Dismissed and Majority and Dissenting Opinions filed December 21, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00040-CV

ESTATE LAND COMPANY, AARON WIESE AND KAMAL BANANI (BANNAN), Appellants

V.

ANTHONY WIESE, Appellee

On Appeal from the 151st District Court
Harris County, Texas
Trial Court Cause No. 2009-00136

M A J O R I T Y O P I N I O N

After signing an amended final judgment and ordering the partition by sale of the real property at issue, the trial court signed two additional orders which are the subject of this appeal by appellants Estate Land Company, Aaron Wiese, and Kamal Banani (Bannan). We dismiss this appeal as moot.

I. Background

In 1999, Aaron Wiese ("Aaron") and his brother, Anthony ("Tony") Wiese, jointly purchased three properties in Houston, Texas: 812 Main Street; 110-114 Main Street; and I–10 McKee–Chapman ("McKee–Chapman"). In 2001, along with Kamal Bannan, they purchased a fourth property, 3302 Polk Street. The parties secured financing, and the record reflects that both Aaron and Tony were equally responsible for the entire amounts of the loans. After disagreements between the brothers arose, Tony sued appellants in 2009, seeking partition of the properties and reimbursement for contributions he had made to the properties. He also sought injunctive relief regarding a lease on the property at 812 Main Street ("Pearl Lease").

In February 2013, the case proceeded to a bench trial. Thereafter, in May 2013, the trial court signed a first amended final judgment and order of sale. Because the trial court found the properties were incapable of partition in kind, the trial court appointed a receiver, Donald Worley, and ordered partition by sale of the properties pursuant to Rule 770 of the Texas Rules of Civil Procedure.[1]

Aaron did not agree with the judgment of the trial court partitioning two of the properties (812 Main and 110-114 Main) and appealed the final judgment. This Court affirmed the final judgment and issued a Memorandum Opinion dated March 10, 2015. The Texas Supreme Court denied review in July 2016.

In connection with the sale of one property,[2] 110-114 Main, the trial court issued two post-judgment orders: On December 18 and 23, 2015, respectively, over

[1] If property is determined to be incapable of partition in kind, then the trial court must order partition by sale and determine the respective interests or shares of the persons entitled thereto. *See* Tex. R. Civ. P. 770.

[2] With respect to the three other properties, Tony and Aaron have either agreed to a sale or the properties have not yet been sold.

appellants' objections, the trial court signed a First Amended Decree Confirming Sale of 110-114 Main Street ("Decree Confirming Sale") and an Order Granting Motion to Turnover Net Sales Proceeds of 110-114 Main to Donald Worley, Receiver ("Turnover Order"). This appeal concerns only these two post-judgment orders.[3]

Decree Confirming Sale

After the judgment was final, the court-appointed receiver, Worley, began marketing the properties for sale. In August 2015, Worley obtained two earnest money contracts for the sale of the 110-114 Main property and presented to the trial court a contract from Zimmerman Interests, Inc. On August 31, 2015, the trial court approved the contract from Zimmerman Interests, Inc., and authorized Worley to "take all reasonable step[s] to finalize the sale of the 110-114 Main property. . . ."

In December 2015, Worley finalized the terms of the sale to Zimmerman Interests, Inc., and filed a report of sale with the trial court. On December 18, 2015, the trial court signed the First Amended Decree Confirming Sale of 110-114 Main Street, ordering the fees for the receiver and broker be calculated from the reduced sales price, approving and confirming the sale to Zimmerman Interests, Inc., and ordering that "the net sales proceeds, after payments of all fees of indebtedness, including payment to extinguish all valid mortgages, liens, other valid encumbrances, and reasonable and necessary receiver, legal and brokerage fees, if any, shall be distributed" among Tony, Aaron, and Kamal.

[3] On May 23, 2016, the trial court signed an Order Denying Defendant's Amended Motion to Compel Post-Judgment Deposition of Receiver. That order is the subject of a separate appeal in this Court under appellate cause number 14-16-00496-CV.

Turnover Order

To close the sale and insure title to 110-114 Main, Stewart Title requested a court order directing it to release the net sales proceeds from the sale to the receiver, Worley, who then would make the distributions in accordance with the final judgment. On December 23, 2015, the trial court issued the Turnover Order, wherein it ordered Stewart Title to turn over the net sales proceeds of 110-114 Main to Worley. The trial court further ordered Worley to deposit the net sales proceeds in an interest on lawyers trust account and then make the distributions in accordance with the trial court's final judgment. The sale of the property proceeded. It is undisputed that 110-114 Main was sold on December 30, 2015. Appellants filed this appeal on January 18, 2016.[4]

II. Issues on Appeal

On appeal, appellants' complain in several issues about two of the trial court's post-judgment orders related to the property at 110-114 Main Street: the trial court's First Amended Decree Confirming Sale of 110-114 Main Street and the trial court's Turnover Order. Appellants essentially argue that the trial court's judgment, which

[4] In their original appeal appellants contested the judgment of the trial court partitioning two properties located on Main Street in Houston (812 Main and 110-114 Main). This court affirmed the final judgment and the Texas Supreme Court denied review. *See Estate Land Co. v. Wiese*, No. 14-13-00524-CV, 2015 WL 1061553 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (mem. op.). While appellants' petition for review was pending, on January 19, 2016, appellants filed a petition for a writ of mandamus with the Texas Supreme Court. In their mandamus petition, appellants complained of the exact same post-judgment orders that are at issue in this appeal, arguing that the trial court lacked jurisdiction to order payment of Aaron's indebtedness and sale of the property should be "subject to" such indebtedness. On July 1, 2016, the Supreme Court of Texas denied appellants' mandamus petition, which was the same date appellants' petition for review was denied.

Additionally, on June 22, 2016, appellants filed another appeal from a post-judgment order in which the trial court denied Aaron's motion to take the deposition of the court-appointed receiver, Worley. This appeal remains pending before this court. *See Estate Land Co. v. Wiese*, appellate cause number 14-16-00496-CV.

included language ordering net proceeds from the sale to be paid to the parties after payment of certain matters, including payment of all "indebtedness" as well as "mortgages, liens, [and] other valid encumbrances," did not allow as part of the sale transaction for Worley and/or Stewart Title to distribute funds to a bank in order to pay Aaron's promissory note obligation in full. Appellants argue that there are no specific findings in the amended final judgment determining or addressing encumbrances on the property. Thus, appellants maintain the post-judgment orders materially and substantially modified the final judgment, depriving the court of jurisdiction. Appellants argue the post-judgment orders are an "impermissible attempt to enforce the final judgment," and appellants request that this court reverse or set aside the post-judgment orders, and remand the matter to the trial court.

Appellee contends that appellants' issues appeal are moot because appeal was not made before the property was sold. Thus, appellee urges this court to dismiss the appeal. Alternatively, appellee argues that the trial court did not commit reversible error by issuing the post-judgment orders.

III. Analysis

As a threshold matter we address whether we have jurisdiction to review the trial court's receiver-related orders or whether appellants' issues are moot.

Unlike other proceedings, a partition case has two final judgments and both are appealable as a final judgment. *Griffin v. Wolfe*, 610 S.W.2d 466 (Tex. 1981). "This is because a partition proceeding is—at least—a two-step process." *Long v. Spencer*, 137 S.W.3d 923, 925 (Tex. App.—Dallas 2004, no pet.) (citing *Carr v. Langford*, 144 S.W.2d 612, 613 (Tex. Civ. App.—Dallas 1940), *aff'd* 138 Tex. 330, 159 S.W.2d 107, 108 (1942)); *see also* Tex. R. Civ. P. 760 (court shall determine share or interest of each claimant and all questions affecting title to property); Tex. R. Civ. P. 761 (court shall determine whether property is subject to partition in kind);

Tex. R. Civ. P. 770 (if property not subject to equitable division, court shall order sale or property and partition proceeds). Thus, issues determined by the partition order must be challenged following issuance of the partition order; they cannot be attacked collaterally after the court issues a later order or judgment. *Long*, 137 SW.3d at 925–26 (citing *Estate of Mitchell*, 20 S.W.3d 160, 162 (Tex. App.—Texarkana 2000, no pet.)); *see Ellis v. First City Nat'l Bank*, 864 S.W.2d 555, 557 (Tex. App.—Tyler 1993, no writ) (providing that matters decided in the first order cannot be reviewed in an appeal from the second order). The same rule applies for an order approving the terms of a proposed sale of real property in a partition suit: the terms of that order must be appealed—if at all—after its issuance, before the property is sold. *Long*, 137 S.W.3d 923, 926 (Tex. App.—Dallas 2004, no pet.) "The reasoning behind the rule is clear: in the partition process, decisions must be made upon which other decisions will be based. An appeal at each stage provides a practical way to review controlling, intermediate decisions before the consequences of any error do irreparable injury." *Id*. at 926.

In the second step of a partition suit, the court issues an order either approving the receiver's report and giving the parties their share or rejecting the report and appointing other commissioners to partition the land. *Ellis*, 864 S.W.2d at 557. If the court approves the sale, this second order is a separate and distinct, yet final judgment. *See id*.

In their original appeal appellants challenged the trial court's first-step order (*i.e.*, the trial court's amended final judgment). In this appeal appellants purport to challenge the second-step post-judgment orders; however, the substance of appellants' complaints is about whether the trial court's final judgment could order payment of Aaron's indebtedness from the net proceeds. Matters related to the final judgment (including the portion ordering net proceeds from the sale of the property

follow the payment of indebtedness, including the payment to extinguish all valid mortgages, liens, and other valid encumbrances) have been fully litigated and cannot be reviewed in this appeal purportedly involving second-step orders.

Further, it is undisputed that the property at issue, 110-114 Main, was sold on December 30, 2015. "A case becomes moot if a controversy ceases to exist at any stage of the proceedings, including the appeal." *In re Kellogg Brown & Root, Inc.*, 166 S .W.3d 732, 737 (Tex. 2005) (orig. proceeding); *Aaron v. Aaron*, No. 14-10-00765-CV, 2012 WL 273766, at *5 (Tex. App.—Houston [14th Dist.] Jan. 31 2012, no pet.) (mem. op.). Appellate courts lack jurisdiction to decide moot controversies and render advisory opinions. *See Nat'l Collegiate Athletic Assoc. v. Jones*, 1 S.W.3d 83, 86 (Tex. 1999); *In re H & R Block Fin. Advisors, Inc.*, 262 S.W.3d 896, 900 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding). The mootness doctrine implicates a court's subject matter jurisdiction, which "is essential to a court's power to decide a case." *See State v. Naylor*, 466 S.W.3d 783, 791–92 (Tex. 2015). Because appellants did not seek an emergency stay, supersedeas bond, or otherwise suspend the enforcement of the trial court's post-judgment orders, the sale of the property at issue was completed and, as such, the issues in this case must be dismissed as moot. *See, e.g., Bass v. Bass*, No. 05-15-01362-CV, 2016 WL 1703007, at *1 (Tex. App.—Dallas Apr. 27, 2016) (mem. op.) ("Because the property that was the subject of the appealed interlocutory order appointing a receiver has been sold, the appeal from that order is now moot."); *Aaron*, 2012 WL 273766, at *5 (parties sold property while appeal pending rendering issues moot); *Taylor v. Hill*, 249 S.W.3d 618, 624 (Tex. App.—Austin 2008, pet. denied) (in a partition suit the terms of an order confirming sale must be appealed—if at all—after its issuance, before the property is sold) (citing *Long*, 137 S.W.3d at 926); *Shaw v. Allied Fin. Co.*, 319 S.W.2d 820, 821–22 (Tex. Civ. App.—Fort Worth 1958, no writ

history) (dismissed appeal as moot where receiver sold property and no supersedeas bond filed or "stay" order sought); *State v. Jackson*, 101 S.W.2d 346, 347 (Tex. Civ. App.—Austin 1937, no writ history) (appeal dismissed when property already sold).

IV. Conclusion

Because our decision cannot have a practical effect on an existing controversy, the case is moot. Accordingly, without reference to the merits, we overrule appellants' issues and dismiss the appeal as moot. *See Jones*, 1 S.W.3d at 86.

/s/ John Donovan
Justice

Panel consists of Chief Justice Frost and Justices Donovan and Wise (Frost, C.J., dissenting).