

Opinion issued March 3, 2022



In The
Court of Appeals
For The
First District of Texas

NO. 01-20-00313-CV

MARILYN ROTH EPSTEIN, Appellant

V.

5AIF BAOBAB, LLC AND 5AIF NUTMEG REO, LLC, Appellees

**On Appeal from the County Court at Law No. 2
Travis County, Texas
Trial Court Case No. C-1-CV-19-006039**

MEMORANDUM OPINION

Marilyn Roth Epstein appeals the county court's judgment awarding 5AIF Nutmeg REO, LLC ("Nutmeg") possession of real property in the underlying

forcible detainer action.¹ In a single issue, Epstein contends the county court lacked jurisdiction to determine the right of possession because the evidence raised questions of title. We will affirm the county court’s judgment.

Background

The property that is the subject of this forcible detainer action is located at 31 St. Stephens School Road, Austin, Texas 78746 (the “Property”). On September 14, 2017, Epstein and her husband executed a general warranty deed conveying all their interest in the Property to Beit Nes, LLC (“Beit Nes”), a limited liability company in which they are members.

Three days later, Beit Nes obtained a loan from 5 Arch Funding Corp. (“Arch”). The loan was evidenced by a promissory note and secured by a deed of trust granting a security interest in the Property. In the event of a default under the note, the deed of trust granted the lender, Arch, the power of sale and provided in pertinent part:

If Lender invokes the power of sale, Lender shall give such notice of default and of election to cause the Property to be sold as may be required by law or as may be necessary to cause Trustee to exercise the power of sale granted herein. Trustee shall then record and give

¹ Pursuant to its docket-equalization authority, the Supreme Court of Texas transferred this appeal from the Court of Appeals for the Third District of Texas to this Court. *See* Misc. Docket No. 20-9048 (Tex. Mar. 31, 2020); *see also* TEX. GOV’T CODE § 73.001 (authorizing transfer of cases). We researched relevant case law and did not locate any conflict between the precedent of the Court of Appeals for the Third District and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

such notice of trustee's sale as then required by law and, after the expiration of such time as may be required by law, may sell the Property at the time and place specified in the notice of sale . . . at public auction to the highest bidder for cash

The deed of trust also provided that, after any applicable “notice and cure or grace period, . . . the Lender may . . . enter the Property and take exclusive possession thereof. If Borrower remains in possession of the Property after such an uncured breach or default and without Lender's prior written consent, Lender may invoke any legal remedies to dispossess Borrower[.]”

Beit Nes executed several other documents as part of the loan transaction. Among the loan documents were two sworn affidavits signed by Epstein as Beit Nes's Chief Executive Manager: (1) a Homestead Affidavit and Disclaimer and (2) an Affidavit Concerning Business Purpose and Non-Owner Occupancy. In the first affidavit, Epstein agreed the Property was a “non-homestead property” and that she did not “reside[] upon, occup[y], use[], or claim[] the . . . Property as a business or residential homestead.” She expressly designated a different Austin-area property as her homestead and acknowledged that property as “the only real property [she] owned” that was “exempt from forced sale.” The second affidavit similarly acknowledged the Property was not a residence and that Epstein had “no intention of ever occupying or making the Property [her] residence.”

Effective September 19, through a series of assignments, Arch assigned all its interests as the beneficiary of the deed of trust and other loan documents to 5AIF

Sycamore 2, LLC (“Sycamore”), an affiliated entity. After Beit Nes defaulted on the loan, Sycamore foreclosed on the Property under the deed of trust. At a nonjudicial foreclosure sale, a substitute trustee sold the Property to Sycamore as the highest bidder. Sycamore received a substitute trustee’s deed memorializing the conveyance and took possession of the Property after having it inspected, finding it vacant, and changing the locks. Sycamore later executed a special warranty deed conveying the Property to another affiliated company, 5AIF Baobab, LLC (“Baobab”).

Sometime after Sycamore took possession of the Property, without the consent of either Sycamore or Baobab, Epstein entered the Property and changed the locks. Baobab gave Epstein written notice to vacate the Property. The notice, sent by Baobab’s counsel and addressed to Epstein and “all current occupants,” stated:

As you may be aware, Lender now owns the Property which you now claim to occupy. Lender became the legal owner of the Property by way of a Substitute Trustee’s Deed dated May 8, 2019, connected to the foreclosure of the Property from the previous owner Beit Nes, LLC.

Notice is hereby given and demand is hereby made by Lender that within three (3) days after delivery of this letter you vacate the Premises and deliver to Lender possession of the Property.

. . . If you do not vacate the Property within three (3) days from the date this notice and demand to vacate is delivered to the premises, Lender has instructed this firm to initiate a forcible entry and detainer suit against you. . . .

Epstein refused to vacate, and Baobab initiated the underlying action in the Travis County justice court, seeking to evict her from the Property. Epstein filed a

plea to the jurisdiction, asserting that issues of title arising from defective foreclosure procedures deprived the justice court of jurisdiction to decide the forcible detainer action. The justice court granted Epstein's jurisdictional plea, and Baobab appealed to the county court.

While the county court proceeding was pending, Baobab conveyed its interest in the Property to another affiliated company, Nutmeg. Baobab amended its pleading to include Nutmeg as the current owner of the Property, and together, Baobab and Nutmeg moved for summary judgment. Their summary judgment motion asserted that the county court had jurisdiction to adjudicate the right to possession of the Property and that Nutmeg's superior right was established as a matter of law.

Epstein responded to the motion for summary judgment and filed another plea to the jurisdiction. In her jurisdictional plea, Epstein again argued that issues of title and possession were intertwined to an extent that deprived the county court of jurisdiction. More specifically, she argued that the foreclosure of the Property was void because Nutmeg's predecessor failed to obtain a court order permitting foreclosure. She asserted that a court order was constitutionally required because the Property was her homestead. Epstein claimed that despite the conveyance of the Property to Beit Nes and her sworn affidavit disclaiming its status as a homestead, she and her husband are the real owners of the Property because Beit Nes was a "shell company" used for the purpose of closing the loan and the brokers involved

in the loan transaction knew they resided at the Property and did not intend to relinquish its status as their homestead.

The county court denied Epstein's plea to the jurisdiction and, on Baobab and Nutmeg's motion for summary judgment, rendered judgment that Nutmeg recover possession of the property.

Jurisdiction to Hear Forcible Detainer Actions

A forcible detainer is a procedure to determine the right to immediate possession of real property. *Dormady v. Dinero Land & Cattle Co.*, 61 S.W.3d 555, 557 (Tex. App.—San Antonio 2001, pet. dism'd w.o.j.). It is intended to be “a speedy, simple, and inexpensive means to obtain immediate possession of property,” without the necessity of a more expensive suit on the title. *See Marshall v. Hous. Auth. of City of San Antonio*, 198 S.W.3d 782, 787 (Tex. 2006); *Scott v. Hewitt*, 90 S.W.2d 816, 818–19 (Tex. 1936); *see also* TEX. PROP. CODE § 24.002. The sole issue in a forcible detainer action is which party has the right to immediate possession of the property. *Dormady*, 61 S.W.3d at 557. Issues of title shall not be adjudicated. *See id.*; *see also* TEX. GOV'T CODE § 27.031(b)(4) (stating justice court does not have jurisdiction to determine title to land); *Hong Kong Dev., Inc. v. Nguyen*, 229 S.W.3d 415, 434 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (observing county court's appellate jurisdiction in a forcible detainer suit is confined to jurisdictional limits of justice court). Thus, to prevail, “a plaintiff is not required to prove title, but is only

required to show sufficient evidence of ownership to demonstrate a superior right to immediate possession.” *Rice v. Pinney*, 51 S.W.3d 705, 709 (Tex. App.—Dallas 2001, no pet.); *see* TEX. R. CIV. P. 510.3(e) (“The court must adjudicate the right to actual possession and not title.”).

Subject matter jurisdiction over forcible detainer actions is expressly given to the justice court where the property is located, and on appeal, to the county court of law for a trial de novo. TEX. PROP. CODE § 24.004(a); TEX. R. CIV. P. 510.10(c). The justice courts and the county courts are deprived of jurisdiction to hear a forcible detainer action only if an issue of title is so intertwined with the issue of possession that possession may not be decided without first determining title. *Dormady*, 61 S.W.3d at 557; *Mitchell v. Armstrong Capital Corp.*, 911 S.W.2d 169, 171 (Tex. App.—Houston [1st Dist.] 1995, writ denied). The existence of subject matter jurisdiction is a question of law. *See State Dep’t of Highways & Public Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002).

Discussion

Epstein contends that issues of title were so intertwined with the issue of possession that the county court was deprived of jurisdiction.² She argues that the

² Epstein has attached to her brief as appendices documents labeled Exhibits “A” through “I.” To the extent these documents are not contained in the appellate record, we have not considered them. *See, e.g., Robb v. Horizon Cmty. Improvement Ass’n, Inc.*, 417 S.W.3d 585, 589 (Tex. App.—El Paso 2013, no pet.) (“It is well established that documents attached to an appellate brief which are not part of the

foreclosure and substitute trustee’s sale of the Property was “unlawful and void ab initio” because Nutmeg’s predecessor failed to obtain a court order permitting foreclosure of the Property. According to Epstein, a court order was required because the Property—despite being transferred to Beit Nes before the loan closing—was her homestead and, therefore, the loan should have been subject to the home-equity lending requirements in article XVI of the Texas Constitution, including the requirement that a lender file an application for judicial foreclosure. *See* TEX. CONST. art. XVI, § 50(a)(6)(D); *see also* TEX. R. CIV. P. 736.1–.13 (setting out procedure for obtaining court order allowing foreclosure of home equity loan). Epstein asserts that the failure to obtain a court order was a defect in the foreclosure proceedings that rendered the substitute trustee’s sale void. In addition, she contends that the substitute trustee lacked the authority to foreclose because certain other “conditions and limitations on the trustee’s power to convey the land were never fulfilled.”

Epstein cites *A Plus Investments, Inc. v. Rushton* to support her argument that the failure to follow the foreclosure procedures for home equity liens raised an issue of title that deprived the county court of jurisdiction. *See* No. 02-03-174-CV, 2004 WL 868866, at *2 (Tex. App.—Fort Worth Apr. 22, 2004, no pet.) (mem. op.).

record may generally not be considered by the appellate court.”); *WorldPeace v. Comm’n for Lawyer Discipline*, 183 S.W.3d 451, 465 n.23 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (“[W]e cannot consider documents attached as appendices to briefs and must consider a case based solely upon the record filed.”).

There, the borrower defaulted on a home equity loan, and the lender applied for a court order allowing foreclosure and sale of the property. *Id.* at *1; *see also* TEX. R. CIV. P. 736.1. The trial court granted the lender's application and ordered the property's sale. *A Plus Invs.*, 2004 WL 868866, at *1. Later, CitiFinancial, the lender's alleged successor, appointed a substitute trustee who conducted a foreclosure sale. *Id.* A Plus purchased the property from CitiFinancial and gave the borrowers notice to vacate. *Id.* After the borrowers refused to vacate, A Plus brought a forcible detainer action and obtained a judgment of possession in the justice court. *Id.* On appeal, the borrowers informed the county court that they were challenging A Plus's title in district court because CitiFinancial, not the lender in whose favor the foreclosure order was granted, had conducted the foreclosure. *Id.* The county court abated the proceeding until title was determined by the district court. *Id.* A Plus later moved to vacate the abatement, requesting that the court try the case or dismiss it for want of jurisdiction. *Id.* The county court dismissed for want of jurisdiction, and A Plus appealed. *Id.*

On appeal, the borrowers argued that the county court lacked jurisdiction because the question of title was so intertwined with the issue of possession that possession could not be adjudicated without first determining title. *Id.* at *1. The appellate court noted that the security instrument required a court order for foreclosure. *Id.* at *2 (citing TEX. CONST. art. XVI, § 50(a)(6)(D)). Therefore, the

appellate court reasoned, “in order for CitiFinancial to have the right to foreclose . . . it would have needed to obtain an order from the district court.” *Id.* But the evidence only showed that the lender obtained such an order; there was “no evidence in the record to support a link between [the lender] and CitiFinancial.” *Id.* The appellate court concluded this “failure to connect the dots [was] fatal to A Plus’s case.” *Id.* Because the county court would have to determine the issue of title to resolve the right to immediate possession, the appellate court held there was no jurisdiction. *Id.* at *3.

A Plus is distinguishable. In short, *A Plus* lacked a court order permitting foreclosure as required by the underlying home equity security instrument and the Texas Constitution. But here, the deed of trust executed by Beit Nes had no similar requirement and instead permitted nonjudicial foreclosure. *See id.* at *2–3; *see also Rearden v. Fed. Home Loan Mortg. Co.*, No. 03-12-00562-CV, 2013 WL 4487523, at *3 (Tex. App.—Austin Aug. 14, 2013, no pet.) (mem. op.) (distinguishing *A Plus* on similar grounds); *Presley v. McGrath*, No. 02-04-403-CV, 2005 WL 1475495, at *3 (Tex. App.—Fort Worth June 23, 2005, pet. dismissed w.o.j.) (mem. op.) (same). And the issues of title and right of possession are not so intertwined that the county court lacked jurisdiction. *See Dormady*, 61 S.W.3d at 558–59 (collecting cases); *Rice*, 51 S.W.3d at 713 (same). The foreclosure was pursuant to a deed of trust that expressly granted the lender the right to “enter the Property and take exclusive

possession thereof” upon an unremedied default, giving the county court an independent basis to determine the issue of immediate possession without resolving the issue of title to the Property. *Schlichting v. Lehman Bros. Bank FSB*, 346 S.W.3d 196, 199 (Tex. App.—Dallas 2011, pet. dism’d); *see also Rice*, 51 S.W.3d at 712 & n.4 (noting title determination may be necessary if lien contract does not create landlord-tenant relationship or other independent basis on which trial court could decide issue of immediate possession). Thus, it was not necessary for the county court to resolve the title dispute to determine the right of immediate possession. *See Rearden*, 2013 WL 4487523, at *3; *see also Kaldis v. Aurora Loan Servs.*, No. 01-09-00270-CV, 2010 WL 2545614, at *3 (Tex. App.—Houston [1st Dist.] June 24, 2010, pet. dism’d w.o.j.) (mem. op.) (holding whether substitute trustee’s deed was “void” or “deficient” was outside scope of forcible detainer action).

Epstein fails to specify which of the other “conditions and limitations on the trustee’s power to convey the land were never fulfilled,” but, at its core, her allegation appears to be that additional defects in the foreclosure process give rise to a title dispute. *See* TEX. R. APP. P. 38.1(i) (“The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.”). Texas courts hold that alleged defects in the foreclosure process do not preclude a court from deciding the issue of immediate possession in a forcible detainer action. *See, e.g., Schlichting*, 346 S.W.3d at 199 (“Any defects in the

foreclosure process or with the purchaser's title to the property may not be considered in a forcible detainer action.”). The proper vehicle to challenge the propriety of a foreclosure sale is not a forcible detainer action but a separate suit for wrongful foreclosure or to set aside a substitute trustee's deed. *See id.*; *see also Martinez v. Cerberus SFR Holdings, L.P.*, No. 02-19-00076-CV, 2019 WL 5996984, at *3 (Tex. App.—Fort Worth Nov. 14, 2019, pet. denied) (mem. op.) (“The arena to challenge the propriety of a foreclosure is not in [a forcible entry and detainer] suit but in a separate suit for wrongful foreclosure or to set aside a substitute trustee's deed.”); *Trimble v. Fed. Nat'l Mortg. Ass'n*, 516 S.W.3d 24, 29 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (“The validity of [a] foreclosure sale can be challenged in adjudication of title regardless of the resolution of the forcible-detainer action; parties have the right to sue in the district court to determine whether the trustee's deed should be cancelled, independent of the award of possession of the premises in the forcible detainer action.”) (quotation omitted); *Williams v. Bank of New York Mellon*, 315 S.W.3d 925, 927 (Tex. App.—Dallas 2010, no pet.) (“Any defects in the foreclosure process or with appellee's title to the property may not be considered in a forcible detainer action. Those defects may be pursued in suits for wrongful foreclosure or to set aside the substitute trustee's deed, but they are not relevant in this forcible detainer action.”).

For these reasons, the county court could determine the right of immediate possession without resolving the title dispute raised by Epstein, and we hold the county court had jurisdiction over the forcible detainer action.

We overrule Epstein's sole issue.

Conclusion

We affirm the judgment of the county court.

Amparo Guerra
Justice

Panel consists of Justices Kelly, Goodman, and Guerra.