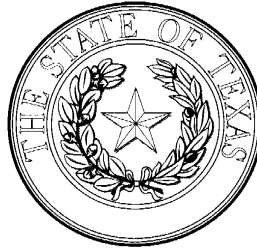


Opinion issued October 5, 2021



In The
Court of Appeals
For The
First District of Texas

NO. 01-19-00686-CV

K&B PROPERTIES, LP, Appellant
V.
ABEL CASTRO, Appellee

On Appeal from the 80th District Court
Harris County, Texas
Trial Court Case No. 2018-38810

MEMORANDUM OPINION

K&B Properties, LP, sued Abel Castro to quiet title and for trespass to try title. K&B Properties argued its quitclaim deed to the disputed property was superior to Castro's claim through a contract for deed and Castro's claim should be quieted. After a bench trial, the trial court rendered judgment in favor of Castro, finding that

K&B Properties had no interest in or title to the property, Castro had established adverse possession of the property, and that adverse possession had been tried by consent. In three issues, K&B Properties argues on appeal that: (1) K&B Properties should have title to the property; (2) Castro did not establish the elements of adverse possession; and (3) adverse possession was not tried by consent. We reverse and render.

BACKGROUND

In 2003, Abel Castro signed a contract for deed with Beltway Trucking, Inc. Guillermo Chavana, then-president of the company, signed the contract on its behalf. Under the contract for deed, Castro was allowed to live on the property, and in exchange, Castro agreed to pay the taxes on the property and make monthly payments directly to Laredo National Bank until Castro had paid the full purchase price of the property. At the time, Laredo National Bank held a vendor's lien on the property. The contract for deed was recorded.

Beltway Trucking changed owners in 2008, and the new owner, Leobardo Revilla, paid Laredo National Bank a lump sum of about \$10,000 to satisfy the remainder of the bank's lien on the property. When Castro attempted to make his monthly payment to Laredo National Bank around that time, the bank refused his payment because the balance had already been paid. Castro stopped making monthly payments but continued living on and paying taxes on the property. Revilla did not

contact Castro to discuss changing or terminating the contract, nor did Revilla assert that Castro was in default or take any steps to foreclose on the property.

Castro was still living on the property when, in 2018, Beltway Trucking sued Castro to quiet title and for trespass to try title. Shortly after filing suit, Beltway Trucking sold the property to K&B Properties. Beltway Trucking issued a quitclaim deed for the property to K&B Properties and substituted K&B Properties as plaintiff in the lawsuit. Throughout the bench trial, Castro maintained that he was entitled to title under the contract for deed because he paid the taxes on the property and continued making payments until the bank refused.

Following the bench trial, Castro requested leave to amend his answer to add a new affirmative defense, adverse possession. The trial court granted leave to amend and rendered judgment that K&B Properties had no title to or interest in the property, the issue of adverse possession had been tried by consent, and Castro established his claim of adverse possession and was entitled to title to the property. K&B Properties now appeals.

DISCUSSION

In three points of error, K&B Properties challenges the trial court's findings. K&B Properties' brief is ambiguous as to whether K&B Properties raises factual or legal sufficiency points of error. "When the party's brief was ambiguous, we and other courts of appeals have looked to a party's prayer for relief to determine what

standard of review to apply.” *Benavente v. Granger*, 312 S.W.3d 745, 747 (Tex. App.—Houston [1st Dist.] 2009, no pet.); *see also* Robert W. Calvert, ‘*No Evidence*’ and ‘*Insufficient Evidence*’ *Points of Error*, 38 TEX. L. REV. 361, 372 (1960) (“If the language of a point of error leaves a [court] in doubt . . . , the Court should resolve the doubt by looking to the procedural predicate for the point, the argument under the point, and the prayer for relief.”). Here, although the brief recites the factual sufficiency standard of review and the prayer for relief seeks remand, each individual point of error raises a no-evidence argument and seeks reversal. We focus on the individual points of error and construe the first two as legal sufficiency or no-evidence points of error; trial by consent, as discussed below, is reviewed for abuse of discretion.

K&B Properties’ appeal raises three issues. First, K&B Properties contends there was no evidence to support the trial court’s finding that K&B Properties had no title to or interest in the property. Second, K&B Properties contends there was no evidence to support the trial court’s finding that Castro established the claim of adverse possession. Finally, K&B Properties contends the trial court erred in finding the issue of adverse possession was tried by consent.

Trial by Consent

In its third point of error, K&B Properties argues the trial court erred in finding the issue of adverse possession was tried by consent.

1. Applicable Law

An issue is tried by consent when both parties present evidence on an issue and the issue is developed during trial without objection. *See Ingram v. Deere*, 288 S.W.3d 886, 893 (Tex. 2009). Trial by consent is intended for the “exceptional case” in which it “clearly appears from the record as a whole” that the parties tried an unpleaded issue—it should be applied with care and never in a doubtful situation. *Compass Bank v. MFP Fin. Servs., Inc.*, 152 S.W.3d 844, 854 (Tex. App.—Dallas 2005, pet. denied). “[A]n issue is not tried by consent merely because evidence regarding it is admitted.” *Bos v. Smith*, 556 S.W.3d 293, 306–07 (Tex. 2018). “We must examine the record not for evidence of the issue, but rather for evidence of *trial* of the issue.” *Id.* at 307 (quoting *Sage Street Assocs. v. Northdale Constr. Co.*, 863 S.W.2d 438, 446 (Tex. 1993)). “The doctrine of trial by consent does not apply when the evidence of an unpleaded matter is relevant to the pleaded issues because it would not be calculated to elicit an objection.” *Id.* (quoting *Moneyhon v. Moneyhon*, 278 S.W.3d 874, 879 n.6 (Tex. App.—Houston [14th Dist.] 2009, no pet.)). Whether an issue was tried by consent is reviewed for abuse of discretion. *Compass Bank*, 152 S.W.3d at 856.

2. Analysis

Castro did not plead title by adverse possession before the bench trial. Accordingly, the trial court’s ruling that Castro proved title by adverse possession

cannot stand unless the trial court acted within its discretion by ruling the issue was tried by consent.

At trial, Castro did not argue adverse possession. He testified that he had lived on the property since 2003, paid taxes on the property, and believed he should have title to the property. This evidence may have been relevant to an adverse possession claim, because proving adverse possession requires six elements: “(1) actual possession of the disputed property; (2) that is open and notorious; (3) that is peaceable; (4) under a claim of right; (5) that is adverse or hostile to the claim of the owner; and (6) consistent and continuous for the duration of the statutory period.” *Dyer v. Cotton*, 333 S.W.3d 703, 710 (Tex. App.—Houston [1st Dist.] 2010, no pet.). But the evidence was also relevant to Castro’s argument at trial that he fully performed the contract for deed: Castro claimed that he paid taxes as required by the contract for deed, and that he believed he should have title to the property because he had been living on it and making monthly payments under the contract for deed. His testimony throughout trial focused on making payments under the contract for deed and fulfilling his obligations under it; he never asserted a claim to the property based on anything other than making payments under the contract for deed. Castro’s testimony was not calculated to put K&B Properties’ lawyer on notice that adverse possession was in play and that he needed to object.

The issue of adverse possession was not fully developed or even mentioned during trial. Whether adverse possession was tried by consent here is doubtful at best, and trial by consent should not be applied in doubtful cases. *See Compass Bank*, 152 S.W.3d at 854. We hold that the trial court abused its discretion in ruling that adverse possession was tried by consent.

We sustain K&B Properties' third point of error.

Adverse Possession

In its second point of error, K&B Properties contends there was no evidence to support the trial court's finding that Castro established adverse possession.

We have already determined Castro's affirmative defense of adverse possession was not pleaded before trial or tried by consent. Therefore, the issue is waived. *See RE/MAX of Tex., Inc. v. Katar Corp.*, 961 S.W.2d 324, 327–28 (Tex. App.—Houston [1st Dist.] 1997, pet. denied) (where an affirmative defense is not pleaded or tried by consent, it is waived, and the trial court has no authority to include a finding on that issue in its judgment).

We sustain K&B Properties' second point of error.

K&B Properties' Claim to Title

We turn finally to K&B Properties' first point of error, challenging the legal sufficiency of the evidence to support the trial court's finding that K&B Properties has no right, title, estate, lien, or interest whatever in or to the property.

1. Standard of Review

When, as here, a trial court does not make findings of fact and conclusions of law to support its ruling after a bench trial, we infer all findings necessary to support the judgment. *Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 52 (Tex. 2003). The judgment of the trial court must be affirmed if it can be upheld on any legal theory that is supported by the evidence. *In re W.E.R.*, 669 S.W.2d 716, 717 (Tex. 1984) (per curiam). Because the appellate record includes the reporter’s and clerk’s records, the trial court’s implied findings are not conclusive and may be challenged for legal and factual sufficiency. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002).

“When a party challenges the legal sufficiency of an adverse finding on which he had the burden of proof at trial, he must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue.” *Ferrara v. Nutt*, 555 S.W.3d 227, 235 (Tex. App.—Houston [1st Dist.] 2018, no pet.). “In conducting this review, we examine the record for evidence that supports the trial court’s finding ‘while ignoring all evidence to the contrary.’” *Id.* (quoting *Nguyen v. Yovan*, 317 S.W.3d 261, 270 (Tex. App.—Houston [1st Dist.] 2009, pet. denied)). “If no evidence supports the finding, we then examine the entire record to determine if the contrary proposition is established as a matter of law.” *Id.* “We will sustain the legal

sufficiency challenge ‘only if the contrary proposition is conclusively established.’” *Id.* (quoting *Nguyen*, 317 S.W.3d at 270).

2. *Applicable Law*

K&B Properties’ first underlying claim is a claim to quiet title. A claim to quiet title allows a plaintiff to remove a cloud on the plaintiff’s title. *See Hahn v. Love*, 321 S.W.3d 517, 531 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). “A cloud on title exists when an outstanding claim or encumbrance is shown, which on its face, if valid, would affect or impair the title of the owner of the property.” *Id.* (quoting *Angell v. Bailey*, 225 S.W.3d 834, 838 n.6 (Tex. App.—El Paso 2007, no pet.)). To remove that cloud, “the plaintiff must prove, as a matter of law, right, title, or ownership in himself with sufficient certainty to enable the court to see that he has a right of ownership and that the alleged adverse claim is a cloud on the title that equity will remove.” *Id.* at 531. The elements of a suit to quiet title are: (1) the plaintiff has an interest in a specific property; (2) title to the property is affected by a claim by the defendant; and (3) the defendant’s claim, though facially valid, is invalid or unenforceable. *Montenegro v. Ocwen Loan Servicing, LLC*, 419 S.W.3d 561, 572 (Tex. App.—Amarillo 2013, pet. denied).

K&B Properties asserts its title to the property through a quitclaim deed from Beltway Trucking. “A quitclaim deed conveys any title, interest, or claim of the grantor, but it does not profess that the title is valid nor does it contain any warrant

or covenants of title.” *Diversified, Inc. v. Hall*, 23 S.W.3d 403, 407 (Tex. App.—Houston [1st Dist.] 2000, pet. denied). “By itself, [a quitclaim deed] does not establish any title in those holding the deed, but merely passes the interest of the grantor in the property.” *Rogers v. Ricane Enters., Inc.*, 884 S.W.2d 763, 769 (Tex. 1994).

In this case, the cloud on K&B Properties’ title was Castro’s prior contract for deed. A contract for deed is an agreement by a seller to deliver a property deed to the purchaser once certain conditions have been met. *Graves v. Diehl*, 958 S.W.2d 468, 470 (Tex. App.—Houston [14th Dist.] 1997, no pet.). These contracts typically provide that the purchaser is entitled to immediate possession of the property, but title remains with the seller until the purchase price is paid in full. *Id.* at 471. Under a contract for deed, the purchase price is usually paid in installments over a course of years. *Id.* On signing a contract for deed, the purchaser acquires an equitable right to make payments on the property; the seller retains legal title to the property subject to the purchaser’s equitable right. *See Gaona v. Gonzales*, 997 S.W.2d 784, 786–87 (Tex. App.—Austin 1999, no pet.).

In response to abuse by sellers in these types of arrangements, the legislature enacted statutory protections for purchasers under residential contracts for deed. *See Flores v. Millennium Interests, Ltd.*, 185 S.W.3d 427, 435 (Tex. 2005) (Wainwright, J., concurring); *see also* TEX. PROP. CODE §§ 5.061–86 (establishing procedural

requirements for contracts for deed, including notice and disclosure requirements, remedies upon default, and purchaser's right to cancel the contract). Subchapter D, Chapter 5, Texas Property Code, provides, among other protections for purchasers, that a recorded contract for deed is equivalent to a deed with a vendor's lien in the amount of the unpaid contract price and that the vendor's lien may be enforced by a foreclosure sale or by judicial foreclosure. TEX. PROP. CODE § 5.079(a).

K&B Properties' second underlying claim is for trespass to try title to establish title to and possession of the property. A trespass-to-try-title claim is a "procedure by which claims to title or the right of possession may be adjudicated." *Rogers*, 884 S.W.2d at 768; *see also* TEX. PROP. CODE § 22.001(a) (a trespass-to-try-title action is "the method of determining title to lands, tenements, or other real property"). When, as here, a defendant pleads "not guilty" to a claim of trespass to try title, the defendant "admits possession of the subject property and claims superior title." *Brumley v. McDuff*, 616 S.W.3d 826, 829 n.4 (Tex. 2021). "The burden of proof is then on the plaintiff to establish that the plaintiff has a title superior to the defendant's title." *Id.* The plaintiff may prove title by establishing a "superior title out of a common source." *Rogers*, 884 S.W.2d at 768. A plaintiff "must recover on the strength of his own title and not on the weakness of his opponent's title." *Trevino v. Munoz*, 583 S.W.2d 840, 842 (Tex. App.—San Antonio 1979, no writ).

3. Analysis

K&B Properties at trial relied on Castro's alleged default under the contract for deed to both prove his claim under the contract for deed invalid and to establish superior title. The evidence is undisputed that Castro stopped making payments under the contract for deed around 2008 or 2009. Regardless of the cause, Castro was in default under the terms of the contract for deed. *See* TEX. PROP. CODE § 5.061 (defining "default" for purposes of Subchapter D as failure to: (1) make a timely payment; or (2) comply with a term of an executory contract).

Castro's recorded contract for deed is the same as a deed with a vendor's lien.¹ *See* TEX. PROP. CODE § 5.079(a). Ordinarily, a seller with a vendor's lien has a choice of remedies to enforce a vendor's lien on the purchaser's default: a seller may sue for his money and foreclose his lien, he may rescind the contract and take possession, or he may, as Beltway Trucking and then K&B Properties did here, sue to recover title and possession. *See Walton v. First Nat'l Bank of Trenton, Trenton, Tex.*, 956 S.W.2d 647, 652 (Tex. App.—Texarkana 1997, pet. denied). However, the legislature in enacting statutory protections for purchasers under residential contracts for deed in Subchapter D, Chapter 5, Texas Property Code, provided only

¹ Because Beltway Trucking was selling the property to Castro, Beltway Trucking held the vendor's lien; the fact that Laredo National Bank once held a vendor's lien on the property that had been fully satisfied long before trial is not relevant to our analysis.

one remedy on the purchaser's default under a recorded contract for deed: foreclosure, either through a foreclosure sale or judicial foreclosure. TEX. PROP. CODE § 5.079(a) ("A recorded [contract for deed] shall be the same as a deed with a vendor's lien. The vendor's lien . . . may be enforced by foreclosure sale under Section 5.066 or by judicial foreclosure."). Until Castro's equitable rights under the contract were formally terminated through foreclosure under Subchapter D, his equitable rights to possession of the property and to perform the contract for deed remained valid. A residential contract for deed does not simply lapse on the purchaser's default; the seller must pursue the statutory remedy of foreclosure to terminate the contract. *See Bullard v. Stifflemire*, No. 10-17-00029-CV, 2019 WL 1966932, at *2 (Tex. App.—Waco May 1, 2019, no pet.) (mem. op.) ("Indeed, our review of case law and the Texas Property Code relating to contracts for deed has found no authority for the concept that a contract for deed can lapse independent of its terms for default and separate from the requirements to terminate a contract for deed as set forth in the Property Code.").

The statutory remedy of foreclosure under Subchapter D requires the seller to give the purchaser notice and the opportunity to cure the default. TEX. PROP. CODE § 5.066(b) ("The seller shall notify a purchaser of a default under the contract and allow the purchaser at least 60 days after the date notice is given to cure the default."). If the ordinary choice of remedies applied to a seller of a residential

contract for deed, every seller under a residential contract for deed could sue the purchaser for trespass to try title to obtain possession after the purchaser's first missed payment and completely circumvent Subchapter D's notice and cure protections, rendering them meaningless. To give effect to Subchapter D, a seller of a contract for deed subject to that subchapter must rely on more than the purchaser's default to invalidate a contract for deed and obtain possession of the property. *See Jackson v. Ranger Dev. Co.*, No. 01-01-00611-CV, 2002 WL 31087161, at *4 (Tex. App.—Houston [1st Dist.] Sept. 19, 2002, no pet.) (not designated for publication) (holding seller was not entitled to forfeiture of contract for deed or possession of property where seller did not give notice complying with Subchapter D).

Bearing in mind the purpose of Subchapter D, we first consider K&B Properties' claim to quiet title. In performing a legal sufficiency review, we examine the record for evidence that supports the trial court's finding and ignore all evidence to the contrary. *Ferrara*, 555 S.W.3d at 235. To succeed on this claim, at trial K&B Properties needed to establish: (1) it had an interest in a specific property; (2) title to the property was affected by a claim by Castro; and (3) Castro's claim, though facially valid, was invalid or unenforceable. *Montenegro*, 419 S.W.3d at 572. K&B Properties claimed title to and the right of possession of the property through the quitclaim deed from Beltway Trucking, which transferred only the interest or title that Beltway Trucking held. *See Rogers*, 884 S.W.2d at 769. K&B Properties'

interest was affected by Castro's contract for deed with Beltway Trucking, executed years earlier, which allowed Beltway Trucking to retain legal title but granted Castro the immediate right of possession of the property. *See Graves*, 958 S.W.2d at 470–71. Therefore, to succeed on this claim, K&B Properties needed to prove that Castro's contract for deed was invalid or unenforceable. K&B Properties relied on the fact that Castro defaulted under the contract to prove its invalidity. K&B Properties presented no evidence that either it or Beltway Trucking successfully terminated Castro's recorded contract for deed through foreclosure (following notice and the opportunity to cure) under Subchapter D; his contract did not lapse simply because he defaulted. *See Bullard*, 2019 WL 1966932, at *2. Therefore, Castro's right of possession of the property and right to perform the contract for deed were not terminated. K&B Properties failed to prove the cloud on its title, Castro's contract for deed, was invalid or unenforceable. *See Montenegro*, 419 S.W.3d at 572. Therefore, on appeal, K&B Properties has not established all vital facts in support of this issue.

We next consider K&B Properties' trespass-to-try-title claim. On this claim, K&B Properties could recover "by proving a superior title out of a common source." *See Rogers*, 884 S.W.2d at 768. Beltway Trucking was the common source of Castro's and K&B Properties' interests in the property. At trial, K&B Properties produced the quitclaim deed from Beltway Trucking, which transferred only the

interest or title that Beltway Trucking held. *See id.* at 769. The validity of the quitclaim deed has not been disputed. Castro produced the recorded contract for deed he signed with Beltway Trucking, which allowed Beltway Trucking to retain legal title but granted Castro the immediate right of possession of the property. *See Graves*, 958 S.W.2d at 471.

Under the contract for deed, Beltway Trucking held legal title to the property subject to Castro's rights to possession of the property and to fully perform the contract for deed. *See Graves*, 958 S.W.2d at 471; *Gaona*, 997 S.W.2d at 786–87. Beltway Trucking, through the quitclaim deed, transferred legal title to K&B Properties, but could not transfer more than it owned. Beltway Trucking did not transfer the right of possession of the property. There is no evidence that Beltway Trucking or K&B Properties took any affirmative steps to divest Castro of his right of possession using the only remedy provided by Subchapter D for the default of a recorded contract for deed: foreclosure following notice and the opportunity to cure. Until Castro's right of possession of the property under the contract for deed is formally terminated through Subchapter D's procedures or until Castro establishes his right to equitable title by fully performing the contract for deed, his superior right of possession remains.

K&B Properties has provided conclusive evidence of its superior claim to *legal* title of the property, subject to, as Beltway Trucking's legal title was, Castro's

right of possession; K&B Properties has established all vital facts in support of its claim to legal title to the property. K&B Properties has not conclusively proved its right of *possession* of the property.

The trial court concluded that K&B Properties has no right, title, estate, lien, or interest whatever in or to the property and vested title in Castro. We conclude that K&B Properties failed to establish ownership in itself “with sufficient certainty” to enable the trial court to remove the cloud on its title, but K&B Properties conclusively established legal title to the property. We also conclude that K&B Properties failed to establish all vital facts in support of its right of possession of the property at this time. As a result, the trial court should have entered judgment in favor of K&B Properties regarding legal title to the property but in favor of Castro regarding possession of the property. *See* TEX. R. CIV. P. 804 (“Upon the finding . . . in favor of the plaintiff for the whole or any part of the premises in controversy, the judgment shall be that the plaintiff recover of the defendant the title or possession, or both, as the case may be”); *see also Davidson v. Gelling*, 263 S.W.2d 940, 943–44 (Tex. 1954) (where plaintiffs in trespass-to-try-title action sued for both title and possession of land but established only title to the land subject to defendants’ easement, trial court’s judgment that plaintiffs take nothing should be reformed so as to award plaintiffs title to the land subject to defendants’ right to use land as provided by easement).

K&B Properties' final point of error is sustained in part and overruled in part.

CONCLUSION

We reverse the trial court's judgment as to its determination that adverse possession was tried by consent, that Castro established adverse possession, and that K&B Properties has no title to the property. We render judgment for K&B Properties as to legal title to the property but for Castro as to the right of possession of the property.

Gordon Goodman
Justice

Panel consists of Justices Goodman, Landau, and Countiss.