Opinion issued July 13, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00321-CV

LISA MONCERRATO SOTO, Appellant

V.

MARCUS KEITH PANTALION, Appellee

On Appeal from the County Civil Court at Law No. 2
Harris County, Texas
Trial Court Case No. 1147167

MEMORANDUM OPINION

This is an appeal from an order of eviction after Marcus Keith Pantalion brought a forcible detainer action against Lisa Moncerrato Soto. Soto, after an adverse judgment by the justice court, appealed to the county court at law for a de novo trial. After the trial, the county court entered a judgment awarding Pantalion

possession of the property, monetary damages, and injunctive relief. On appeal, Soto raises three issues, arguing that (1) the county court lacked subject matter jurisdiction to enter an eviction order, (2) the evidence at trial was legally insufficient to support the county court's judgment, and (3) the county court erred by awarding monetary damages and injunctive relief to Pantalion.

We affirm in part and reverse and remand in part.

Background

Pantalion and Soto were in a relationship and they had two young sons. Pantalion purchased a condominium unit in April 2013. Soto moved into Pantalion's condo the following year without a lease agreement. Her name was not on the deed or the mortgage.

Pantalion moved out of the condo and into his parents' home after he was arrested for domestic violence against Soto. Soto obtained a protective order against Pantalion, which prohibited him "from coming within 200 feet of [Soto's] place of residence." Soto and the children continued to live at the condo.

In December 2019, Pantalion filed a petition for eviction in the justice court, alleging a forcible detainer claim. He alleged that Soto was holding over after termination of her right to possession of the property. He specifically alleged that he allowed Soto to "use the property as her residence without a lease or rent" and that he provided Soto with a notice of termination and a notice to vacate on October 2,

2019. He noted that he mailed and posted the notice to vacate on the "exterior door" in a "properly labeled envelope" and that he provided notice on October 2, 2019. Pantalion sought a judgment that he was entitled to possession of the property, "attorney's fees, court costs, and such other and further relief to which [he] may be entitled." Following a hearing, the justice court entered a judgment for Pantalion. The justice court did not award Pantalion attorney's fees, court costs, or other relief. Soto appealed the judgment to the county court.

The county court held a de novo trial. Pantalion testified that he solely owned the condo and introduced copies of his warranty deed and Wells Fargo mortgage statement to show ownership. He testified that he paid all mortgage payments, homeowner's association fees, and household expenses. He testified that he did not enter into a lease agreement with Soto or require her to pay rent.

Pantalion also testified about a family court proceeding in which Soto claimed a legal right to remain in the property. Soto alleged that she was entitled to a one-half community property interest in the condo because she was informally married to Pantalion. Pantalion introduced an order from the family court finding that no informal marriage existed.

Pantalion testified that Soto caused him to incur HOA fines by violating deed restrictions while she was living in the condo. He presented three violation notices for complaints about a dangerous dog that lived on the property. He also presented

a cease-and-desist letter from a law firm for the violations. Pantalion testified that Soto had not reimbursed him for the HOA fines.

Pantalion testified that he incurred other expenses because Soto sold his personal property, including his grandfather clock and artwork, to "maintain[ ] her life" while she was "unemployed." He introduced Soto's online advertisements for sale of these items, along with pictures of the items.

Finally, Pantalion testified that he provided Soto with a notice to vacate the property before filing the forcible detainer suit. His attorney served Soto the notice to vacate because the protective order prohibited him from visiting the property. He testified that the notice to vacate was posted on the front door of his unit and sent by regular mail. Pantalion introduced pictures of a stamped envelope and sealed envelope affixed to a door, and the court admitted the pictures into evidence over Soto's hearsay objection.

Soto testified that she was entitled to remain in possession of the property. She introduced copies of the protective order and a temporary order in family court. In the protective order, the family court made a finding that Soto resides at the property and that "[Soto] will change her address upon findings from a future court that [Soto] does not reside" at the property. She testified that this finding meant that she was protected while living at the condo as her primary residence. She also testified that the family court made no findings that she did not have a right to

possession of the property or that she needed to vacate. On cross-examination, Soto testified that she understood that family courts have no authority to evict tenants.

The county court entered a judgment in favor of Pantalion, awarded him possession of the property, and ordered Soto to pay Pantalion any expenses due to HOA violations and to "cease sale of any items from the property."

Soto filed for bankruptcy, which was dismissed, reinstated, then dismissed again. Soto then moved to vacate the judgment and for new trial, which the county court denied. Soto appealed the county court's judgment. While this appeal was pending, Soto filed another bankruptcy petition.

Before we address the appellate issues, we must first address Soto's request for judicial notice.

Judicial Notice

In her statement of the case, Soto requests that we take judicial notice of multiple pleadings and court proceedings that are not included in the record, including her petition for protection, the Texas Attorney General's SAPCR[1] petition, and a previous forcible detainer action against Soto. Pantalion objects because these pleadings and the records from these proceedings were not included in the appellate record.

[1] Suit affecting the parent-child relationship. *See* TEX. FAM. CODE §§ 151.001–151.003; *In Interest of H.S.*, 550 S.W.3d 151, 152 (Tex. 2018).

Under Rule 34.1 of the Texas Rules of Appellate Procedure, evidence that is not in the appellate record is not properly before this Court. *See* TEX. R. APP. P. 34.1 (appellate record consists of clerk's record and reporter's record). We will not consider any materials outside of the appellate record, and judicial notice is improper in this case.[2] *See Tex. Windstorm Ins. Ass'n v. Jones*, 512 S.W.3d 545, 552 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

Subject Matter Jurisdiction

In her first issue, Soto contends that the county court lacked jurisdiction over the forcible detainer action because it could not determine possession without first determining title. Pantalion responds that Soto did not raise an issue of title because she failed to provide evidence showing that she had a legal interest in the condo.

A. Standard of review

Subject matter jurisdiction is essential to the authority of a court to decide a case. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553–54 (Tex. 2000). A court has the power to dispose of every issue once it acquires subject-matter jurisdiction. *Mladenka v. Mladenka*, 130 S.W.3d 397, 400 (Tex. App.—Houston [14th Dist.] 2004, no pet.). Whether a court has subject matter jurisdiction is a question of law

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[2] "As a general rule, appellate courts take judicial notice of facts outside the record only to determine jurisdiction over an appeal or to resolve matters ancillary to decisions which are mandated by law (e.g., calculation of prejudgment interest when the court renders judgment)." *SEI Bus. Sys., Inc. v. Bank One Tex., N.A.*, 803 S.W.2d 838, 841 (Tex. App.—Dallas 1991, no writ) (citing TEX. GOV'T CODE § 22.220(c)).

that we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

B. Applicable law

Jurisdiction over a forcible detainer action is expressly given to the justice court of the precinct where the property is located and, on appeal, to the county court for a trial de novo. *See* TEX. PROP. CODE § 24.004(a); TEX. GOV'T CODE § 27.031(a)(2); TEX. R. CIV. P. 510.10(c). A trial de novo is a new trial in which the entire case is presented as if there had been no previous trial. TEX. R. CIV. P. 510.10(c). The only issue a county court must adjudicate is the right to actual possession and not title. TEX. R. CIV. P. 510.3(e); *see Black v. Washington Mut. Bank*, 318 S.W.3d 414, 417 (Tex. App.—Houston [1st Dist.] 2010, pet. dism'd w.o.j.) ("[T]he justice court, and a county court on appeal, lack jurisdiction to resolve any questions of title beyond the immediate right to possession.").

A forcible detainer "action 'is intended to be a speedy, simple, and inexpensive means to obtain immediate possession of property.'" *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 919 (Tex. 2013) (quoting *Marshall v. Hous. Auth. of City of San Antonio*, 198 S.W.3d 782, 787 (Tex. 2006)). The judgment in a forcible detainer action is a final determination only of the right to immediate possession. *Id*. Thus, to prevail in a forcible detainer action, the plaintiff is not required to prove title, but is only required to present sufficient evidence of

ownership to demonstrate a superior right to immediate possession. TEX. R. CIV. P. 510.3(e); *Isaac v. CitiMortgage, Inc.*, 563 S.W.3d 305, 310 (Tex. App.—Houston [1st Dist.] 2018, pet. denied). If, however, an issue of title is so intertwined with the issue of possession that a court must resolve the title dispute before determining which party has a superior right to immediate possession, then the justice court and the county court lack jurisdiction to resolve the matter and must dismiss the case. *Yarbrough v. Household Fin. Corp. III*, 455 S.W.3d 277, 280 (Tex. App.—Houston [14th Dist.] 2015, no pet.). "A landlord-tenant relationship provides 'an independent basis on which the trial court could determine the issue of immediate possession without resolving the issue of title to the property.'" *Salazar v. HPA Tex. Sub 2016-1 LLC*, No. 01-19-00330-CV, 2020 WL 7702176, at *3 (Tex. App.—Houston [1st Dist.] Dec. 29, 2020, no pet. h.) (mem. op.) (quoting *Rice v. Pinney*, 51 S.W.3d 705, 712 (Tex. App.—Dallas 2001, no pet.)).

C. Analysis

Soto argues that her claim of joint ownership of the property through informal marriage during the SAPCR proceedings raised the issue of title to the property in the county court. She further argues that the court court's reliance on the finding that no informal marriage existed was improper because the family law court entered an interlocutory order that was not binding on the county court. Thus, she contends that the issues of title to the property and possession of the property are so intertwined

with the issue of possession that the county court should have resolved the title dispute before determining which party has a superior right to immediate possession of the property. We disagree.

Soto presented no evidence to support her claim that the right to immediate possession necessarily requires the resolution of a genuine title dispute. *See* TEX. R. CIV. P. 510.3(e); *Trimble v. Fed. Nat'l Mortgage Ass'n*, 516 S.W.3d 24, 28 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). As previously stated, we decline to take judicial notice of allegations from other legal proceedings that are unsupported by the appellate record. *See* TEX. R. APP. P. 34.1; *Jones*, 512 S.W.3d at 552. In contrast, Pantalion provided evidence showing that the 245th Judicial District Court found that no informal marriage existed between Pantalion and Soto. The court's ruling demonstrates that Soto could not legally claim a one-half community property interest in the condo. Soto testified that she did not appeal the family law court's ruling. Moreover, in its conclusion of law, the county court "reviewed the evidence submitted from the 245th District Court . . . and determined the issue had already been ruled upon." Therefore, Soto's claim was insufficient to raise a genuine title dispute. *See Ferrara v. Nutt*, 555 S.W.3d 227, 235–36 (Tex. App.—Houston [1st Dist.] 2018, no pet.) ("We will uphold conclusions of law if the judgment can be sustained on any legal theory supported by the evidence."); *see also Falcon v. Ensignia*, 976 S.W.2d 336, 338 (Tex. App.—Corpus Christi 1998, no pet.)

("Specific evidence of title dispute is required to raise an issue of a justice court's jurisdiction. Without the Falcons having presented specific evidence to raise a genuine title dispute, the jurisdiction of the court was never at issue.").

Soto asserts that the county court lacked jurisdiction because no landlord-tenant relationship existed between Pantalion and Soto. Relying on *Goodman-Delaney v. Grantham*, 484 S.W.3d 171, 174 (Tex. App.—Houston [14th Dist.] 2015, no pet.), Soto contends that "a landlord-tenant relationship by *itself* demonstrates that there is a title issue in a forcible detainer action that precludes [the] county court['s] jurisdiction." It is undisputed that the parties did not enter into a lease agreement. But a landlord-tenant relationship is not a prerequisite to jurisdiction. *See Yarbrough*, 455 S.W.3d at 280; *Salazar*, 2020 WL 7702176, at *4. And the lack of such a relationship does not establish a title issue. *See Salazar*, 2020 WL 7702176, at *4.

We note that Pantalion was not required to prove title. *Trimble*, 516 S.W.3d at 29. He only needed to show sufficient evidence of ownership to demonstrate his superior right to immediate possession. *Id*. Pantalion provided evidence to the county court showing that he solely owned the property. The warranty deed lists "Marcus K. Pantalion, a single man" as the grantee of the property. Similarly, the mortgage statement lists only "Marcus K. Pantalion" as the borrower. Soto did not challenge the validity of either Pantalion's deed or mortgage statement. *See Stroman*

v. Martinez, No. 14-13-01143-CV, 2015 WL 2090497, at *3 (Tex. App.—Houston [14th Dist.] May 5, 2015, no pet.) (mem. op.). Pantalion testified that he allowed Soto to reside at the property and provided evidence showing that he terminated her right to remain on the property in writing. The county court noted in its conclusions of law that "[p]roper superior right to title was proven via deed, testimony and evidence submitted to the court."

We conclude that Soto raised no genuine issue related to title in the courts below. Therefore, the justice court and the county court had jurisdiction over the forcible detainer action. *See Falcon*, 976 S.W.2d at 338; *Johnson v. Mohammed*, No. 03-10-00763-CV, 2013 WL 1955862, at *4 (Tex. App.—Austin May 10, 2013, pet. dism'd w.o.j.) (mem. op.) (determining that justice court had jurisdiction over forcible detainer action where occupant of property who did not sign a lease contract or pay rent and refused to vacate the property).

We overrule issue one.

Forcible Detainer Action

In her second issue, Soto contends that the evidence at trial was legally insufficient to support a forcible detainer claim. A tenant is subject to eviction if she refuses to surrender possession of real property after the landlord has lawfully terminated the tenant's right to possession. TEX. PROP. CODE § 24.002(a). To establish a superior right to immediate possession for a forcible detainer claim,

Pantalion had the burden of proving that (1) he owned the property, (2) Soto was either a tenant at will, tenant at sufferance, or a tenant or subtenant willfully holding over after the termination of the tenant's right of possession, (3) Pantalion gave proper notice to Soto to vacate the premises, and (4) Soto refused to vacate the premises. *Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 478 (Tex. 2017). Soto challenges the second and third elements. She argues that there is no evidence of a landlord-tenant relationship because the parties did not enter into a lease agreement. She also argues that Pantalion did not provide the requisite statutory notice showing that he delivered the notice to vacate at least three days before he filed the forcible detainer suit or that he mailed a copy of the notice by 5:00 p.m. on that same day.

In response, Pantalion argues that no prior lease is required to create a landlord-tenant relationship and that Soto was either a tenant at sufferance or a tenant at will. He further argues that he strictly complied with the statutory notice requirements and provided evidence of service at trial.

A. Standard of review

When an appellant challenges the legal sufficiency of the evidence supporting an adverse finding on which she did not have the burden of proof at trial, the appellant must demonstrate that there is no evidence to support the adverse finding. *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005). We review the evidence in the light most favorable to the trial court's ruling, crediting favorable evidence if

a reasonable factfinder could, and disregarding contrary evidence unless a reasonable factfinder could not. *Id*. "Anything more than a scintilla of evidence is legally sufficient to support the finding." *Formosa Plastics Corp. U.S.A. v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998).

More than a scintilla exists when the evidence would enable reasonable and fair-minded people to reach different conclusions. *Gunn v. McCoy*, 554 S.W.3d 645, 658 (Tex. 2018). By contrast, the record contains less than a scintilla when the evidence to prove a vital fact is "so weak as to do no more than create a mere surmise or suspicion." *Id*. (quoting *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003)). We will uphold conclusions of law on appeal if the judgment can be sustained on any legal theory the evidence supports. *Nguyen v. Yovan*, 317 S.W.3d 261, 267 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). Incorrect conclusions of law do not require reversal if the controlling findings of fact support the judgment under a correct legal theory. *Id.*

B. Landlord-tenant relationship

A lease is not necessarily required to establish a landlord-tenant relationship. The Texas Property Code authorizes a "landlord" to bring a forcible detainer action against a tenant to reclaim possession of real property. *See* TEX. PROP. CODE §§ 24.001–24.011. "Landlord" means an "owner . . . of a dwelling." *Id*. § 92.001(2). Pantalion testified that he purchased the property at issue and introduced a deed and

mortgage statement into evidence showing that he owned the property. Thus, Pantalion was a landlord, even though no lease agreement existed. Pantalion asserts that Soto was either a tenant at will or a tenant at sufferance.

There are two types of tenants in Texas: a holdover tenant at will and a holdover tenant at sufferance. *Coinmach Corp.*, 417 S.W.3d at 915 (citing TEX. PROP. CODE § 24.002(a)(2)). A holdover tenant at will has the landlord's consent to remain in possession of the property, and a landlord can put her "out of possession at any time." *Id*. A holdover tenant at sufferance, on the other hand, is "'[a] tenant who has been in lawful possession of property and wrongfully remains as a holdover after the tenant's interest has expired.'" *Id*. (quoting BLACK'S LAW DICTIONARY 1605 (9th ed. 2009)). In a tenancy at sufferance, the landlord may revoke consent and treat the tenant as a trespasser. *Id*. at 916; *see ICM Mortg. Corp. v. Jacob*, 902 S.W.2d 527, 530 (Tex. App.—El Paso 1994, writ denied) (tenant at sufferance is "merely an occupant in naked possession of property" and "is not in privity with the owner and possesses no interest capable of assignment").

Pantalion testified that he allowed Soto to move into his home without requiring her to pay rent or execute a lease agreement. Soto occupied the condo while Pantalion resided at his parents' home as a result of the protective order. The record shows that Pantalion served Soto with a notice to vacate his home and demanded possession, as evidenced by the pictures he introduced at trial, but she refused to

surrender possession. Thus, there was some evidence to support the trial court's implied conclusion that Soto was either a holdover tenant at will or a holdover tenant at sufferance. The second element of a forcible detainer claim is satisfied because Pantalion has demonstrated that a landlord-tenant relationship exists. *See Goggins v. Leo*, 849 S.W.2d 373, 377–78 (Tex. App.—Houston [14th Dist.] 1993, no writ); *Johnson v. Mohammed*, No. 03-10-00763-CV, 2013 WL 1955862, at *7 (Tex. App.—Austin May 10, 2013, pet. dism'd w.o.j.) (mem. op.).

C. Requisite statutory notice

Along with ownership of the property, the existence of a landlord-tenant relationship, and a refusal by the tenant to vacate, statutory notice is an element of a forcible detainer action. *Briones v. Brazos Bend Villa Apartments*, 438 S.W.3d 808, 811 (Tex. App.—Houston [14th Dist.] 2014, no pet.). A landlord must give a holdover tenant at least three days' written notice to vacate the premises before the landlord may file a forcible detainer suit. TEX. PROP. CODE §§ 24.002(b), 24.005(a). According to Section 24.005, the notice shall be given in person or by mail at the premises in question. *Id*. § 24.005(f). If the notice is delivered in person, then a person may deliver it to the premises and affix the notice inside of the main entry door. *Id*.

Section 24.005(f-1) also allows for an alternative procedure for notice:

> As an alternative to the procedures of Subsection (f), a landlord may deliver the notice to vacate by securely affixing to the outside of the

> main entry door a sealed envelope that contains the notice and on which is written the tenant's name, address, and in all capital letters, the words "IMPORTANT DOCUMENT" or substantially similar language and, not later than 5 p.m. of the same day, depositing in the mail in the same county in which the premises in question is located a copy of the notice to the tenant if:
>
> > (1) the premises has no mailbox and has a keyless bolting device, alarm system, or dangerous animal that prevents the landlord from entering the premises to affix the notice to vacate to the inside of the main entry door; or
> >
> > (2) the landlord reasonably believes that harm to any person would result from personal delivery to the tenant or a person residing at the premises or from personal delivery to the premises by affixing the notice to the inside of the main entry door.

Id. § 24.005(f-1).

The evidence shows that Pantalion, through his attorney, sent Soto a written notice to vacate the premises in person, which was attached to the front door, and by regular mail. Pantalion introduced into evidence photographs of two sealed envelopes. The envelope attached to the door was addressed to "Lisa Soto" at the property address and displayed "IMPORTANT DOCUMENT" on the front. The other envelope was stamped, addressed to Soto, and showed Pantalion's attorney's law office and address as the sender.

Pantalion testified that he could not recall when he served Soto with the notice to vacate. Pantalion testified that his attorney mailed and posted the notice on the outside of the front door of his condo because Soto had a dog in the home. The cease-and-desist letter, which was introduced at trial, states that this dog has attacked

people in the past. Pantalion testified that his attorney served notice in this manner because the protective order prevented him from entering the property.

The county court made a finding of fact that "photographic evidence, with time stamp, that the notice to vacate was properly posted on Defendant's door and mailed to her, per TPC 24.005 f-1." But the photographs in the record have no time or date stamps. No testimony establishes the date or time of service either. Consequently, we are unable to determine whether Pantalion, through his attorney, mailed the notice before 5:00 p.m. the same day it was posted on the front door. *See* TEX. PROP. CODE § 24.005(f-1)(1). Pantalion needed to prove that he complied with 5:00 p.m. deadline.

Because the record lacks proof of the date and time of delivery, there is not legally sufficient evidence in the record to support the county court's finding that Pantalion complied with the notice requirements in Sections 24.002(b) and 24.005(f-1)(1). *See Briones*, 438 S.W.3d at 811 ("Because forcible detainer is a statutory cause of action, a landlord must strictly comply with its requirements."); *cf. Effel v. Rosberg*, 360 S.W.3d 626, 631 (Tex. App.—Dallas 2012, no pet.) (statutory notice requirement met when landlord, through his attorney, sent written notice by both regular and certified mail, notice stated that tenant had ten days to surrender premises, and landlord sued more than two months after notice was delivered.).

We sustain issue two because Pantalion has not established the third element of his forcible detainer claim. Because this issue is dispositive, we need not address Soto's third appellate issue. *See* TEX. R. APP. P. 47.1.

Conclusion

Because there is legally insufficient evidence to support that Pantalion strictly complied with the statutory notice requirements by depositing a copy of the notice to vacate before 5:00 p.m. on the day another copy of the notice was posted to the condo, we reverse the trial court's judgment in part and remand for a new de novo trial. *See Vista Chevrolet, Inc. v. Lewis*, 709 S.W.2d 176 (Tex. 1986) (per curiam) (where evidence is insufficient, the appellate court must reverse and remand). We affirm the remainder of the judgment.

Sarah Beth Landau
Justice

Panel consists of Justices Kelly, Landau, and Hightower.