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 BANNAN (A/K/A KAMAL BANANI), Appellants

V.

ANTHONY WIESE, Appellee

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

D I S S E N T I N G O P I N I O N

The appellants challenge two post-judgment orders, asserting that (1) the trial court erroneously ordered the net proceeds from the sale of the property at 110-114 Main Street to be turned over to the receiver rather than to the trial court and (2) the trial court erroneously approved the deduction of certain items from the gross sale proceeds. The majority concludes that these complaints are moot because the sale of the property already has occurred, and therefore, the majority

reasons, this court's judgment on appeal can have no practical effect on any existing controversy. An actual controversy between the parties as to the appellants' complaints continues to exist, and the sale of the property does not prevent this court from rendering a judgment that would have a practical effect on this controversy. So, the appellants' claims are not moot, and this court should not dismiss them on mootness grounds.

Law on Mootness

Appellate courts are not to decide moot controversies,[1] a rule rooted in constitutional prohibitions against rendering advisory opinions.[2] A case becomes moot if there ceases to be an actual controversy between the parties at any stage of the litigation.[3] If a judgment can have no practical effect on an existing controversy, the case becomes moot and any opinion issued on the merits in the appeal would constitute an impermissible advisory opinion.[4] A case becomes moot if, during the appeal, either of the opposing sides of the litigation ceases to have a legally cognizable interest in the appeal's outcome.[5]

The Existence of an Actual Controversy

Appellants Estate Land Company, Aaron Wiese, and Kamal Bannan (a/k/a Kamal Banani) (collectively the "Estate Land Parties") challenge the trial court's order confirming the sale of the property at 110-114 Main Street (the

[1] *Nat'l Collegiate Athletic Ass'n v. Jones*, 1 S.W.3d 83, 86 (Tex. 1999).

[2] *See id*; *see also Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000) (per curiam) ("Under article II, section 1 of the Texas Constitution, courts have no jurisdiction to issue advisory opinions.").

[3] *Jones*, 1 S.W.3d at 86; *see Robinson v. Alief I.S.D.*, 298 S.W.3d 321, 324 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

[4] *Thompson v. Ricardo*, 269 S.W.3d 100, 103 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

[5] *See Jones*, 1 S.W.3d at 87.

"Confirmation Order") and its order requiring the title company from the sale to turn over net sale proceeds to the receiver (the "Turnover Order"). The Estate Land Parties assert that the trial court erred in issuing these orders and that these orders conflict with and materially change a part of the trial court's prior final judgment because (1) the trial court ordered the receiver's distribution of the sale proceeds without any requirement that the proceeds be "returned into court" for distribution by the trial court, as allegedly required by the trial court's final judgment; (2) the trial court approved certain deductions from the gross proceeds of the sale without determining whether each amount deducted was a payment to extinguish a valid mortgage, a valid lien, or another valid encumbrance, or a reasonable and necessary receiver, legal, or brokerage fee, as allegedly required by the trial court's final judgment; (3) in the Turnover Order, the trial court asserted personal jurisdiction over the title company from the sale even though the title company has not been served with process, waived service of process, or voluntarily appeared; and (4) in the Turnover Order, the trial court ordered the title company from the sale to turn over net sale proceeds to the receiver rather than ordering that the proceeds be "returned into court," as allegedly required by the trial court's final judgment. Though appellee Anthony Wiese asserts that the sale of the property moots the Estate Land Parties' appellate complaints, to the extent these issues are not moot, Anthony asserts that the Confirmation Order and the Turnover Order do not conflict with or materially change any part of the trial court's final judgment and that the trial court did not err as the Estate Land Parties allege. An actual controversy still exists between the Estate Land Parties and Anthony as to the Estate Land Parties' appellate complaints.[6]

[6] *See In re C.C.E.*, 530 S.W.3d 314, 318–19 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

Satisfaction of the Practical Effect Requirement

The majority concludes that, because the property at 110-114 Main Street has been sold to a third-party who is not a party to this litigation, this court cannot render an appellate judgment that would have a practical effect.[7] If the Estate Land Parties were complaining on appeal that the trial court erred in allowing this sale to proceed and were urging this court to render judgment ordering that the sale not take place, then the majority's conclusion would be correct.[8] But, the Estate Land Parties do not lodge this complaint or make this request on appeal; instead, they complain that the trial court erred in certain respects in ordering what should be done with the sale proceeds. They do not challenge the sale.

To the extent that one of the post-judgment orders materially changed the relief awarded in the prior final judgment, the trial court lacked jurisdiction to make the change, and this part of the order is void.[9]

If this court has appellate jurisdiction over the two orders and if this court were to find that the Estate Land Parties' appellate complaints have merit, this court could conclude that the challenged parts of the orders are void, and this court could remand to the trial court for further proceedings. Though the sale has occurred, the receiver is still operating, and the Estate Land Parties and Anthony are still parties to this case.[10] The trial court could order Anthony and Kamal to

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[7] *See ante* at 7–8.

[8] *See Lee v. Lee*, 528 S.W.3d 201, 209–10 (Tex. App.—Houston [14th Dist.] 2017, pet. filed).

[9] *See Partners In Bldg. v. Eure*, No. 14-12-00123-CV, 2013 WL 1279407, at *2 (Tex. App.—Houston [14th Dist.] Mar. 28, 2013, no pet.) (mem. op.).

[10] *See Lee*, 528 S.W.3d at 209–10 (concluding that challenges to approval of settlement agreement between the receiver and one party were not moot despite closing of the agreement because the complained-of action could still be reversed and because there still was a live controversy); *Taylor v. Hill*, 249 S.W.3d 618, 622, 624–25 (Tex. App.—Austin 2008, pet. denied) (necessarily rejecting argument that appeal in partition case was moot because the

repay funds to the receiver or could offset amounts against any future distributions in this case as to other properties. Despite the sale of the property, this court still could render an appellate judgment that would have a practical effect.[11]

The Majority's Description of the Estate Land Parties' Complaints

According to the majority, though the Estate Land Parties purport to challenge the two post-judgment orders, the substance of their appellate complaints is a challenge to the prior final judgment in which they assert that the trial court should not have ordered payment of Aaron's indebtedness from the net sale proceeds.[12] Neither the form nor the substance of the Estate Land Parties' appellate complaints challenges the prior final judgment.[13] In the challenge as to the deductions from the gross sale proceeds, the Estate Land Parties assert that the trial court erroneously approved certain deductions from the gross sale proceeds without determining whether each amount deducted was a payment to extinguish a valid mortgage, a valid lien, or another valid encumbrance, or a reasonable and necessary receiver, legal, or brokerage fee, as allegedly required by the trial court's final judgment. Though the majority asserts that the Estate Land Parties are challenging matters determined by the trial court's prior final judgment, a review of the Estate Land Parties' appellate complaints shows that they are not challenging any matter determined in the prior judgment.[14]

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property already had been sold and the net proceeds delivered to the parties whom the trial court found to have an interest in the property).

[11] *See Lee*, 528 S.W.3d at 209–10; *Taylor*, 249 S.W.3d at 622, 624–25.

[12] *See ante* at 6–7.

[13] *See supra* at 3.

[14] *See ante* at 6–7.

The Majority's Addressing of the Merits in Determining Jurisdiction

Even presuming for the sake of argument that the Estate Land Parties are challenging matters determined by the trial court's prior final judgment, those challenges would be barred by law of the case, claim preclusion, or issue preclusion. None of these doctrines (or facts supporting them) would deprive this court of jurisdiction or make any appellate complaint moot.[15] If, as the majority concludes, all of the Estate Land Parties' appellate complaints contradict the trial court's prior final judgment, the proper appellate disposition would be to affirm the post-judgment orders rather than to dismiss this appeal as moot.[16] In determining whether this court lacks jurisdiction over this appeal based on mootness of the appellate complaints, this court may not address the merits of those complaints.[17] The merits of the Estate Land Parties' appellate complaints are not relevant to whether this court can render an appellate judgment that would have a practical effect, and this court should not address whether the prior judgment bars any of

[15] *See Philips v. McNease*, 467 S.W.3d 688, 697–99 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (affirming, rather than dismissing appeal as moot, when the claim-preclusion doctrine barred the appellate complaints); *Jacobs v. Jacobs*, 448 S.W.3d 626, 630–31 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (affirming post-judgment orders, rather than dismissing appeal as moot, when the law-of-the-case doctrine barred the appellate complaints); *Simulis, LLC v. Gen. Elec. Capital Corp.*, 392 S.W.3d 729, 735 n.7 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (noting that the proper recourse if a plaintiff asserts claims barred by law of the case, claim preclusion, or issue preclusion is for the defendant to seek judgment on the merits by filing a summary-judgment motion).

[16] *See Philips*, 467 S.W.3d at 697–99; *Jacobs*, 448 S.W.3d at 630–31; *Simulis, LLC*, 392 S.W.3d at 735 n.7.

[17] *See Schwartzott v. Etheridge Prop. Mgmt.*, 403 S.W.3d 488, 502 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (concluding that, in determining this court's jurisdiction, the court does not address the merits of any of the claims); *Smith v. City of League City*, 338 S.W.3d 114, 129 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (holding that the merits of a claim are not at issue in determining whether courts have subject-matter jurisdiction over the claims and presuming for the sake of argument that the claim had merit in determining whether courts had jurisdiction over the claim).

these complaints.[18]

For the foregoing reasons, the Estate Land Parties' complaints are not moot.[19] Because the majority reaches the opposite conclusion and dismisses this appeal on mootness grounds, I respectfully dissent.

/s/ Kem Thompson Frost
Chief Justice

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

[18] *See Schwartzott*, 403 S.W.3d at 502; *Smith*, 338 S.W.3d at 129.

[19] *See In re C.C.E.*, 530 S.W.3d at 318–19; *Lee*, 528 S.W.3d at 209–10; *Taylor*, 249 S.W.3d at 622, 624–25.