In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-15-00410-CV

DARRYLL JOHNSON AND PENNY JOHNSON, Appellants

V.

LIBERTY COUNTY AND JUAN ZAVALA, Appellees

On Appeal from the 253rd District Court
Liberty County, Texas
Trial Cause No. CV1509179

MEMORANDUM OPINION

This is an interlocutory permissive appeal that involves the transfer of real property at a tax sale and the legal effect of a pending bankruptcy on the tax sale. On October 7, 2015, the trial court signed an interlocutory order that identified a controlling question of law that may materially advance the ultimate termination of the litigation, and the trial court granted permission to appeal the trial court's

interlocutory order granting Defendant, Juan Zavala, a summary judgment. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(d) (West Supp. 2015); *see also* Tex. R. Civ. P. 168.

On October 9, 2015, Darryll Johnson and Penny Johnson (the Johnsons or Appellants) filed a petition for permission to appeal from the interlocutory order. *See* Tex. R. App. P. 28.3(a). Appellee, Juan Zavala (Zavala), filed a response. *See* Tex. R. App. P. 28.3(f). The other party defendant in the underlying suit, Liberty County, did not file a response. On October 30, 2015, the Johnsons filed a motion for a temporary order staying the trial court's interlocutory order pending the appeal. *See generally* Tex. R. App. P. 29.3. Zavala filed a response to the motion for a temporary order. This Court granted the petition for permissive appeal and also entered a stay order. *See* Tex. R. App. P. 28.3(k). The Johnsons and Zavala presented briefs on appeal and we set the matter for oral argument. Liberty County did not make an appearance in the appeal.

Underlying Facts

The underlying facts in the case are largely undisputed. Liberty County filed a tax suit against the Johnsons for unpaid property taxes relating to certain real property in Liberty County described as:

> 5.00 acres, more or less, situated in the Samuel Strong Survey, Abstract 110, Liberty County, Texas, as described in deed dated August 26, 1991, from James D. Hopper, et ux to Darryll Dean Johnson, et ux, in Volume 1380, page 405, Official Public Records of Liberty County, Texas [("the Property")]. . . .

Liberty County obtained a Judgment and Decree of Sale on October 24, 2011, for the unpaid taxes pertaining to the Property. An Order of Sale was issued on March 23, 2012.

According to a Deed under Order of Sale in Tax Suits pertaining to the Property, Liberty County published notice that the Property would be sold at a public sale. There is no contention by any of the parties that there were any irregularities with the tax judgment or notice of the tax sale, and the Johnsons have not alleged that they did not receive notice of the Judgment and Order of Sale, or of the tax sale. The Deed under Order of Sale in Tax Suits reflects the Property was sold on May 1, 2012, to Liberty County, Trustee, for itself and for Hardin Independent School District. Just a few days prior to the tax sale, on April 26, 2012, the Johnsons filed for Chapter 7 bankruptcy. The bankruptcy action was filed in the United States Bankruptcy Court for the Eastern District of Texas, Case Number 12-10273. The Certificate of Notice of the bankruptcy includes a sworn declaration that the notice of the bankruptcy was mailed by first class mail to Liberty County, Liberty County TAC, and Liberty I.S.D. on April 28, 2012. There

is no evidence in the record before us as to when or if Liberty County received the notice of the bankruptcy.

On May 1, 2012, the Sheriff sold the Property at a tax sale to Liberty County, and a Deed under Order of Sale in Tax Suits was executed from the Sheriff, as Grantor, to Liberty County, as Grantee. According to the file-stamped copy of such document, the Deed under Order of Sale in Tax Suits was recorded into the Official Records of Liberty County on June 5, 2012. Over two years later, on September 8, 2014, Liberty County sold the Property to Zavala and transferred the Property by a Quitclaim Deed. On January 5, 2015, an attorney representing Zavala sent a letter to the Johnsons notifying the Johnsons that Zavala had purchased the Property from Liberty County and requesting that the Johnsons vacate the Property.

On March 4, 2015, the Johnsons filed Plaintiffs' Original Petition in Cause No. CV1509179, styled *Darryll Johnson and Penny Johnson, Plaintiffs, v. Liberty County and Juan Zavala, Defendants*. In the Plaintiffs' Original Petition, the Johnsons alleged that the Sheriff's sale to Liberty County on May 1, 2012, "violated the automatic stay under § 362 of the Bankruptcy laws and is void or voidable" and the "subsequent sale to Juan Zavala is as well void or voidable." The Johnsons included headings for two sections in their petition for what they styled

as "breach of contract" and "specific performance[,]" but did not include any additional factual allegations regarding such claims. The Johnsons also sought "Other Relief" wherein they requested that the trial court require Liberty County and Zavala to "return" the Property to the Johnsons. And, the Johnsons stated in the petition that "[t]his action is one for Trespass to Try Title[.]" Plaintiffs alleged that they were the owners of the Property, and were in possession of the Property, but that Zavala unlawfully entered and threatened to dispossess them of the Property by forcible detainer.

Zavala filed a verified answer to the lawsuit and asserted a general denial, and Zavala included specific denials denying that there was a defect in the deed vesting title in Zavala, denying that the tax foreclosure and deeds were void or voidable, and denying any damages. Zavala also asserted several affirmative defenses including, among other defenses, that the claim was barred by the statute of limitations. Liberty County also filed an Original Answer and therein included a plea to the jurisdiction, general denial, and disclaimer of ownership in the Property. In its Original Answer, Liberty County also asserted affirmative defenses, including that the claim was barred by section 33.54 (a)(2)(A) of the Texas Tax Code because the Johnsons failed to maintain the suit against the "purchaser of the property at a tax sale" before the second anniversary of the date of the deed

executed to the purchaser at the tax sale is filed for record, the action is barred by the statute of limitations as set out in section 33.54(c) of the Texas Tax Code, and the action is barred by the Johnsons' failure to post a deposit into the registry of the court in an amount equal to the total taxes, penalties, interest and costs awarded in the tax judgment as required by section 34.08 of the Texas Tax Code.

On July 30, 2015, Zavala filed Defendant's Motion for Summary Judgment. In his Motion for Summary Judgment, Zavala alleged that the Sheriff's deed to Liberty County was filed of record on June 5, 2012, and Zavala attached a certified copy of the recorded deed. Zavala further alleged and attached a certified copy of the "[t]ax resale deed conveying the subject property" to Zavala which was recorded on December 23, 2014. Zavala argued that "[v]iolations of a bankruptcy automatic stay are not void, but merely voidable[,]" that the statute of limitations in section 33.54 of the Texas Tax Code barred the claims asserted by the Johnsons, and that section 34.08 of the Texas Tax Code conclusively establishes that Zavala acquired full title.

The Johnsons filed Plaintiffs' Response to Defendant's Motion for Summary Judgment and argued that the bankruptcy stay was effective on the day the Chapter 7 bankruptcy was filed, that the bankruptcy stay prevented Liberty County from proceeding with the tax foreclosure sale on May 1, 2012, that the Sheriff's deed to

Liberty County was void, and that Liberty County's subsequent transfer and deed to Zavala is also void.[1] The Motion for Summary Judgment was set for a hearing. The Johnsons also filed Plaintiff's Motion for Accelerated Appeal.

On October 7, 2015, the trial court entered an Order Granting Defendant Zavala's Motion for Summary Judgment and Granting Plaintiffs' Motion for Accelerated Appeal. In the Order, the trial court concluded that Zavala was entitled to a Judgment against Plaintiff and to recover "title to and possession of" the Property and to a Writ of Possession. The Order also granted an appeal under section 51.014(d) of the Texas Civil Practice and Remedies Code and identified controlling questions of law as:

> a. Does Liberty County's willful violation of the bankruptcy stay under 11 U.S.C. § 362 mean that any subsequent transfer of the property is invalid?
>
> b. Which statute of limitations is applicable, that under Tex. Tax Code § 33.54[,] or does Tex. Civ. Prac. & Rem. Code § 16.024 apply?

[1] The Johnsons also alleged in their Response to the Motion for Summary Judgment that "[a]ccording to the Liberty County Real Estate Index the property was transferred by Juan Zavala to Wet Leaves, LLC on 17 MARCH 2015, thirteen days after this suit was filed." There is no discussion from either party in this appeal as to whether Wet Leaves, LLC should be a party to the underlying suit.

Arguments of Parties on Appeal

The Johnsons argue, as they did in the trial court below, that the tax foreclosure sale on May 1, 2012, was automatically stayed upon the filing of their bankruptcy petition pursuant to 11 U.S.C. § 362. And, they argue that, absent a request to and permission from the bankruptcy court lifting the stay, the Sheriff's sale of the Property conducted on May 1, 2012, was in violation of the automatic stay and the deed issued to Liberty County was void. Appellants further argue that because the deed to Liberty County was void, Liberty County could not pass any title to Zavala and Zavala's deed is also void. Additionally, Appellants contend that the applicable statute of limitations for the action is contained in section 16.024 of the Texas Civil Practice and Remedies Code and that the underlying suit was timely filed within the statute of limitations. Appellants contend that the trial court therefore erred in granting the summary judgment and they ask this Court to "VACATE the order of the 253rd District Court and remand the case for trial."

Appellee argues that the trial court correctly granted the summary judgment to Zavala, that the Johnsons failed to provide any evidence to the trial court that Liberty County willfully violated the automatic stay, that the Johnsons failed to establish whether there was a discharge or dismissal of the bankruptcy, that the Johnsons failed to plead or introduce evidence regarding the applicability of

section 16.024, that the trial court failed to rule on a "specific 'controlling question of law[,]'" and that violations of the automatic stay are not void, but merely voidable.

Discussion and Analysis

A. Effect of Filing of the Bankruptcy Petition

Subject to some limited exceptions that do not apply in the case at bar, under the Bankruptcy Code, the filing of a bankruptcy petition operates as a stay of, among other activities:

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> (4) any act to create, perfect, or enforce any lien against property of the estate;
>
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title[.]

11 U.S.C. § 362(a)(1)-(6). Appellant places emphasis upon subsections (2) and (3). As stated above, the bankruptcy stay prevents "the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case[,]" as well as, "any act to obtain possession of the *property of the estate* or of property from the estate or to exercise control over *property of the estate*[.]" *Id*. § 362(a)(2), (3) (emphasis added). The Bankruptcy Code defines "property of the estate" to include "all legal or equitable interests of the debtor in property as of the commencement of the [bankruptcy] case." *Id*. § 541(a)(1); *see United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204-05 (1983). In Texas, debtors can exempt homestead property so that the homestead does not become part of the bankruptcy estate. *In re Parsons*, 530 B.R. 411, 417 (Bankr. W.D. Tex. 2014) (citing to Tex. Const. art. XVI, § 51 and Tex. Prop. Code Ann. § 41.002). There is no indication in the appellate record as to whether the Property in question was declared to be exempt homestead property in the bankruptcy. The parties did not include any evidence on this point in the record, neither party presented any argument on this point on appeal, and this question is not included as an issue with the "controlling questions" presented by the trial court in this appeal. Accordingly, solely for purposes of answering the "controlling questions" presented to us, we will assume without deciding that the Property was "property of the estate." There is no

evidence in the record as to whether the Johnsons received a discharge or a dismissal in the bankruptcy, or whether the bankruptcy remains open.

A bankruptcy stay is effective automatically by operation of law upon the filing of the Petition in Bankruptcy and regardless of whether an affected party has notice of the bankruptcy filing. *Elbar Invs., Inc. v. Pierce* (*In re Pierce*), 272 B.R. 198, 203 (Bankr. S.D. Tex. 2001) (citing to *Jones v. Garcia (In re Jones)*, 63 F.3d 411, 412 n.3 (5th Cir. 1995) and *In re Smith*, 876 F.2d 524, 525-26 (6th Cir. 1989)). Any interested party may request that the bankruptcy court grant relief from the automatic stay. 11 U.S.C. § 362(d).

The parties agree that the tax sale of the Property on May 1, 2012, occurred after the bankruptcy petition was filed, and that the tax sale was pursuant to a Judgment and Order of Sale that was entered prior to the filing of the bankruptcy. Nevertheless, section 362(a)(2) of the Bankruptcy Code expressly provides that it stays "the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement" of the bankruptcy. *See* 11 U.S.C. § 362(a)(2).

Zavala had the burden of proof on his Motion for Summary Judgment to establish that there was no genuine issue of material fact and that he was entitled to a judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c); *Mann Frankfort Stein*

& Lipp Advisors, Inc. v. Fielding, 289 S.W.3d 844, 848 (Tex. 2009); *Nixon v. Mr. Prop. Mgmt. Co*., 690 S.W.2d 546, 548 (Tex. 1985). There is no evidence in the record before us that Liberty County or Zavala or some other party to the bankruptcy ever requested relief from the stay from the bankruptcy court or otherwise sought the bankruptcy court's approval for the tax sale. Consequently, assuming that the Property was *property of the estate* at the time of the tax sale, we conclude that on the face of the record now before us that the post-petition tax sale of the Property on May 1, 2012, was in violation of the automatic stay that was in effect pursuant to section 362(a).

Nevertheless, Zavala argues that even if the tax sale was done in violation of the automatic stay, it does not make the deed to Liberty County and the subsequent transfer to Zavala void, but only voidable. We note that the Texas Supreme Court has previously discussed the difference between a void and voidable instrument. Most recently, in *Wood v. HSBC Bank USA, N.A.*, _____ S.W.3d _____, No. 14-0714, 2016 Tex. LEXIS 383 (Tex. May 20, 2016), the Texas Supreme Court discussed whether a lien securing a noncompliant home-equity loan should be considered void or voidable, as well as the inapplicability of the statute of limitations on a suit to quiet title relating thereto. Therein the Court stated:

> Under the common law, a "void" act "is one which is entirely null, not binding on either party, and not susceptible of ratification." *Cummings v. Powell*, 8 Tex. 80, 85 (1852). In comparison, "a voidable act is one which is obligatory upon others until disaffirmed by the party with whom it originated and which may be subsequently ratified or confirmed." *Id.* When an instrument is void, a quiet-title action can be brought at any time to set it aside. *Slaughter v. Qualls*, 139 Tex. 340, 162 S.W.2d 671, 674 (Tex. 1942). However, when an instrument is voidable, a four-year statute of limitations applies to actions to cancel it. *Id.* "When a deed is merely voidable, equity will not intervene as the claimant has an adequate legal remedy." *Ford v. Exxon Mobil Chem. Co.*, 235 S.W.3d 615, 618 (Tex. 2007).
>
> . . . .
>
> Because we hold that home-equity liens securing constitutionally noncompliant loans are invalid before the defect is cured, we also hold that no statute of limitations applies to cut off a homeowner's right to quiet title to real property encumbered by an invalid lien under section 50(c). "We have held that as long as an injury clouding the title remains, so too does an equitable action to remove the cloud; therefore, a suit to remove the cloud is not time-barred." *Ditta v. Conte*, 298 S.W.3d 187, 192 (Tex. 2009). Indeed, it would make little sense to cut off a homeowner's claim merely because of the passage of time when the constitutional protections do not contemplate such a limitation. The Constitution's plain text compels that homeowners' right to seek a declaration of an invalid lien not be bound by a statute of limitations. As such, no statute of limitations applies to this type of quiet-title action.

Wood, 2016 Tex. LEXIS 383, at **10-11, 17.

Appellee principally relies upon language contained in *Chapman v. Bituminous Insurance Company* (*In re Coho Res., Inc.)*, 345 F.3d 338, 344 (5th Cir. 2003), for his argument that in the context of transfers taken in violation of the

automatic stay, the transfers are voidable rather than void. Appellant contends that *Chapman* is not controlling and cannot be read out of context, nor is it inconsistent with binding Texas precedent. We agree.

In *Chapman*, the Fifth Circuit stated:

> . . . We adhere to the view that violations are merely "voidable" and are subject to discretionary "cure." This position rests on the bankruptcy court's statutory power to annul the automatic stay, i.e., to "lift the automatic stay retroactively and thereby validate actions which otherwise would be void."

Id. (footnote omitted). The Fifth Circuit has more fully explained that the ability to "retroactively validate" an action taken in violation of the automatic stay is left to the discretion of bankruptcy courts, and that is why the Fifth Circuit considers the matters voidable, rather than void. *See City Bank v. Indus. Bank NA (In re Brown),* 178 Fed. App'x 409, 410 (5th Cir. 2006), *cert. denied*, 549 U.S. 1019 (2006). "'[T]he retroactive validation of actions taken in violation of an automatic stay is reserved to the discretion of bankruptcy courts, and they are cautioned to use this discretion sparingly because of the adverse impact that validation could have on other creditors who honored the stay.'" *Mestena, Inc. v. Atravasada Land & Cattle Co.* (*In re Atravasada Land & Cattle Inc.*), 388 B.R. 255, 268 (Bankr. S.D. 2008) (quoting *City Bank*, 178 Fed. App'x at 410).

Longstanding and controlling precedent from the Texas Supreme Court provides that an attempt to transfer real property in the State of Texas that is done in violation of an automatic stay is void, not voidable. *See, e.g.*, *Cont'l Casing Corp. v. Samedan Oil Corp.*, 751 S.W.2d 499, 501 (Tex. 1988) ("An action taken in violation of the automatic stay is void, not merely voidable."). Whether a violation of the automatic stay renders a judgment void or voidable was also addressed by the Texas Supreme Court in *York v. State*, 373 S.W.3d 32, 40 (Tex. 2012). In *York*, the Court adhered to its earlier conclusion that an action taken in violation of the automatic stay is void, not merely voidable, ruling that a judgment that violates the automatic stay is invalid and void unless the creditor seeks relief from the stay in the bankruptcy court. *Id.*; *see also Thuesen v. Amerisure Ins. Co.*, 487 S.W.3d 291, 297 (Tex. App.—Houston [14th Dist.], 2016, no pet.) ("The bankruptcy court may grant relief from the stay. *See* 11 U.S.C. § 362(d). If the bankruptcy court has not granted such relief and a party or state court takes an action that violates the bankruptcy stay, such action is void.") (citing *York*, 373 S.W.3d at 37-40)).

In the first "controlling question" the trial court asks "Does Liberty County's willful violation of the bankruptcy stay under 11 U.S.C. § 362 mean that any

subsequent transfer of the property is invalid?"[2] In response to the first "controlling question," we conclude that Texas law does not permit a purchaser at a judicial sale to acquire title from a deed obtained at a tax sale if the sale violated the automatic stay of the Bankruptcy Code, regardless of whether the Sheriff and the purchaser willfully or unintentionally violated the bankruptcy stay. *York*, 373 S.W.3d at 40. To the extent Zavala argues that there is no evidence in the record as to whether the bankruptcy was dismissed or whether the Johnsons were discharged in bankruptcy, the legal effect of such facts is not currently before us in this limited appeal.

We further conclude that because the deed to Liberty County was void, Liberty County could not pass any right, title, or interest to Zavala in the Property. *See Poag v. Flories*, 317 S.W.3d 820, 825 (Tex. App.—Fort Worth 2010, pet. denied) ("A void deed is without vitality or legal effect."); *see also Bradford v.*

[2] We find no evidence in the record now before us from which we can determine whether there was a "willful violation" of the bankruptcy stay, but note that the first controlling question does not ask the court of appeals to make a determination on that element. "Willfulness within the context of an alleged stay violation is almost universally defined to mean intentional acts committed with knowledge of the bankruptcy petition." *In re San Angelo Pro Hockey Club, Inc.*, 292 B.R. 118, 124 (Bankr. N.D. Tex. 2003). We note that a creditor may inadvertently violate a bankruptcy stay. *See, e.g.*, *In re White-Robinson*, No. 11-32080-SGJ-7, 2011 Bankr. LEXIS 3893 (Bankr. N.D. Tex. 2011).

Thompson, 470 S.W.2d 633, 635, 637 (Tex. 1971) (concluding that a foreclosure was "null and void[]" and therefore declaring that a trustee's deed arising from the foreclosure was "cancelled and held for naught[]"); *Tex. Dep't of Transp. v. A.P.I. Pipe & Supply, LLC*, 397 S.W.3d 162, 168 (Tex. 2013); *Sanchez v. Telles*, 960 S.W.2d 762, 768 (Tex. App.—El Paso 1997, writ denied). The May 1, 2012 tax deed was void at the time it was issued in violation of the bankruptcy stay, and it was void when Zavala acquired his quitclaim deed from Liberty County. While Zavala or Liberty County could have sought relief from the automatic stay in the bankruptcy court, there is no evidence in the record before us indicating that either did so.

B. Applicable Statute of Limitation

In the second "controlling question" the trial court asks:

> Which statute of limitations is applicable, that under Tex. Tax Code § 33.54[,] or does Tex. Civ. Prac. & Rem. Code § 16.024 apply?

Zavala asserted several affirmative defenses to the Johnsons' claim, including among other defenses that the claim was barred by the statute of limitations. Zavala argued in his Motion for Summary Judgment that the claim was barred as a matter of law by section 33.54(a)(2)(A) of the Texas Tax Code and that the failure of the Johnsons to maintain the suit against the "purchaser of the

property at a tax sale" before the second anniversary of the date of the deed executed to the purchaser at the tax sale is filed for record, as well as the statute of limitations in section 33.54(c).[3] The Johnsons argued that the applicable statute of limitations is contained in section 16.024 of the Texas Civil Practice and Remedies Code and not in the Tax Code because the initial tax sale to Liberty County and the deed to Liberty County was void and of no legal consequence, and Liberty County had no title to pass to Zavala.

Sections 33.54 and 34.08 appear in Chapters 33 and 34 of the Texas Tax Code and state as follows:

> Sec. 33.54. Limitation on Actions Relating to Property Sold for Taxes
>
> (a) Except as provided by Subsection (b), an action relating to the title to property may not be maintained against the purchaser of the property at a tax sale unless the action is commenced:
>
> (1) before the first anniversary of the date that the deed executed to the purchaser at the tax sale is filed of record; or
> (2) before the second anniversary of the date that the deed executed to the purchaser is filed of record, if on the date that the suit to collect the delinquent tax was filed the property was:
> (A) the residence homestead of the owner; or
> (B) land appraised or eligible to be appraised under Subchapter C or D, Chapter 23.

[3] Zavala also argued that the Johnsons failed to follow the requirements of section 34.08(a) by posting a deposit into the registry of the court in an amount equal to the total taxes, penalties, interest and costs awarded in the tax judgment.

(b) If a person other than the purchaser at the tax sale or the person's successor in interest pays taxes on the property during the applicable limitations period and until the commencement of an action challenging the validity of the tax sale and that person was not served citation in the suit to foreclose the tax lien, that limitations period does not apply to that person.

(c) When actions are barred by this section, the purchaser at the tax sale or the purchaser's successor in interest has full title to the property, precluding all other claims.

Sec. 34.08. Challenge to Validity of Tax Sale.

(a) A person may not commence an action that challenges the validity of a tax sale under this chapter unless the person:

(1) deposits into the registry of the court an amount equal to the amount of the delinquent taxes, penalties, and interest specified in the judgment of foreclosure obtained against the property plus all costs of the tax sale; or
(2) files an affidavit of inability to pay under Rule 145, Texas Rules of Civil Procedure.

(b) A person may not commence an action challenging the validity of a tax sale after the time set forth in Section 33.54(a)(1) or (2), as applicable to the property, against a subsequent purchaser for value who acquired the property in reliance on the tax sale. The purchaser may conclusively presume that the tax sale was valid and shall have full title to the property free and clear of the right, title, and interest of any person that arose before the tax sale, subject only to recorded restrictive covenants and valid easements of record set forth in Section 34.01(n) and subject to applicable rights of redemption.

(c) If a person is not barred from bringing an action challenging the validity of a tax sale under Subsection (b) or any other provision of this title or applicable law, the person must bring an action no later

> than two years after the cause of action accrues to recover real property claimed by another who:
>
> > (1) pays applicable taxes on the real property before overdue; and
> > (2) claims the property under a registered deed executed pursuant to Section 34.01.
>
> (d) Subsection (c) does not apply to a claim based on a forged deed.

Tex. Tax Code Ann. §§ 33.54, 34.08 (West 2015).

In comparison to the Tax Code provisions, section 16.024 of the Civil Practice and Remedies Code provides that "[a] person must bring suit to recover real property held by another in peaceable and adverse possession under title or color of title not later than three years after the day the cause of action accrues." Tex. Civ. Prac. & Rem. Code Ann. § 16.024 (West 2002).

The Appellants contend that the applicable statute of limitations is the three-year statute in section 16.024, but they argue that their cause of action against Zavala did not "accrue" until Liberty County sold the property to Zavala. The underlying suit was filed on March 4, 2015. Assuming section 16.024 applies, the suit would be timely. We have already concluded, however, that the deed to Liberty County was void, and the deed from Liberty County to Zavala would also be void. Accordingly, because a person holding a void deed does not have title or color of title, he would not be entitled to the protection of the three-year statute of

limitations in section 16.024. *See Levitas v. Barraza*, No. 13-02-510-CV, 2004 Tex. App. LEXIS 6836, at **7-8 (Tex. App.—Corpus Christi July 29, 2004, no pet.) (mem. op.) (citing to *Field Measurement Serv. Inc. v. Ives*, 609 S.W.2d 615, 620-21 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.)). Accordingly, section 16.024 is not controlling.

In the Motion for Summary Judgment filed by Zavala, Zavala alleged that the deed acquired by Liberty County at the tax sale was not void, but only voidable, and that all of the claims asserted by the Johnsons were barred by sections 33.54 and 34.08 of the Texas Tax Code. Neither Appellants nor Appellees addressed whether the underlying claim that purports to assert a trespass to try title suit would also be barred by the respective tax code sections.

A trespass to try title action is a procedure by which claims to title or the right of possession may be adjudicated. Tex. Prop. Code Ann. 22.001 (West 2014). The plaintiff in a trespass to try title action must recover, if at all, on the strength of the plaintiff's own title and not on the weakness of the defendant's title. *Land v. Turner*, 377 S.W.2d 181, 183 (Tex. 1964); *Adams v. Rowles*, 228 S.W.2d 849, 853 (Tex. 1950). The plaintiff in a trespass to try title suit has the burden to establish superior title by showing that the plaintiff has (1) title emanating from the sovereignty of the soil, (2) a superior title in itself emanating from a common

source to which the defendant claims, (3) title by adverse possession, or (4) title by earlier possession coupled with proof that possession has not been abandoned. *Land*, 377 S.W.2d at 183. The statute of limitations for a trespass to try title suit depends upon the basis for the plaintiff's title. If there is a challenge to a deed, the Texas Supreme Court explained in *Slaughter v. Qualls*, 162 S.W.2d 671, 674 (1942):

> The rule has long been established in this State that where a deed is absolutely void, a suit at law in trespass to try title may be maintained to recover the land without setting the deed aside, and the statutes of limitation governing actions for the recovery of land apply. On the other hand, where a deed is merely voidable and the equity powers of the court must first be invoked to cancel the deed before a suit can be maintained at law to recover the land, then the four year statute, Art. 5529, R.C.S. 1925, controls. [citations omitted]. Therefore, it is necessary for us to decide whether the trustee's deed was void or merely voidable in order to determine whether or not the suit was barred by limitation.

In comparison to a trespass to try title action, an equitable suit to quiet title is not subject to any statute of limitations if a deed is void. *Wood*, 2016 Tex. LEXIS 383, at *11; *Ford v. Exxon Mobil Chem. Co.*, 235 S.W.3d 615, 618 (Tex. 2007); *see also Slaughter*, 162 S.W.2d at 674 (stating that four-year statute of limitations applies to deeds that are voidable). "[O]ur courts have never regarded the legal remedy of . . . trespass to try title, as being the same in substance and effect as an equitable proceeding to cancel an opposing claim, or remove a cloud from the

plaintiff's title." *Haskins v. Wallet*, 63 Tex. 213, 218 (Tex. 1885). Although the plaintiff must still base his or her claim upon the strength of his or her own title, the plaintiff is not required to trace his or her title to either the sovereign or common ownership. *Wright v. Matthews*, 26 S.W.3d 575, 578 (Tex. App.—Beaumont 2000, pet. denied).

According to section 33.54(a) of the Tax Code, an action relating to the title to property may not be maintained against the purchaser of the property at a tax sale unless the action is commenced either before the first anniversary of the date that the deed executed to the purchaser at the tax sale is filed of record, or before the second anniversary of the date that the deed executed to the purchaser is filed of record, if on the date that the suit to collect the delinquent tax was filed the property was either the residence homestead of the owner, or land appraised or eligible to be appraised under Subchapter C or D, Chapter 23. Tex. Tax Code Ann. § 33.54(a); *see Session v. Woods*, 206 S.W.3d 772, 775-79 (Tex. App.—Texarkana 2006, pet. denied) (claim of adverse possession of portion of tract was barred by limitations when brought more than one year after opposing party's filing of tax deed). There is no evidence in the record before us as to whether or not the Property was the "residence homestead" of the Johnsons or if it was "land appraised or eligible to be appraised under Subchapter C or D, Chapter 23." Under

the Tax Code, no action challenging the validity of a tax sale may be brought after the statute of limitations has expired. Tex. Tax Code Ann. § 34.08(b); *see Roberts v. T.P. Three Enters*., 321 S.W.3d 674, 677 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (suit filed more than two years after tax deed recorded was barred by limitations).

This Court examined and applied the Tax Code limitation provisions in *John K. Harrison Holdings, LLC v. Strauss*, 221 S.W.3d 785, 788 (Tex. App.—Beaumont 2007, pet. denied). In *Strauss*, a certain tract was sold to a trustee at a tax sale in 1996. *Id*. Strauss then purchased the property from the trustee. *Id.* In 2003, Harrison Holdings filed a suit against Strauss, arguing that Harrison Holdings acquired title to the tract in 2001 in a quitclaim deed from the owners, and that the tax judgment and deed from the Sheriff were invalid and void because "'the 'named defendants [in the tax suit] had no ownership interest in the property,'" and "'because known and/or record owners of the property at the time were not made parties to the tax suit or notified of the sale.'" *Id.* The parties stipulated to the facts and submitted the claim to the trial court for a decision on the law. *Id.* at 787 n.1. The trial court denied Harrison's claim. *Id.* at 791. On appeal, this Court stated: "[a]lthough Harrison describes its claim as a 'cause of action [to] quiet title[,]' the suit, in effect, is a challenge to the validity of the tax

sale." *Id.* at 787. Strauss asserted a limitations defense under sections 34.08(b) and 33.54 of the Texas Tax Code. *Id.* This Court concluded that the requirements of section 33.54(a)(1) were not met and sub-section (b) did not apply because no tax payment was made by Harrison or its predecessor during the applicable limitations period. *Id.* at 788. "The limitations provisions preclude Harrison's claim." *Id.* (citing *Jordan v. Bustamante*, 158 S.W.3d 29, 39-40 (Tex. App.—Houston [14th Dist.] 2005, pet. denied)). This Court also noted that Harrison stated in its brief that the limitations provisions of the Tax Code "'would appear to equally validate tax deeds which convey nothing and tax deeds which are void,"' but this Court did not decide whether a void deed can be validated by virtue of the limitations period contained in the Tax Code. *Id.* In fact, this Court went on to explain that Harrison's argument that the tax sale was void for failing to name all interested parties was incorrect because the sale would be valid as to the parties it named. *Id*. at 791.

Appellants maintain that the time limitation and restrictions in the Tax Code apply only to actions challenging the validity of a tax sale and resulting deed, and they are not applicable when the tax deed is void in its entirety because the tax sale violated an automatic stay in the bankruptcy. We agree. *See Sec. State Bank & Trust v. Bexar Cty.*, 397 S.W.3d 715, 723-24 (Tex. App.—San Antonio 2012, pet. denied) (when lienholder was not joined in tax foreclosure suit, tax sale was void

as to that lienholder's interest, so sections 33.54 and 34.08 did not bar suit by the lienholder to enforce lien against property); *Hays v. Butler*, 295 S.W.3d 53, 57-58 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (tax deed's property description was inadequate, so deed was void and section 33.54(a) was inapplicable); *Mem'l Park Med. Ctr., Inc. v. River Bend Dev. Grp., L.P.*, 264 S.W.3d 810, 813-17 (Tex. App.—Eastland 2008, no pet.) (when tax sale was voided and prior tax sale purchaser had received a refund of purchase price, the subsequent trespass to try title action based on superior title regardless of tax sale was not barred by the Tax Code).

Zavala only received a quitclaim deed from Liberty County. As a matter of law, a quitclaim deed only conveys whatever right, title, and interest that the grantor holds and it does not act as a "muniment of title." *Rogers v. Ricane Enters., Inc.*, 884 S.W.2d 763, 769 (Tex. 1994). Liberty County could not convey any right, title or interest to the Property because the tax sale was conducted in violation of the bankruptcy stay. Accordingly, the time limitations contained in sections 33.54 and 34.08 of the Tax Code would not be controlling. Therefore, we reverse the trial court's entry of summary judgment and remand the case to the trial court.

REVERSED AND REMANDED.

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LEANNE JOHNSON
Justice

Submitted on April 14, 2016
Opinion Delivered July 28, 2016

Before McKeithen, C.J., Kreger and Johnson, JJ.