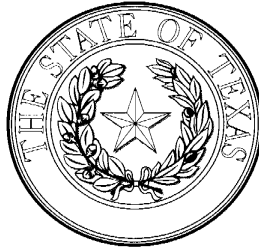


Opinion issued August 10, 2021



In The
Court of Appeals
For The
First District of Texas

NO. 01-19-00650-CV

JOSEPH C. CARABOTTA, Appellant

V.

JOSEPH M. BERNS, Appellee

**On Appeal from the County Court at Law
Waller County, Texas
Trial Court Case No. C19-047**

MEMORANDUM OPINION

This is an appeal in a forcible detainer suit. Appellant, Joseph C. Carabotta, appeals from the county court at law's July 25, 2019 judgment awarding possession of the disputed residential premises to appellee Joseph M. Berns. Carabotta failed to

post appellate security, and Berns took possession of the premises pursuant to a writ of possession executed on September 5, 2019.

“An action for forcible detainer is intended to be a speedy, simple, and inexpensive means to obtain immediate possession of property.” *Marshall v. Hous. Auth. of City of San Antonio*, 198 S.W.3d 782, 787 (Tex. 2006); *see Hong Kong Dev., Inc. v. Nguyen*, 229 S.W.3d 415, 434 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (op. on reh’g). “Judgment of possession in a forcible detainer action is not intended to be a final determination of whether the eviction is wrongful; rather, it is a determination of the right to immediate possession.” *Marshall*, 198 S.W.3d at 787; *see* TEX. PROP. CODE § 24.008 (a suit for forcible detainer “does not bar a suit for trespass, damages, waste, rent, or mesne profits”). “The sole issue to be determined in a forcible detainer action is the entitlement to actual and immediate possession, and the merits of the title shall not be adjudicated.” *Black v. Washington Mut. Bank*, 318 S.W.3d 414, 416 (Tex. App.—Houston [1st Dist.] 2010, pet. dism’d w.o.j.).

Because the only issue in a forcible detainer action is the right to possession of the premises, an appeal in a forcible detainer action becomes moot when the appellant ceases to have actual possession of the property, unless the appellant has a potentially meritorious claim of right to current, actual possession. *See Marshall*, 198 S.W.3d at 787 (holding appeal in forcible detainer action was moot because

lease had expired and tenant presented no basis for claiming right to possession after expiration date).

Carabotta claims a right to possession based on a temporary residential lease that was incorporated into a contract for sale of the leased premises. The lease provided for rent of \$1 per day. He contends that he had a right to immediate possession of the premises because the lease has not terminated.

The termination paragraph of the lease states:

This lease terminates upon (a) closing and funding of the sale under the Contract, (b) termination of the Contract prior to closing, (c) Tenant's default under this Lease, or (d) Tenant's default under the Contract, whichever occurs first. Upon termination other than by closing and funding the sale, Tenant shall surrender possession of the property.

The sales contract did not specify a date for closing on the sale.

At trial, Berns testified that Carabotta never paid rent, and Carabotta testified that he paid in cash but never got a receipt. The trial court was entitled to believe Berns and disbelieve Carabotta's testimony about payment of rent. *See City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005) (factfinder determines credibility of witnesses and "may choose to believe one witness and disbelieve another"); *Bowman v. Stephens*, 569 S.W.3d 210, 223 (Tex. App.—Houston [1st Dist.] 2018, no pet.) ("In a bench trial, the trial court determines the credibility of the witnesses and the weight to be given their testimony."). Thus, the trial court could have

concluded that Carabotta was in default of the lease and not entitled to immediate possession.

In the alternative, the trial court could have concluded that Carabotta was a tenant at will because the lease was for an uncertain period of time. *See Holcombe v. Lorino*, 79 S.W.2d 307, 310 (1935) (holding that lease of uncertain duration creates tenancy at will); *1320/1390 Don Haskins, Ltd. v. Xerox Com. Sols., LLC*, 584 S.W.3d 53, 68 (Tex. App.—El Paso 2018, pet. denied) (same); *Effel v. Rosberg*, 360 S.W.3d 626, 630 (Tex. App.—Dallas 2012, no pet.) (same); *Providence Land Servs., LLC v. Jones*, 353 S.W.3d 538, 542 (Tex. App.—Eastland 2011, no pet.) (same). “Because tenants at will remain in possession with their landlords’ consent, their possession is lawful, but it is for no fixed term, and the landlords can put them out of possession at any time.” *Coinmach Corp. v. Aspenwood Apt. Corp.*, 417 S.W.3d 909, 915 (Tex. 2013). Berns posted notice to vacate and proceeded with the underlying forcible detainer suit. Thus, the trial court could have concluded that Carabotta was a tenant at will who was not entitled to immediate possession.

The record demonstrates that Carabotta did not supersede the judgment, a writ of possession was executed, and Carabotta is no longer in possession of the premises at issue in the underlying forcible detainer action. We notified the parties of our intent to dismiss for want of jurisdiction and gave the parties an opportunity to respond. *See* TEX. R. APP. P. 42.3(a). We conclude that Carabotta has no potentially

meritorious claim of right to current, actual possession of the property, and we hold that we lack jurisdiction over this appeal.

We dismiss the appeal for want of jurisdiction.

Peter Kelly
Justice

Panel consists of Justices Kelly, Goodman, and Countiss.