No. DC-16-04096.
Opinion delivered by Justice Fillmore, Justices Lang and Schenck participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee the Bank of New York Mellon f/k/a the Bank of New York, as Trustee for CWABS, Inc., Asset-Backed Certificates, Series 2005-17, recover its costs of this appeal from appellants Neil Albrecht and Shelia Albrecht.

Judgment entered this 21st day of February, 2018.