

**CONDITONALLY GRANT and Opinion Filed November 13, 2020**



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

**No. 05-20-00777-CV**

**IN RE 2999TC AQUISITIONS, LLC F/K/A MO 2999TC, LLC, Relator**

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**Original Proceeding from the 14th Judicial District Court  
Dallas County, Texas  
Trial Court Cause No. DC-20-05864**

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**MEMORANDUM OPINION**

**Before Justices Whitehill, Pedersen, III, and Carlyle  
Opinion by Justice Whitehill**

In this original proceeding, relator 2999TC Acquisitions LLC (Acquisitions) requests a writ of injunction to prevent foreclosure of its property pending final disposition of its interlocutory appeal from the trial court's denial of its temporary injunction application.

We conclude that superseding the judgment is not an adequate remedy for relator and a writ of injunction is necessary to protect this court's jurisdiction over the appeal. Accordingly, we: (i) conditionally grant relator's petition for injunction, enjoining the foreclosure of the real property at issue, contingent upon relator posting bond in the amount of \$5,200,000. within ten (10) days of this order and notifying the court that the bond has been posted; and (ii) continue our August 28,

2020 stay of the foreclosure sale for eleven days from the entry of this order or final disposition of the appeal in cause number 05-20-00774-CV, whichever occurs first.

## **I. BACKGROUND**

The underlying proceeding involves a property dispute concerning real property located at 2999 Turtle Creek Boulevard, Dallas, Texas. Relator acquired that real property by executing a deed of trust and \$32.5 million loan. Shortly thereafter, relator announced a plan to develop the property into a 5-star Mandarin Oriental Hotel and branded residential project.

According to relator, defendants-real parties 2999 Turtle Creek, LLC (Lender), Madison Realty Capital (of which 2999 Turtle Creek is an affiliate), and various non-signatories to the loan agreement (HNGH Turtle Creek, Vipin Nambiar, William Hutchinson, and HN Green Hollow Capital Partners) improperly declared a default based on relator's alleged failure to pay property taxes, and improperly posted the property for foreclosure on August 4, 2020. Relator sought a temporary restraining order to prevent the foreclosure, which the court granted on August 3, 2020. Relator posted a \$25,000 bond to secure the TRO.

On August 19, 2020, the court held the temporary injunction hearing. Relator's application for temporary injunction was denied, and the TRO expired by

its own terms. On August 26, 2020, relator filed an interlocutory appeal from the denial of the temporary injunction. That appeal is currently pending in our court.<sup>1</sup>

Relator also filed this petition for writ of injunction, seeking to prevent real parties from foreclosing on the property pending resolution of relator's interlocutory appeal. Relator argues that the writ of injunction is necessary to preserve this Court's subject matter jurisdiction over the interlocutory appeal. On August 28, 2020, we granted a stay of the September 1 foreclosure sale pending resolution of this original proceeding.

Lender responded to the petition, arguing that: (i) Realtor has not shown that it is entitled to injunctive relief; (ii) the unclean hands doctrine Realtor is not entitled to equitable relief because of unclean hands; and (iii) the foreclosure sale and requests for injunction are ancillary to the lawsuit. Lender also alleged that Relator's proposed \$25,000 bond would be inadequate, and "at a minimum, Realtor should be required to pay its monthly amounts due, approximately 350,000.00 . . . ."

HNGH (along with other non-signatories to the Loan) also responded to the petition for injunction, arguing that relator is not entitled to a writ of injunction because relator would be adequately protected by money damages.<sup>2</sup> The response

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<sup>1</sup> See *2999TC Acquisitions, LLC f/k/a MO 2999TC, LLC v. HNGH Turtle Creek, LLC, William Hutchinson, Vipin Nambiar, HN Green Hollow Capital Partners, LLC, 2999 Turtle Creek, LLC, and Madison Realty Capital, LP*, No. 05-20-00774-CV.

<sup>2</sup> HNGH is not a signatory to the Loan but holds a junior participation interest in Relator's loan with Lender, and Lender assigned a participation interest in the Loan and deed of trust in exchange for HNGH's payment to Lender.

argued that if this Court does grant injunctive relief, the bond should be set at \$4,042,776.

On August 28, 2020, we stayed the foreclosure of the property pending resolution of this original proceeding. HNGH moved to clarify the stay order to allow Lender to provisionally post the property for foreclosure while the stay is pending. Relator responded that the motion should be denied. We denied the motion for clarification.

On August 31, 2020, HNGH filed an emergency motion to require security, asking that we require relator to post security totaling at least \$2,879,300.05. We granted the motion for security but ordered the trial court to conduct a hearing to determine the appropriate bond amount and provide this court with findings to support the determination. The trial court did so and found that bond in the amount of \$5,200,000. is appropriate.

## II. ANALYSIS

### A. **Is an injunction necessary to preserve our jurisdiction?**

The Texas Constitution provides that the courts of appeals have such appellate and original jurisdiction as prescribed by law. TEX. CONST. art. V, § 6. Under the Government Code, a court of appeals “may issue a writ of mandamus and all other writs necessary to enforce jurisdiction of the court.” TEX. GOV’T CODE § 22.221(a). Thus, a court of appeals may issue such a writ to prevent an appeal from becoming moot. *Dallas Morning News v. Fifth Court of Appeals*, 842 S.W.2d 655,

657 (Tex. 1992) (orig. proceeding); *In re Shields*, 190 S.W.3d 717, 719 (Tex. App.—Dallas 2005, orig. proceeding). Indeed, “[t]he power of the courts of appeals to protect their jurisdiction is essential for the orderly administration of justice.” *Dallas Morning News*, 842 S.W.2d at 658.

Here, the primary question to be answered in the underlying appeal is whether the trial court erred in denying the writ of injunction preventing foreclosure. The issue we must decide in determining whether to grant a writ of injunction is whether foreclosure on the Property before the underlying appeal is determined would render the appeal moot, thereby interfering with this court’s jurisdiction over the appeal. *See In re Teague*, 2-06-033-CV, 2006 WL 302123, at \*2 (Tex. App.—Fort Worth Feb. 6, 2006, orig. proceeding) (mem. op.); *In re Gruebel*, 153 S.W.3d 686, 689–90 (Tex. App.—Tyler 2005, orig. proceeding) (mem. op.); *see also Reyes v. Atkins*, 619 S.W.2d 26, 27–28 (Tex. Civ. App.—Fort Worth 1981, orig. proceeding) (declining to consider merits of underlying appeal when determining whether writ of injunction should issue).

HNGH argues that government code §22.221(a) does not grant us the power to prevent damage to an appellant during a pending appeal. *See In re Harris*, No. 05-14-00692-CV, 2014 WL 2527488, at\*1 (Tex. App.—Dallas Jun. 3, 2014, orig. proceeding). As we have previously held, statutes allowing appellants to supersede judgments by posting an appropriate bond serve to protect an appellant from damage during an appeal. *See In re Day Inv. Grp., LLC*, 05-20-00643-CV, 2020 WL

5036145, at \*1 (Tex. App.—Dallas July 2, 2020, no pet. h.). Thus, “[t]he issuance of an extraordinary writ, such as a writ of injunction, is not authorized when there is another adequate remedy.” *In re Walker*, No. 14-18-01078-CV, 2018 WL 6684309, at \*1 (Tex. App.—Houston [14th Dist.] Dec. 20, 2018, orig. proceeding) (per curiam) (mem. op.).

Although the ability to supersede the judgment is an adequate remedy if it will stop the appeal from becoming moot, there are times when superseding the judgment will not avoid mootness. *See In re Teague*, 2006 WL 302123 at \*3. Mootness deprives us of jurisdiction. *See In re Health Discovery Corp.*, 148 S.W.3d 163, 164 (Tex. App.—Waco 2004, orig. proceeding).

For example, in *In re Teague*, the relator was appealing from an order granting a plea to jurisdiction, dissolving the TRO, and dismissing the case. Although the City argued that a writ of injunction would be improper because Teague could have superseded the judgment, our sister court rejected that argument, explaining that “superseding the trial court’s judgment would have no effect because the judgment simply declines to prohibit the City from acting on its order.” *In re Teague*, 2006 WL 302123 at \*2. The court observed that superseding the judgment would not revive the TRO or stop the City from demolishing the building at issue. *Id.* Thus, the court granted the writ of injunction. *Id.* at \*3.

Similarly, in *Reyes v. Atkins*, our sister court enjoined the sale of property pending an appeal from the refusal of the district court to grant a temporary injunction preventing a sale. *Reyes*, 619 S.W.2d at 27.

HNGH argues that simply showing “mootness” cannot be the right standard, because otherwise, every wrongful foreclosure case with a denied request for temporary injunction would warrant an automatic stay on appeal. But a pending appeal on the denial of a temporary injunction is precisely the kind of situation where this court may need to act to protect its jurisdiction over the underlying appeal. As the Waco court observed: “[i]t has been held in many cases that where an original petition for writ of injunction is brought pending the appeal of the trial court’s denial of a similar injunction, the appellate court should issue the writ to protect its jurisdiction over the appeal.” *In re Health Discovery Corp.*, 148 S.W.3d at 164 (quoting *EMW Mfg. Co. v. Lemons*, 724 S.W.2d 425, 426–27 (Tex. App.—Fort Worth 1987, orig. proceeding) (internal citations and quotation marks omitted). “Granting the injunction preserves the subject matter of the appeal and the effectiveness of the court’s decision on the appeal should the relator prevail.” *Id.*

In this instance, even if relator were to supersede the judgment, it would not have the effect of enjoining the foreclosure sale, nor would it revive the now-expired TRO. Thus, superseding the judgment is not an adequate remedy. Accordingly, we conclude that an injunction should be granted to preserve our jurisdiction over the underlying appeal while we decide the merits. *See In re Teague*, 2006 WL 302123

at \*3, *Reyes*, 619 S.W.2d at 27; *see also In re Williams*, No. 02-13-00087-CV, 2013 WL 1437253, at \*3 (Tex. App.—Fort Worth Apr. 8, 2013, orig. proceeding) (mem. op.).

**B. Should Realtor be required to post a bond?**

The Texas Rules of Appellate Procedure expressly provide that we may require appropriate security when we enter a temporary order to protect the parties' rights pending disposition of an interlocutory appeal. *See* TEX. R. APP. P. 29.3. *See Ranchos Real Dev., Inc. v. County of El Paso*, 138 S.W.3d 441, 445 (Tex. App.—El Paso 2004, no pet.); *see also In re Geomet Recycling, LLC*, 578 S.W.3d 82, 87–88 (Tex. 2019, orig. proceeding). And the rule gives appellate courts some discretion in determining the amount of security. *Ranchos*, 138 S.W.3d at 445.

Because the record initially provided insufficient guidance to determine the appropriate security, we granted the motion for security and remanded to the trial court to make findings and recommendations as to the appropriate amount of security. The trial court found that a \$5,200,000. bond is appropriate, representing 10% of the face value of the now mature \$32,500,000.00 note plus approximately three months of interest at the default rate. We adopt these findings as to the appropriate security amount.

**III. CONCLUSION**

We (i) **CONDITIONALLY GRANT** relator's petition for injunction, enjoining the foreclosure of the real property at issue, contingent upon relator



posting bond in the amount of \$5,200,000. within ten (10) days of this order and notifying the court that the bond has been posted; and (ii) continue our August 28, 2020 stay of the foreclosure sale for eleven days from the entry of this order or final disposition of the appeal in cause number 05-20-00774-CV, whichever occurs first.

/Bill Whitehill/  
BILL WHITEHILL  
JUSTICE

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