Opinion issued March 19, 2019

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00401-CV

DARRIUS BANKS, Appellant

V.

RAMIN EQUITIES, LLC, Appellee

On Appeal from the County Civil Court at Law No. 4
Harris County, Texas
Trial Court Case No. 1107428

MEMORANDUM OPINION

In this forcible detainer case, Darrius Banks, acting pro se, appeals the county court's judgment granting Ramin Equities, LLC possession of his former residence. Interpreting his brief broadly, Banks contends that (1) Ramin's claim was barred by res judicata; (2) the underlying proceeding was retaliatory in nature; (3) the county

court erred by refusing to consider the evidence he submitted; (4) the county court failed to consider nearly $1,000 in late fees charged by Ramin; (5) the county court deprived him of a due process right to obtain legal counsel during the trial de novo; and (6) Ramin conspired with the Houston Police Department to unlawfully search his residence.

We affirm.

Background

Banks entered a residential, month-to-month lease agreement with Ramin for a room at the Ramin Rooming House. After Banks stopped paying his rent, Ramin sued Banks for forcible detainer in the justice court and obtained a judgment awarding it possession of the premises. Banks appealed to the county court for a trial de novo.

In the county court, Banks filed a written motion to dismiss the case on res judicata. According to Banks, Ramin had attempted to evict him before but had not prevailed. Although Banks supported his motion to dismiss with a copy of the county clerk's notice of a judgment in his favor in another action filed by Ramin, he did not submit a copy of the judgment itself with the motion. The judgment does not otherwise appear in the record. Nor does the record include any notice of hearing or written ruling by the county court on Banks's motion to dismiss.

During the trial de novo, Ramin presented the testimony of its owner, Juan Hernandez, on the issue of possession. Hernandez testified that Banks had stopped paying rent more than ten months before trial and owed $4,676 in unpaid rent.[1] Banks attempted to cross-examine Hernandez about Ramin's prior attempt to evict him, but the trial court interrupted that line of questioning, stating that the trial de novo was "about today, about what [Hernandez] testified here today. You may ask him questions about that but not another case[.]" Banks declined to ask any further questions, telling the county court that he could not prevail if he could not bring up the other case.

When it was time for Banks to present his defense, he became agitated in an exchange with the county court:

> THE COURT: What do you want to tell me about this?
>
> MR. BANKS: Your Honor, I'm not criticizing you, but there's no way I can win this case if I cannot bring up what has happened prior because this is a violation of res judicata. . . .
>
> THE COURT: This is a whole new trial.
>
> MR. BANKS: I know it is.
>
> THE COURT: Yes, it is.

[1] Although a ledger purporting to show Banks's rent payment history is included in the appellate record and marked as Ramin exhibit number 3, the ledger was never offered or admitted as evidence during the trial de novo.

MR. BANKS: I said I know. I didn't say I didn't. You're arguing with me and I said I knew it's a whole new trial.

. . .

THE COURT: I'm not arguing with you, sir. What would you like to tell me? They say that you owe $4,676.

. . .

MR. BANKS: That's absolutely not true.

THE COURT: What proof do you have that it's not true?

MR. BANKS: They had the police ramshacked my room. I have a police report showing they ramshacked my room.

THE COURT: I'm really not familiar with the term "ramshack." What does that mean?

MR. BANKS: That means they open the door and now the police go through my property without my permission and without a warrant.

The record indicates that a deputy present in the courtroom, apparently concerned by the tone of the exchange, moved nearer to the parties and the bench. Banks reacted:

MR. BANKS: I'm not trying to be hostile with you. Now that you figure I'm not gonna leave you calling your deputy on me for no reason.

THE COURT: Sir, sir, my deputy is in charge of security and —

MR. BANKS: Why would you —

THE COURT: — when you raise your voice to me, sir, he gets to stand up. That's what he gets to do. He's in charge of security. He's not my deputy. He's a

longstanding member of the Harris County Sheriff's Department. He's not my employee. I don't have an employee.

MR. BANKS: For my protection I would like to leave. I did nothing to him —

THE COURT: Sir, no, we're not doing that. You're not going to — he's standing five feet away from you. He's standing just as close to Mr. Hernandez [a witness] and Ms. Higginbotham [appellee's counsel] as he is to you. So, no, you're not going to try and imply that you're being intimidated because he's just standing there quietly which is his prerogative as the chief person in charge of security in this courtroom. I don't tell him what to do. He's a sworn law enforcement officer. He does what he feels is necessary to keep law and order in this courtroom.

Now, I'm asking you and you're diverting from the question I asked you which is: What proof do you have that you do not owe the $4,676 of rent that they say you owe? That's the only question I've asked you.

MR. BANKS: At this point in time, none.

THE COURT: Okay. Is there anything else?

MR. BANKS: No.

At the end of the trial de novo, the county court rendered a judgment awarding Ramin possession of the room Banks rented, damages equal to the amount of unpaid rent, attorney's fees, and court costs.

Discussion

Banks raises six issues on appeal. We do not reach the merits of any of these issues, however, because the alleged errors about which Banks complains are not properly presented for our review. Banks's first two issues and his fifth issue—respectively, his complaints that the underlying action is precluded by the doctrine of res judicata, retaliatory, and a violation of due process—are waived because he did not obtain any adverse rulings from the county court on those issues. His third and fourth issues—regarding the county court's alleged refusal to consider evidence—are waived because he did not present any evidence for the county court to consider. And, his sixth issue— alleging a conspiracy between Ramin and the Houston Police Department—was outside the scope of the forcible detainer action in the county court.

To properly present a complaint for appellate review, an appellant must undertake certain actions in the trial and appellate courts. The appellant must first preserve the error in the trial court, as shown by a record establishing that (1) he made the complaint to the trial court by a timely request, objection, or motion and (2) the trial court ruled on or refused to rule on the request, objection, or motion. TEX. R. APP. P. 33.1(a); *see Nicholson v. Fifth Third Bank*, 226 S.W.3d 581, 583 (Tex. App.—Houston [1st Dist.] 2007, no pet.) ("It is the burden of the appellant to bring forward a sufficient record to show the error committed by the trial court.").

The appellant then must present his complaint to the appellate court in accordance with the appellate rules, which require the appellant to include in his brief "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); *see Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 284–85 (Tex. 1994) (discussing "long-standing rule" that inadequate briefing results in waiver). These rules apply equally to pro se litigants and to those represented by counsel. *Wheeler v. Green*, 157 S.W.3d 439, 444 (Tex. 2005) (stating that "pro se litigants are not exempt from the rules of procedure," and warning that having "two sets of rules—a strict set for attorneys and a lenient set for pro se parties—might encourage litigants to discard their valuable right to the advice and assistance of counsel"). "Pro se litigants," like Banks, "are held to the same standards as licensed attorneys and must comply with all applicable laws and rules of procedure." *Hope's Fin. Mgmt. v. Chase Manhattan Mortg. Corp.*, 172 S.W.3d 105, 107 (Tex. App.—Dallas 2005, pet. denied).

Banks's first issue—complaining that this action is barred by res judicata—is waived. Res judicata is an affirmative defense that prevents the re-litigation of a claim or cause of action that has been finally adjudicated in a prior lawsuit. *Barnes v. United Parcel Serv., Inc.*, 395 S.W.3d 165, 173 (Tex. App.—Houston [1st Dist.] 2012, pet. denied). Here, although Banks sought to elicit testimony about Ramin's prior lawsuit, Banks did not specifically urge the county court to rule on his motion

to dismiss or object to a refusal to rule, as was required to preserve the issue for our review. TEX. R. APP. P. 33.1(a)(2); *Immobiliere Jeuness Establissement v. Amegy Bank Nat'l Assoc.*, 525 S.W.3d 875, 884 (Tex. App.—Houston [14th Dist.] 2017, no pet.) ("To preserve a complaint for appellate review when a trial court fails to expressly or implicitly rule on a party's timely request, objection, or motion, the party generally must object to the court's refusal to rule."); *see Martin v. Comm. Metals Co.*, 138 S.W.3d 619, 623 (Tex. App.—Dallas 2004, no pet.) (holding party waives issues contained in motions by not obtaining ruling on motions or objecting to refusal to rule). Even had Banks preserved this issue, the record would not support a holding on res judicata because it does not include a copy of the judgment on the merits in Ramin's prior lawsuit, which is an essential element of the affirmative defense.[2] *See Igal v. Brightstar Info. Tech. Grp., Inc.*, 250 S.W.3d 78, 86 (Tex. 2008)

[2] To his reply brief and a separately filed "brief addendum," Banks attached a copy of a judgment dismissing a prior action brought against him by Ramin for want of prosecution, as well as copies of numerous other documents that he contends should have been included in the appellate record. But documents attached to a brief as an exhibit or appendix that are not included in the appellate record cannot be considered on appeal. *See Garcia v. Sasson*, 516 S.W.3d 585, 591 (Tex. App.—Houston [1st Dist.] 2017, no pet.) ("[D]ocuments attached as appendices to briefs do not constitute part of the record of the case and cannot be considered by this Court on appeal."); *Hogg v. Lynch, Chappell & Alsup, P.C.*, 480 S.W.3d 767, 773 (Tex. App.—El Paso 2015, no pet.) ("Documents attached to a brief as an exhibit or appendix, but not appearing in the appellate record, cannot be considered on appellate review."). In addition, a dismissal for want of prosecution generally is not an adjudication on the merits that operates as a bar to subsequent lawsuits. *See Attorney General of Tex. v. Rideaux*, 838 S.W.2d 340, 341–42 (Tex. App.—Houston [1st Dist.] 1992, no writ).

(instructing that affirmative defense of res judicata requires proof of prior final judgment on merits by court of competent jurisdiction).

Likewise, Banks's second issue asserting that the underlying action is retaliatory in nature is waived. Under the Property Code, landlord retaliation may be a defense for nonpayment of rent in a forcible detainer action. *See* TEX. PROP. CODE § 92.335 ("In an eviction suit, retaliation by the landlord under Section 92.331 is a defense and a rent deduction lawfully made by the tenant under this chapter is a defense for nonpayment of the rent to the extent allowed by this chapter."). But Banks did not present any evidence of retaliation or ask the county court to consider in any way whether his failure to make rent payments was excused by the Property Code. Accordingly, nothing is presented for our review. *See* TEX. R. APP. P. 33.1(a).

Banks's third issue raising evidentiary error also is not properly presented. Banks does not identify the specific evidence he contends was erroneously excluded and, thus, has not adequately briefed the issue. *See* TEX. R. APP. P. 38.1(i); *Coleman v. Progressive Cty. Mut. Ins. Co.*, No. 01-16-00448-CV, 2017 WL 3184753, at *1 (Tex. App.—Houston [1st Dist.] July 27, 2017, no pet.). Moreover, the record does not show that the county court actually excluded evidence. To the contrary, the county court informed Banks that he was required to present any documents or testimony he wished to be considered at the trial de novo and, at least six times, invited him to do so. Banks declined those invitations.

Banks's decision not to present evidence during the trial de novo also precludes our consideration of his fourth complaint regarding the county court's alleged failure to account for nearly $1,000 in late fees charged by Ramin. Although Banks disputed at trial whether he owed any rent at all, the record does not reflect that he asked the trial court to reduce the judgment for unaccounted-for late fees or that the county court denied such a request. The issue therefore is waived. *See* TEX. R. APP. P. 33.1(a).

With regard to Banks's fifth issue regarding an alleged deprivation of due process, the record nowhere reflects that Banks asked the county court to leave the courtroom during the trial de novo to seek legal counsel or that the county court denied such a request. Thus, Banks did not preserve this issue for appellate review. *See* TEX. R. APP. P. 33.1(a); *cf. In re B.L.D.*, 113 S.W.3d 340, 350 (Tex. 2003) (acknowledging that absent recognized exception, constitutional complaint is waived if not properly preserved in trial court).

Finally, to the extent that Banks argues in his sixth issue either that Ramin should be liable for conspiring with the Houston Police Department to conduct an unlawful search of his residence or that an unlawful search precluded a judgment against him in this case, that issue was not properly before the county court in this forcible detainer action. A forcible detainer action is a special proceeding created to provide a speedy, simple, and inexpensive means for resolving the question of the

right to possession of premises. *See Fontaine v. Deutsche Bank Nat'l Trust Co.*, 372 S.W.3d 257, 259 (Tex. App.—Dallas 2012, pet. dism'd w.o.j.). Claims unrelated to possession, such as counterclaims and claims against third parties, are not permitted in a forcible detainer action and must be brought in a separate lawsuit. *See Tehuti v. Bank of N.Y. Mellon Trust Co.*, 517 S.W.3d 270, 274–75 (Tex. App.—Texarkana 2017, no pet.). Simply put, because the lawfulness of any search of Banks's residence was not properly before the county court in this forcible detainer action, we cannot address it on appeal. *See id.*

Conclusion

We affirm the trial court's judgment.

Sarah Beth Landau
Justice

Panel consists of Justices Keyes, Higley, and Landau.