TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00667-CV

Nasim Iqbal; Tej Iqbal; and all other occupants of 2503 Paden Circle, Cedar Park, Texas, 78613, Appellants

v.

Federal National Mortgage Association, a/k/a Fannie Mae, Appellee

FROM COUNTY COURT AT LAW NO. 4 OF WILLIAMSON COUNTY
NO. 15-0444-CC4, HONORABLE JOHN MCMASTER, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Appellants, Nasim Iqbal, Tej Iqbal, and all other occupants of 2503 Paden Circle, Cedar Park, Texas, 78613 (collectively, the Iqbals), appeal the ruling in a forcible detainer action that granted possession of the property at issue to Appellee, Federal National Mortgage Association, (FNMA). The Iqbals contend in two issues that the trial court erred in rendering judgment for FNMA because: (1) the evidence is legally insufficient to support the trial court's holding; and (2) the trial court abused its discretion in admitting evidence based on the testimony of a witness who lacked sufficient personal knowledge to testify. We will affirm.

BACKGROUND

In 2006, the Iqbals executed a deed of trust that secured a promissory note in connection with real property located in Williamson County, at 2503 Paden Circle, Cedar Park,

Texas, 78613 (the Property). The deed of trust provided that if a default and foreclosure occurred, any occupant of the Property who refused to surrender possession would become a tenant at sufferance and could be removed by writ of possession or other court proceeding.

The Iqbals defaulted on the underlying promissory note, and in August 2012, FNMA purchased the Property at a nonjudicial foreclosure sale, as documented in a substitute trustee's deed and accompanying statement of facts. On February 25, 2015, FNMA sent the Iqbals notices to vacate the Property. Asserting that the Iqbals refused to vacate the property, FNMA filed its petition for forcible detainer on March 11, 2015, in Williamson County Justice Court, Precinct 2. Attached to the petition were the verification required under Texas Rule of Civil Procedure 510.3(a) and copies of the deed of trust, the substitute trustee's deed, and the notices to vacate with certified mailing documentation. Without specifying its grounds in its order, the justice court dismissed the action on motion by the Iqbals.

FNMA appealed the justice court's decision to the Williamson County Court at Law No. 4, which held a trial *de novo* on September 22, 2015. At the trial, FNMA offered the substitute trustee's deed, the notices to vacate, and the live testimony of Jaime Miloch, a regional manager for the law firm that prosecuted FNMA's forcible detainer action against the Iqbals in the justice court. When FNMA rested its case, the Iqbals moved for judgment claiming that FNMA presented no evidence of a material element of the claim because the deed of trust had not been admitted into evidence. The court denied the Iqbals' motion. Later, during their case-in-chief, the Iqbals requested that the trial court take judicial notice of the court's file, which included the deed of trust. The Iqbals then presented arguments to the trial court relating to a discrepancy in descriptions of the Property

based on the language of the deed of trust and other documents. The trial court ultimately entered judgment in FNMA's favor, awarding possession of the Property to FNMA and ordering the issuance of a writ of possession. The Iqbals appealed the trial court's judgment to this court.

ANALYSIS

A forcible detainer action is designed to be a speedy, simple, and inexpensive means to determine the right to immediate possession of real property where there is no claim of unlawful entry. *Marshall v. Housing Auth. of San Antonio*, 198 S.W.3d 782, 787 (Tex. 2006). The only issue to be adjudicated is the right to actual possession. Tex. R. Civ. P. 510.3(e). In order to prevail in a forcible detainer action where the property was purchased at a foreclosure sale, the plaintiff must prove that: (1) the substitute trustee conveyed the property by deed to the plaintiff after the foreclosure sale; (2) a landlord–tenant relationship existed and the occupants became tenants at sufferance; (3) the plaintiff gave proper notice to the occupants that it required them to vacate the premises; and (4) the occupants refused to vacate the premises. *See* Tex. Prop. Code §§ 24.002, .005; *Reardean v. Federal Home Loan Mortg. Corp.*, No. 03-12-00562-CV, 2013 WL 4487523, at *1 (Tex. App.—Austin Aug. 14, 2013, no pet.) (mem. op.); *Murphy v. Countrywide Home Loans, Inc.*, 199 S.W.3d 441, 445 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

The Iqbals' first issue challenges the legal sufficiency of the evidence supporting the trial court's findings that a landlord–tenant relationship existed (the second element) and that the Iqbals refused to vacate the Property (the fourth element). In their second issue, the Iqbals contend that the trial court erred in admitting evidence supporting the finding that notice to vacate (the third element) was provided to the Iqbals.

We will address the Iqbals' first issue in two parts: (1) the landlord–tenant relationship; and (2) refusal to vacate the property. The Iqbals assert that legally insufficient evidence supports the trial court's findings on these two elements. In a legal-sufficiency challenge, we review all evidence in the light most favorable to the verdict, crediting favorable evidence if a reasonable fact finder could, and disregarding contrary evidence unless a reasonable fact finder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). If more than a scintilla of evidence exists in the record to support the challenged finding, then the legal-sufficiency challenge fails. *Gharda USA, Inc. v. Control Sols., Inc.*, 464 S.W.3d 338, 347 (Tex. 2015). In a bench trial, the trial court is the finder of fact and the sole judge of the credibility of testimony and weight to be given any particular evidence. *Vo Eng'g, Ltd. v. Cai*, No. 03-13-00529-CV, 2015 WL 513269, at *2 (Tex. App.—Austin Feb. 4, 2015, no pet.) (mem. op.).

Landlord–Tenant Relationship

In order to prove that a landlord–tenant relationship existed, FNMA was required to prove that the Iqbals became tenants at sufferance upon refusal to vacate following sale of the property. The deed of trust contains the following language:

> If the Property is sold pursuant to this Section 22, Borrower or any person holding possession of the Property through Borrower shall immediately surrender possession of the Property to the purchaser at that sale. If possession is not surrendered, Borrower or such person shall be a tenant at sufferance and may be removed by writ of possession or other court proceeding.[1]

[1] The deed of trust provides that "'Borrower' is Nasim Iqbal, joined herein pro forma by her spouse, Tej Iqbal."

Thus, the deed of trust establishes that a landlord–tenant relationship was created upon the Iqbals' refusal to surrender possession following sale of the Property. However, the Iqbals argue that the deed of trust was not admitted into evidence in the trial court, so the record contains no evidence to support the trial court's finding that the Iqbals were tenants at sufferance. In response, FNMA argues that the deed of trust was judicially noticed and admitted "for all practical purposes," despite not being expressly admitted in evidence.

The Iqbals primarily contend that the deed of trust was not admitted into evidence at any point in the trial court proceedings and that the substitute trustee's deed alone does not prove that the Iqbals were tenants at sufferance. They further assert that the deed of trust could not have been considered by the trial court because it was not referenced at trial until after FNMA had rested its case. A careful review of the reporter's record facilitates our analysis. Following FNMA's presentation of its case-in-chief, the Iqbals moved for judgment based on the fact that the deed of trust had not been admitted into evidence. The trial court denied the Iqbals' motion. The Iqbals then proceeded with the presentation of their case, calling no witnesses but directing the judge's attention to two pieces of evidence. First, the Iqbals requested that the court take judicial notice of "the file," and specifically the deed of trust, which was an attachment to FNMA's original petition in the justice court. Second, they offered Defendant's Ex. 1, several pages of plat records from Williamson County, which was admitted with no objection from FNMA. The Iqbals relied on these documents, along with the substitute trustee's deed, to present a defensive argument regarding a conflict in the descriptions of the Property contained in the two deeds.[2] The Iqbals referred to the deed of trust

[2] This issue was not raised on appeal to this court.

several times, and it was integral to their argument regarding the property description discrepancy. FNMA did not object to the Iqbals' request that the court take judicial notice of the deed of trust, and it also relied upon the document in its responsive property description argument. The trial court did not expressly rule on the request.

Based on the record presented by this case, we conclude that the trial court took judicial notice of the deed of trust contained in the court's file. Under Texas Rule of Evidence 201(b)(2), a court may take judicial notice of its own records, such as pleadings, in the same or related proceedings involving the same or nearly same parties. *B.L.M. v. J.H.M., III*, No. 03-14-00050-CV, 2014 WL 3562559, at *11 (Tex. App. —Austin July 17, 2014, pet. denied) (mem. op.) (citing *Tschirhart v. Tschirhart*, 876 S.W.2d 507, 508-09 (Tex. App.—Austin 1994, no writ)). Similarly, a court may take judicial notice of the records of another court if presented with sufficient evidence of the indisputability of the records. *Freedom Commc'ns, Inc. v. Coronado*, 372 S.W.3d 621, 623 (Tex. 2012); *see WorldPeace v. Commission for Lawyer Discipline*, 183 S.W.3d 451, 459 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). In addition, we have held that a notarized, recorded, and certified deed meets the requirements of Texas Rule of Evidence 201, and that judicial notice is appropriate for such documents. *Johnson v. Johnson*, No. 03-02-00427-CV, 2005 WL 3440773, at *6 (Tex. App.—Austin Dec. 16, 2005, no pet.) (mem. op.); *see Lockhill Ventures, LLC v. Ard Mor, Inc.*, No. 04-14-00796-CV, 2015 WL 4113691, at *1 n.2 (Tex. App.—San Antonio July 8, 2015, pet. denied) (mem. op.) (relying on recorded document that was in the clerk's record and was the subject of party's request for judicial notice, but was not expressly admitted into evidence). In fact, judicial notice is mandatory "if a party requests it and the

court is supplied with the necessary information." Tex. R. Evid. 201(c)(2); *Office of Pub. Util. Counsel v. Public Util. Comm'n*, 878 S.W.2d 598, 600 (Tex. 1994). Further, we may presume that a trial court took judicial notice of the file even if there is no record that the trial court did so expressly. *Chavez v. Martinez*, No. 03-14-00470-CV, 2016 WL 690749, at *3 n.5 (Tex. App.—Austin Feb. 18, 2016, no pet.) (mem. op.); *Marble Slab Creamery, Inc. v. Wesic, Inc.*, 823 S.W.2d 436, 439 (Tex. App.—Houston [14th Dist.] 1992, no writ) (presumption that judicial notice was taken by the trial court does not require request or announcement). When making such a presumption, we take care to ensure that parties are not denied the opportunity to be heard, which is guaranteed under Texas Rule of Evidence 201(e). *See In re C.L.*, 304 S.W.3d 512, 515 (Tex. App.—Waco 2009, no pet.) (holding that if a court takes judicial notice *sua sponte* "it must at some point notify the parties that it has done so and give them an opportunity to challenge that decision").

The Iqbals assert that the trial court's decision and our review is limited to evidence admitted during FNMA's case-in-chief. Based on the record before us, we disagree. Where, as here, a motion for judgment at the close of plaintiff's case-in-chief is denied, and movant thereafter introduces additional evidence, movant must re-urge its motion at the close of its case. *Ratsavong v. Menevilay*, 176 S.W.3d 661, 667 (Tex. App.—El Paso 2005, pet. denied); *1986 Dodge Pickup v. State*, 129 S.W.3d 180, 183 (Tex. App.—Texarkana 2004, no pet.) (citing *Cliffs Drilling Co. v. Burrows*, 930 S.W.2d 709, 712 (Tex. App.—Houston [1st Dist.] 1996, no writ); *McMeens v. Pease*, 878 S.W.2d 185, 190 (Tex. App.—Corpus Christi 1994, writ denied)). Otherwise, the movant effectively waives the motion based solely on the evidence presented by the plaintiff. *See Majeed v. Hussain*, No. 03-08-00679-CV, 2010 WL 4137472, at *4 (Tex. App.—Austin

Oct. 22, 2010, no pet.) (mem. op.) ("once the defendant elects to present its own evidence, that additional evidence, and any other evidence presented at trial, must be considered by the trial court in determining whether there is legally sufficient evidence"); *Ratsavong*, 176 S.W.3d at 667. This is true for jury and nonjury trials. *Wenk v. City Nat'l Bank*, 613 S.W.2d 345, 348 (Tex. Civ. App.—Tyler 1981, no writ). While we recognize that the proceeding below was short in duration and the parties seemed to dispense with some of the formalities of trial, the record before us indicates that the Iqbals introduced additional evidence following denial of their motion for judgment and did not re-urge their motion at the close of their case. Consequently, the trial court's consideration, and ours, cannot be limited to the evidence presented in FNMA's case-in-chief, but must include all evidence presented at trial. As discussed herein, the deed of trust became a part of the evidentiary record during the Iqbals' case-in-chief and is now evidence that must be considered pursuant to our sufficiency review.[3]

The Iqbals also rely on *Wells Fargo, N.A. v. Steel*, No. 03-13-00297-CV, 2014 WL 108414 (Tex. App.—Austin Jan. 7, 2014, no pet.) (mem. op.), to support their claim that FNMA failed to prove a landlord–tenant relationship. However, the *Steel* opinion and the evidentiary problems discussed therein are qualitatively different than the case before us. In *Steel*, Wells Fargo argued that the substitute trustee's deed and the deed of trust had already been admitted, despite not being formally offered and admitted at trial, because they were attached to Wells Fargo's original petition in the justice court. However, only the substitute trustee's deed had actually been

[3] Because we conclude that the trial court took judicial notice of the deed of trust, we need not address FNMA's argument that it was effectively admitted because both parties relied on the document and treated it as if it were evidence.

attached to the original petition. Contrary to the instant case, we noted explicitly that, "the deed of trust is nowhere to be found in the clerk's record." *Id.* We did not reach the issue of whether the documents included in the record but not admitted at trial provided any evidentiary support to the trial court in a *de novo* appeal. In this case, the deed of trust became part of the evidence in the trial court through the doctrine of judicial notice. Because the deed of trust provides more than a scintilla of evidence supporting the finding that a landlord–tenant relationship existed, we overrule this part of the Iqbals' first issue.

Refusal to Vacate

In the second part of their first issue, the Iqbals assert that the trial court erred in rendering judgment for FNMA because there was no evidence that the Iqbals had refused to vacate the property after demand was made. We disagree. Over objection by the Iqbals, FNMA admitted into evidence notices to vacate advising the Iqbals that they must vacate the Property within three days. Attached to the notices were United States Postal Service tracking records showing that the notices were sent via certified mail on February 25, 2015, and delivered to the Iqbals and other occupants at the Property on February 28, 2015. The record further shows that an eviction citation was served on the Iqbals in person at the Property on March 13, 2015. In addition, the Iqbals have "tacitly conceded that [they have] remained in possession of the property by continuing to prosecute [an] appeal" from the lower court judgment awarding FNMA possession. *Rodriguez v. Citimortgage, Inc.*, No. 03-10-00093-CV, 2011 WL 182122, at *6 (Tex. App.—Austin Jan. 6, 2011, no pet.) (mem. op.); *see Marshall*, 198 S.W.3d at 787. If they had relinquished

possession, their appeal regarding their right to immediate possession would be moot. *Rodriguez*, 2011 WL 182122, at *6. We overrule the remainder of the Iqbals' first issue.

Admission of Notices to Vacate

In their second issue, the Iqbals claim that the trial court abused its discretion in admitting three notices to vacate that were sent to the Iqbals. The notices' admission was predicated on the live testimony of FNMA's witness, Jaime Miloch. The Iqbals assert that Ms. Miloch lacked sufficient personal knowledge for the trial court to admit the documents based on her testimony.

The decision to admit or exclude evidence is within the trial court's sound discretion. *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001); *Owens–Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). We review the admission or exclusion of evidence under an abuse-of-discretion standard. *Southwestern Energy Prod. Co. v. Berry–Helfand*, 491 S.W.3d 699, 728 (Tex. 2016); *ICON Benefit Adm'rs II, L.P. v. Abbott*, 409 S.W.3d 897, 906 (Tex. App.—Austin 2013, pet. denied). A trial court abuses its discretion when it acts without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

We have held that the rules of evidence "do not require that the qualified witness who lays the predicate for the admission of business records be their creator, be an employee of the same company as the creator, or have personal knowledge of the contents of the record—personal knowledge of the manner in which the records were kept will suffice." *Rodriguez*, 2011 WL 182122, at *5 (citing *In re E.A.K.*, 192 S.W.3d 133, 142 (Tex. App.—Houston [14th Dist.] 2006, pet. denied); Tex. R. Evid. 803(6), 902(10)). A witness who has adequate knowledge of the mode of preparation

of the exhibits in dispute is qualified to lay the predicate for the records. *Montoya v. State*, 832 S.W.2d 138, 141 (Tex. App.—Ft. Worth 1992, no pet.); *In re K.C.P.*, 142 S.W.3d 574, 578 (Tex. App.—Texarkana 2004, no pet.).

Ms. Miloch testified that she was a regional manager for Robertson Anschutz Vetters, a law firm that provided legal services to FNMA in forcible detainer actions. The firm drafted and mailed the notices to vacate to the Iqbals and instituted the forcible detainer action in this case at the justice court. Ms. Miloch testified that she had personal knowledge of the firm's procedures with respect to eviction proceedings and the manner in which her employer's records were created and maintained. Additionally, Ms. Miloch testified that the firm's records were maintained on a web-based system, through which she was able to access records created in any of the firm's offices. Ms. Miloch affirmed that the records were kept in the normal course of business as part of the firm's regular practice. Lastly, she testified that she had reviewed the records that specifically relate to this case and identified the documents as the notices to vacate sent to the Iqbals on February 25, 2015. The trial court overruled the Iqbals' objection to admission of the notices because Ms. Miloch testified that she had knowledge based on her access to the website where the records were maintained and that she had accessed the records. Ms. Miloch's testimony established her qualifications to lay the predicate for the notices to vacate and certified mailing documentation. Therefore, the admission of Plaintiff's Ex. 1 was not arbitrary, and it did not constitute an abuse of discretion on the part of the trial judge. We overrule the Iqbals' second issue.

CONCLUSION

Having overruled the Iqbals' issues presented on appeal, we affirm the judgment of the trial court.

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Cindy Olson Bourland, Justice

Before Chief Justice Rose, Justices Pemberton and Bourland

Affirmed

Filed: June 29, 2017