

Vacated and Remanded and Opinion Filed October 29, 2021



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

No. 05-21-00348-CV

**VISTA BANK, Appellant
v.
NELEZER, INC., Appellee**

**On Appeal from the 192nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-21-02535**

MEMORANDUM OPINION

Before Justices Myers, Partida-Kipness, and Carlyle
Opinion by Justice Myers

Vista Bank brings this interlocutory appeal of a temporary injunction prohibiting it from foreclosing its deed of trust concerning two properties owned by Nelezer, Inc. Vista Bank brings three issues contending (1) no viable cause of action supports the injunctive relief; (2) the temporary injunction is overbroad because it restrains the foreclosure of either of the properties when the relief sought was to restrain the combined sale of the properties; and (3) the temporary injunction is void for failing to comply with Rule of Civil Procedure 683 because the order does not provide any reasons for the injunction and the \$100 bond was inadequate to protect Vista Bank's interest when the outstanding amount owed is \$4.6 million. We

conclude the trial court abused its discretion by issuing the temporary injunction because appellee's cause of action, partition of the debt, did not support injunctive relief in this case. We also conclude the order is void because it does not comply with Rule 683. We vacate the trial court's order granting the temporary injunction, dissolve the temporary injunction, and remand the cause to the trial court for further proceedings.

BACKGROUND

On January 5, 2018, appellee signed a promissory note for \$4,616,000 from Vista Bank for a three-year term. The loan was to be repaid monthly with payments of \$31,828.55 with the remainder of the loan paid in the final payment. The loan was secured by one deed of trust providing two tracts of land as collateral. On November 23, 2020, Vista Bank notified appellee that it would not extend the loan and asked appellee to make arrangements to refinance or pay off the loan. Appellee was unable to make the final payment. On January 27, 2021, Vista Bank sent appellee notice that both tracts would be sold in a single foreclosure sale on March 2, 2021.

Appellee filed suit seeking "a judgment partitioning each tract respective to its security position with the Note and Deed of Trust" and injunctive relief from the pending foreclosure. The trial court granted a temporary restraining order prohibiting Vista Bank from foreclosing on the tracts. Following a hearing, the trial court granted a temporary injunction prohibiting Vista Bank from foreclosing on the

tracts. Vista Bank now appeals that order. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(4).

TEMPORARY INJUNCTION

A temporary injunction's purpose is to preserve the status quo of the litigation's subject matter pending a trial on the merits. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002); *Bartoo v. Dallas Area Rapid Transit*, No. 05-02-00828-CV, 2003 WL 751812, at *2 (Tex. App.—Dallas Mar. 6, 2003, no pet.) (mem. op.). A temporary injunction is an extraordinary remedy and does not issue as a matter of right. *Butnaru*, 84 S.W.3d at 204. To obtain a temporary injunction, the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Id.* Whether to grant or deny a temporary injunction is within the trial court's sound discretion. *Id.* A reviewing court should reverse an order granting injunctive relief only if the trial court abused that discretion. *Id.* The reviewing court must not substitute its judgment for the trial court's judgment unless the trial court's action was so arbitrary that it exceeded the bounds of reasonable discretion. *Id.*

ANALYSIS

In its first issue, Vista Bank contends the trial court abused its discretion by enjoining it because appellee did not plead and prove the existence of a viable cause of action against it. *See Bartoo*, 2003 WL 751812, at *2.

In its petition, appellee alleged that the two properties were “entirely different” and:

there is no way that a bulk foreclosure can expose each individually with their own individual characteristics to the market. A buyer who wants one but not the other will be inclined to underbid the sale thereby leaving a possible deficiency. However, by conducting two sales, each property can be individually exposed to the market, and the sum of both sales can then be used to calculate whether any excess proceeds should be remitted to Nelezer.

The only way to fix this issue is to partition the foreclosure and run each sale of each tract separately, respective to each already partitioned lien position. It is fundamentally flawed to execute the sale as Vista Bank has it now—a bulk transfer mistreating distinct tracts of land as nothing more than fungible goods.

The petition then alleged appellee’s sole cause of action, which was for partition: “Plaintiff seeks a judgment partitioning each tract respective to its security position with the Note and Deed of Trust.” Nowhere in the petition did appellee allege what interest was jointly held or claimed by Vista Bank and appellee.

During the temporary injunction hearing, Vista Bank agreed to sell the properties in separate sales if directed to do so by the trial court. But this is not the only relief appellee seeks. As we read the petition, appellee wants the trial court to divide the debt among the two tracts, changing the transaction from having each property securing the entire debt to having each property securing separate portions of the debt. As appellee explains in its brief: “the partition should be by kind such that each property be given its own apportionment of the total debt, and if unsatisfied, by separate and distinct non-judicial foreclosure sale.”

The right to partition is governed by section 23.001 of the Property Code:

A joint owner or claimant of real property or an interest in real property or a joint owner of personal property may compel a partition of the interest or the property among the joint owners or claimants under this chapter and the Texas Rules of Civil Procedure.

TEX. PROP. CODE ANN. § 23.001. Appellee argues that the statute applies because Vista Bank and appellee are both “joint owners or claimants.” We disagree. There is no interest Vista Bank and appellee jointly own or claim. In a partition suit, the role of the courts is to “segregate the undivided interest of the parties according to their share, leaving the title unaffected.” *Bankston v. Bankston*, 206 S.W.2d 839, 842 (Tex. App.—Galveston 1947, writ ref’d). Vista Bank does not have an undivided interest in the property; it has a lien, a security interest, on appellee’s ownership interest. The deed of trust set forth Vista Bank’s rights: the power to request the trustee to sell the properties in the event of default and the right to the proceeds up to the amount of the debt. These are not rights in which appellee shares. Likewise, appellee has legal title to the two properties; Vista Bank has no title to the properties. There is no undivided interest shared by Vista Bank and appellee, and no joint ownership or claim to the properties. Instead, appellee owns the properties, and Vista Bank has a lien on appellee’s interest.

Appellee argues that if the two tracts are sold in separate sales, “each property can be individually exposed to the market, and the sum of both sales can then be used to calculate whether any excess proceeds should be remitted to [appellee].” However, appellee does not adequately explain, either here or in the trial court, why

partition of the debt between the two properties is necessary to conduct two sales. Partitioning the debt between the two properties would presumably mean that if one of the properties sold for more than the debt assigned to it, then the excess funds from that sale would be returned to appellee regardless of whether the sale of the second property yielded funds equaling or exceeding the debt secured by that property. Partition would change the nature of Vista Bank's security interest without its consent. Appellee cites no case or other authority that would permit the court to partition the debt between the properties securing a debt without the consent of both the borrower and the lender.

Appellee appears to argue that partitioning one debt among multiple properties was an established course of dealing between Vista Bank and the companies owned by appellee's president. Appellee cites to a promissory note between Vista Bank and a different corporation in which the loan was secured by five separate tracts. The note provided that as the indebtedness was paid down to various specific amounts, the tracts would be released. However, one transaction does not establish a course of dealing binding another party. *See Arc Designs, Inc. v. Nabors Indus., Inc.*, No. 01-18-00992-CV, 2020 WL 1917840, at *8 (Tex. App.—Houston [1st Dist.] Apr. 21, 2020, no pet.) (mem. op.) (discussing “course of performance” under TEX. BUS. & COM. CODE ANN. § 1.303; “a single transaction cannot constitute a course of dealing”); *Shell Trading (US) Co. v. Lion Oil Trading & Transp., Inc.*, No. 14-11-00289-CV, 2012 WL 3958029, at *6 (Tex. App.—

Houston [14th Dist.] Sept. 11, 2012, pet. denied) (mem. op.) (two contracts out of thirty-one did not establish course of dealing).

We conclude appellee did not allege a viable cause of action against Vista Bank. Therefore, the trial court abused its discretion by enjoining appellee. We sustain Vista Bank's first issue.

However, even if partition of the debt were a viable cause of action, Vista Bank correctly contends in its third issue that the temporary injunction is void for failing to comply with Rule of Civil Procedure 683 because the order does not provide any reasons for the injunction. *See* TEX. R. CIV. P. 683. Rule 683 requires “[e]very order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms.” *Id.* “If a temporary injunction fails to comply with the requirements of rule 683, it is void.” *Indep. Capital Mgmt., L.L.C. v. Collins*, 261 S.W.3d 792, 795 (Tex. App.—Dallas 2008, no pet.).

The temporary injunction in this case states:

Considering the papers on file with this Court, the evidence admitted, the testimony offered, and the argument of counsel, it appears from the facts set forth in the verified Application, and this Court likewise finds, that Plaintiff will suffer immediate and irreparable harm by the foreclosure of the properties made the subject of this cause of action and this Order, unless Defendant Vista Bank and those acting in concert with it having notice of this Temporary Injunction, are immediately restrained from, directly or indirectly, the following

As we stated in *Independent Capital Management*,

The temporary injunction order simply sets out the elements necessary for injunctive relief. It does not specify the facts the trial court relied on, making the trial court's finding conclusory. It also fails to identify

the injury appellees will suffer if the injunction does not issue. Merely stating that appellees are “suffering irreparable harm” and have “no adequate remedy at law” does not meet the rule 683 requirement for specificity.

Id. at 796 (citations omitted). In that case, we concluded the temporary injunction order was void because it did not satisfy the requirements of Rule 683. *Id.* Likewise, the temporary injunction order in this case is void.

Appellee argues Vista Bank did not preserve this issue for appellate review because it did not object in the trial court to the lack of specificity in the order. *See* TEX. R. APP. P. 33.1(a)(1). However, Vista Bank asserted in its post-order Motion to Dissolve or Modify the Temporary Injunction that “[t]he temporary injunction is void because it fails to state the reasons for the restrained activities as required.” Even if Vista Bank had not preserved error, the issue would not be waived. “Because a temporary injunction order that fails to comply with rule 683 is void, a party cannot waive the error” *Indep. Capital Mgmt.*, 261 S.W.3d 795, n.1. Furthermore, “[a]n appellate court can declare a temporary injunction void even if the issue has not been raised by the parties.” *Id.* at 795 (quoting *City of Sherman v. Eiras*, 157 S.W.3d 931, 931 (Tex. App.—Dallas 2005, no pet.)). Therefore, we could declare the temporary injunction order void even if Vista Bank had not raised the failure to comply with Rule 683 in the trial court or in its appellant’s brief.

We sustain Vista Bank’s third issue to the extent it complains of the lack of specificity in the temporary injunction order. We do not address Vista Bank’s

arguments in the third issue that the order failed to set an adequate bond or its second issue that the order was overbroad. *See* TEX. R. APP. P. 47.1.

CONCLUSION

We vacate the trial court's temporary injunction order, dissolve the temporary injunction, and remand the cause to the trial court for further proceedings.

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/Lana Myers//
LANA MYERS
JUSTICE



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

JUDGMENT

VISTA BANK, Appellant

No. 05-21-00348-CV V.

NELEZER, INC., Appellee

On Appeal from the 192nd Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-21-02535. Opinion delivered by Justice Myers. Justices Partida-Kipness and Carlyle participating.

In accordance with this Court's opinion of this date, the trial court's April 19, 2021 temporary injunction order is **VACATED** and the temporary injunction is **DISSOLVED**. This cause is **REMANDED** to the trial court for further proceedings.

It is **ORDERED** that appellant VISTA BANK recover its costs of this appeal from appellee NELEZER, INC.

Judgment entered this 29th day of October, 2021.