



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00021-CV

Colleen T. **BRADY**,
Appellant

v.

COMPASS BANK d/b/a BBVA Compass,
Appellee

From the 131st Judicial District Court, Bexar County, Texas
Trial Court No. 2017-CI-10192
Honorable Norma Gonzales, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice

OPINION ON MOTION TO REVIEW SUPERSEDEAS BOND AMOUNT

Delivered and Filed: April 3, 2019

AFFIRMED

Appellant Colleen T. Brady has filed a motion to review the trial court's order setting \$48,000 as the cash amount Brady must deposit in the trial court's registry to supersede the trial court's judgment and order allowing foreclosure. *See* TEX. R. APP. P. 24.4. After reviewing Brady's motion and the response filed by appellee Compass Bank d/b/a BBVA Compass, we affirm the trial court's order.

BACKGROUND

On June 5, 2017, Brady filed a lawsuit against Compass Bank asserting the home equity loan on property owned by her and her deceased husband violated the Texas Constitution. Brady also asserted various DPTA claims. Compass Bank filed a counterclaim seeking to foreclose on the property.

Based on a jury's verdict, the trial court signed a judgment and order allowing foreclosure on October 30, 2018. Brady filed this appeal of the trial court's judgment.

Because the trial court's judgment had not been superseded, Compass Bank posted the property for foreclosure on February 5, 2019. On February 4, 2019, Brady filed a motion requesting the trial court to set the amount of the supersedeas she must post to stay the foreclosure, and the trial court held a hearing the same day.

At the hearing, Brady's attorney asserted the amount of the supersedeas is "supposed to be reflective of what monthly rent would be." Brady's attorney stated the monthly rent on the property is \$4,000 and requested a supersedeas bond of \$4,000. The trial court asked Brady's attorney if the appeal would only be pending one month. Brady's attorney responded "no," but asserted Brady had filed an affidavit of indigency and the supersedeas amount should not overly impair an appellant. The trial court noted the supersedeas amount also must protect the property and asked Compass Bank for its position. Compass Bank's attorney asserted even if Brady prevailed on appeal, Compass Bank would be entitled to subrogation for the amount of the lien the bank paid off which was over \$500,000. Brady's attorney responded no judgment was entered against Brady because the loan was a non-recourse loan; therefore, the supersedeas amount is "simply bonding against the protection of the property, which the rules clearly say is based on a monthly rental amount." Compass Bank's attorney responded Brady had not made a mortgage payment since February of 2011, and she is renting the house for \$4,000 a month. Compass Bank's

attorney noted a typical appeal takes between twelve to fifteen months and suggested a supersedeas amount of \$48,000. Brady's attorney replied Brady would not "be able to pay 20 times 4,000." Compass Bank's attorney responded Brady had been collecting the \$4,000 monthly rent during the entire pendency of the case while living in Hawaii and while Compass Bank continued to pay the taxes and insurance on the property. After hearing the argument, the trial court signed an order setting the supersedeas amount at \$48,000.

DISCUSSION

In her motion challenging the trial court's order, Brady asserts the \$48,000 supersedeas amount will cause her substantial economic harm and contends she should be allowed to supersede the judgment by depositing the \$4,000 monthly rental into the registry of the trial court. The only citation in Brady's motion is a reference to an unpublished order issued by this court in a prior appeal. However, this court's unpublished order provides no binding precedent and no basis for comparing the evidence presented in that case with the evidence presented in this case.

"We review a trial court's ruling under Rule 24 under an abuse of discretion standard." *El Caballero Ranch, Inc. v. Grace River Ranch, L.L.C.*, No. 04-16-00298-CV, 2016 WL 4444400, at *3 (Tex. App.—San Antonio Aug. 24, 2016, order). "A trial court abuses its discretion when it renders an arbitrary and unreasonable decision lacking support in the facts or circumstances of the case, or when it acts in an arbitrary or unreasonable manner without reference to guiding rules or principles." *Id.* (internal quotation omitted).

As a general rule, a judgment debtor is entitled to supersede a judgment while pursuing an appeal. *Miga v. Jensen*, 299 S.W.3d 98, 100 (Tex. 2009). When the judgment is for the recovery of an interest in real property, the trial court determines the type of security the judgment debtor must post, and the amount of security must be at least the value of the property interest's rent or revenue. TEX. R. APP. P. 24.2(a)(2). In this case, it was undisputed that the monthly rental value

of the property was \$4,000, and, in setting the supersedeas amount at \$48,000, the trial court did not abuse its discretion in finding an appeal could be pending twelve months from filing to disposition.

With regard to Brady's contention that the supersedeas amount would cause her substantial economic harm, Brady did not preserve this contention by requesting the trial court to reduce the supersedeas amount due to substantial economic harm pursuant to Rule 24.2(b). *Johnson v. Villatoro*, No. 14-18-00150-CV, 2018 WL 3848070, at *2 (Tex. App.—Houston [14th Dist.] Aug. 14, 2018, order) (mem. op.) (“We cannot review the [trial] court’s exercise of discretion unless the record demonstrates that a request to reduce the amount of security due to substantial economic harm was presented to the county court and a ruling made thereon.”); TEX. R. APP. P. 24.2(b) (“The trial court must lower the amount of security required by (a) to an amount that will not cause the judgment debtor substantial economic harm if, after notice to all parties and a hearing, the court finds that posting a bond, deposit, or security in the amount required by (a) is likely to cause the judgment debtor substantial economic harm.”). Even if we consider the arguments made during the hearing setting \$48,000 as the supersedeas amount as a motion to reduce the supersedeas amount based the issue of substantial economic harm,¹ Brady had the burden to prove she would suffer substantial economic harm if the supersedeas amount was not decreased. *In re Nalle Plastics Family Ltd. P’ship*, 406 S.W.3d 168, 170 (Tex. 2013); *Drake Interiors, Inc. v. Thomas*, 531 S.W.3d 325, 328 (Tex. App.—Houston [14th Dist.] 2017, order); *Knowles v. Mack*, No. 04-04-00422-CV, 2004 WL 2046612, at *1 (Tex. App.—San Antonio Sept. 15, 2004, mand. denied) (mem. op.). Whether Brady is likely to suffer substantial economic harm is a question of fact, “which require[s] a showing both of irreparable harm to [Brady] and that a lesser amount would not substantially

¹ We question whether a motion could be made to reduce the supersedeas amount before the trial court made a ruling setting the amount.

impair [Compass Bank's] ability to recover under the judgment after appellate remedies [are] exhausted.” *In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d at 170; *see also O.C.T.G., L.L.P v. Laguna Tubular Prods. Corp.*, 525 S.W.3d 822, 831 (Tex. App.—Houston [14th Dist.] 2017, mand. denied) (noting issue is question of fact); TEX. R. APP. P. 24.2(b) (referring to court “finding” supersedeas amount is likely to cause the judgment debtor substantial economic harm). Here, Brady did not offer any evidence to support such a finding. *See Morse v. Fed. Nat'l Mortg. Ass'n*, No. 05-18-00999-CV, 2018 WL 4784585, at *1-2 (Tex. App.—Dallas Oct. 4, 2018, order) (mem. op.) (holding filing of affidavit of indigence does not relieve appellant of obligation to post a supersedeas bond and appellant did not meet burden to show substantial economic harm by mentioning indigence without offering evidence). Therefore, she did not meet her burden.

CONCLUSION

The trial court's order is affirmed.

Rebeca C. Martinez, Justice