NUMBER 13-16-00376-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

NATHAN CARUSO AND JENNIFER DONNER, Appellants,

v.

NATHANIEL YOUNG, Appellee.

On appeal from the County Court at Law No. 1 of Travis County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Benavides
Memorandum Opinion by Justice Rodriguez

Appellants Nathan Caruso and Jennifer Donner (collectively Caruso) appeal the county court's order granting appellee Nathaniel Young immediate possession of real property located at 3901 Bandice Lane, Pflugerville, Texas (the Property). By two

issues, Caruso contends that (1) the trial court erred in concluding that Young was entitled to possession of the property through forcible detainer, and (2) the justice court, where the suit was first filed, had no jurisdiction because this is a title dispute, not a forcible-detainer matter. In response, Young claims, among other things, that the county court lacked jurisdiction over the action because Caruso failed to timely perfect an appeal from the justice court's judgment. We vacate the county court's judgment and dismiss the case.[1]

I. PROCEDURAL BACKGROUND

On February 13, 2015, Young filed the underlying action in justice court, claiming that Caruso had committed forcible detainer and was in wrongful possession of the Property. Young sought possession of the Property and a writ of possession. On March 17, 2015, the justice court signed an agreed judgment awarding possession of the Property to Young. The judgment stated that "[b]ecause both parties agree the losing party in this matter intends to appeal to the . . . County Court of Law[, Caruso has] elected to sign the Agreed Judgment in order to facilitate a faster de novo appeal." The justice court's order also set out that "if [Caruso] wish[es] to appeal no appeal bond shall be due."

Caruso filed no bond, cash deposit, or statement of inability to pay. *See* TEX. R. CIV. P. 510.9(a), (f). But on April 7, 2015, Caruso filed a notice of appeal in justice court, giving Young "notice of [his] intent to Appeal the Agreed Judgment in this matter . . . to the County Court of Law, Travis County, Texas." And on April 16, 2015, by written

[1] This case is before the Court on transfer from the Third Court of Appeals in Austin pursuant to an order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through 2017 R.S.).

correspondence, the civil clerk of the justice court informed the parties that the court had received Caruso's appeal on April 7, 2015, had approved the appeal, and had transferred the case to the county clerk's office on April 15, 2015.[2]

Young filed a motion to dismiss the appeal as untimely, but the county court proceeded to hold a trial on the merits. It rendered judgment awarding Young possession of the Property.

Caruso appealed the county court's judgment to this Court. Young, in turn, challenged our jurisdiction in his responsive appellate issue and in a motion to set aside the county court's judgment and to dismiss the appeal for want of jurisdiction. On October 10, 2016, we carried Young's motion with the case. Because jurisdiction is dispositive of Caruso's appeal, we address it first. *See* TEX. R. APP. P. 47.1.

II. JURISDICTION

Young asserts that we lack jurisdiction because Caruso filed his appeal of the justice court's judgment to the county court of law outside the five-day filing deadline. *See* TEX. R. CIV. P. 510.9(a). Caruso responds that the twenty-one day deadline set out in section 506.1 should apply because the substance of Young's allegations is "nothing more than a breach of lease [and] . . . not a forcible detainer action." *See id.* R. 506.1(a). Caruso also argues that a bond was not necessary because the parties intended and agreed to the appeal and the justice court waived the filing of the bond and approved the appeal.

[2] Caruso attached the civil clerk's April 16, 2015 letter to his response to Young's motion to dismiss. Young filed no objections to the letter.

A. Standard of Review and Applicable Law

"Because the question of jurisdiction is a legal question, we follow the de novo standard of review." *Parks v. DeWitt Cnty. Elec. Co-op., Inc*., 112 S.W.3d 157, 160 (Tex. App.—Corpus Christi 2003, no pet.) (citing *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998)). "Jurisdiction of a court is never presumed." *Id.*

The time for filing a notice of appeal is jurisdictional. *Garg v. Pham*, 485 S.W.3d 92, 99 (Tex. App.—Houston [14th Dist. 2015, no pet.). In an eviction case, an appellant perfects an appeal from justice court by filing a bond, cash deposit, or statement of inability to pay with the justice court within five days after the court signs the judgment. TEX. R. CIV. P. 510.9(a), (f). "The [justice court] may for good cause shown, extend any time period under these rules *except those relating to new trial and appeal*." TEX. R. CIV. P. 500.5(c) (emphasis added); *see id.* R. 510.2 ("Rule 500.5 applies to the computation of time in an eviction case."). "A county court of law does not have jurisdiction over an appeal for which a timely appeal from a justice court's judgment was not perfected." *Wetsel v. Fort Worth Brake, Clutch & Equip., Inc.*, 780 S.W.2d 952, 954 (Tex. App.—Fort Worth 1989, no writ).

B. Discussion

1. Section 510.9 Applies Because Young Pleaded Forcible-Detainer Allegations

Caruso first argues that although Young refers to his pleading as a forcible-detainer action, to which the five-day appellate deadline would apply, it sounds nothing like an action where a tenant can be evicted. Caruso claims that this is a non-eviction case and that the twenty-one day deadline applies. *Compare* TEX. R. CIV. P. 510.9(a)

(providing for a five-day deadline to perfect an appeal in a forcible-detainer case) *with id.* R. 506.1(a) (setting out a general deadline of twenty-one days for an appeal from justice court in a non-eviction case); *see id.* R. 500.3(d) ("To the extent of any conflict between Rule 510 and the rest of [the rules of practice in the justice courts], Rule 510 applies."). We disagree.

A person utilizes a forcible-detainer action to recover possession of real property from a person who refuses to surrender possession on demand. *See* TEX. PROP. CODE ANN. § 24.002(a)(1) (West, Westlaw through 2017 R.S.); TEX. R. CIV. P. 510.1 ("Rule 510 applies to a lawsuit to recover possession of real property under Chapter 24 of the Texas Property Code."). Justice courts and, on appeal by trial de novo, county courts have jurisdiction of forcible-detainer suits. *See* TEX. PROP. CODE ANN. § 24.004 (West, Westlaw through 2017 R.S.) (providing that a justice court in the precinct in which the real property is located has jurisdiction in eviction suits); *Dormady v. Dinero Land & Cattle Co.*, 61 S.W.3d 555, 557 (Tex. App.—San Antonio 2001, pet dism'd w.o.j.) (op. on reh'g) (explaining that in an appeal from the justice court, the county court has jurisdiction of a forcible-detainer suit).

Claiming that Caruso "committed forcible detainer and [was] in wrongful possession of the Property," Young sued Caruso in justice court. In his petition, Young alleged that Caruso materially breached the lease agreement when he failed to notify Young of sub-tenancy, which was required under the lease agreement. The petition also set out that Young provided Caruso with a written notice to vacate, as required by section 24.005. *See* TEX. PROP. CODE ANN. § 24.002(b) (requiring that a landlord make a written

demand for possession in order to comply with section 24.005's requirements for a notice to vacate); *id.* § 24.005(h) (West, Westlaw through 2017 R.S.) (providing that a notice to vacate is considered a demand for possession for purposes of section 24.002(b)). Finally, Young prayed for, among other things, possession of the Property, a writ of possession for the Property, and a money judgment for court costs and attorney's fees.

Without deciding the merits of any title issue, *see* TEX. R. APP. P. 47.1, we conclude that Young's petition alleged a forcible-detainer claim,[3] *see* TEX. PROP. CODE ANN. § 24.002(a)(1), and the five-day appellate deadline set out in Texas Rule of Civil Procedure 510.9 applied. *See* TEX. R. CIV. P. 510.9. We are not persuaded by Caruso's argument that this is not a forcible-detainer case.

2. Caruso Did Not Timely Perfect His Appeal from Justice Court and Neither the Parties' Agreement nor the Justice Court's Waiver and Approval Conferred Jurisdiction

Under rule 510.9, the deadline to appeal a justice court's forcible-detainer judgment is five days after the court signs the judgment. *Id.* R. 510.9(a), (f). In this case, the justice court signed the judgment of possession in favor of Young on Tuesday, March 17, 2015. Allowing for the weekend, Caruso was required to perfect his appeal on or before Tuesday, March 24, 2015, for the county court to acquire jurisdiction. *See id.*; *see also id.* R. 4 (providing for the computation of time prescribed by these rules,

[3] We note that Caruso, himself, identified this appeal on his docketing statement as a "forcible detainer" case involving a judgment for "possession of residence." We further recognize that "[j]ustice courts may adjudicate possession even when issues related to the title of real property are tangentially or collaterally related to possession." *Falcon v. Ensignia*, 976 S.W.2d 336, 338 (Tex. App.—Corpus Christi 1998, no pet.). And "successful prosecution of a forcible entry and detainer suit does not bar a later action for wrongful eviction." *Magcobar N. Am. v. Grasso Oilfield Servs*., 736 S.W.2d 787, 797 (Tex. App.—Corpus Christi 1987), *writ dism'd*, 754 S.W.2d 646 (Tex. 1988).

order, or statute and, in relevant part, setting out that "Saturdays, Sundays, and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules"). Yet, it is undisputed that Caruso filed nothing before the March 24 deadline. Instead, he filed a notice of appeal on April 7, 2015, fourteen days after the appellate deadline expired.[4] *See id.* We conclude that Caruso failed to perfect a timely appeal to the county court, and the county court never acquired jurisdiction over the case. *See Wetsel*, 780 S.W.2d at 954.

Nonetheless, Caruso generally asserts that we should find jurisdiction in the county court and now in this Court because (1) the parties agreed to appeal, and (2) the justice court waived the bond and approved and transferred his appeal to the county court. But it is "well settled" that "appellate jurisdiction cannot be created by consent, stipulation of the parties, or waiver, either by the court or by the litigants." *Welder v. Fritz*, 750 S.W.2d 930, 932 (Tex. App.—Corpus Christi 1988, no writ); *see Stine v. State*, 908 S.W.2d 429, 431 (Tex. 1995) (en banc) ("It is . . . . fundamental that the parties of a suit can neither confer nor waive jurisdiction by agreement or consent."); *see also In re T.A.H.*, No. 13-13-00045-CV, 2013 WL 1883049, at *2 (Tex. App.—Corpus Christi 2013, no pet.) (per curiam) (mem. op.) ("Although the trial court's order extending post-judgment

[4] We offer no opinion as to whether the form of Caruso's notice of appeal was proper or whether a bond, even a $0 bond, should have been filed. *See, e.g.*, *Goebel v. Peters Real Estate, Inc.*, No. 03-14-00635-CV, 2015 WL 1778295, at *1 (Tex. App.—Austin Apr. 16, 2015, no pet.) (mem. op.) (perfecting an appeal from justice court to county court by filing a timely "Notice of Appeal and Bond," which set out that the plaintiff in the eviction case wished to appeal the order of dismissal to the county court, that "[t]he [Justice] Court set a bond amount of zero dollars ($0)," that it "has not filed a bond or made a cash deposit," and that it "remains ready and willing to do so in the event the bond amount is increased"). Because we dispose of this issue based on the time of the filing and not on the form of the notice filed, we need not address these matters. *See* TEX. R. APP. P. 47.1.

deadlines attempts to change the date of judgment to September 28, 2012, it cannot alter the appellate deadlines.").

Caruso provides no authority, and we find none, to support a conclusion that the parties' agreement that Caruso intended to appeal and that they had signed the agreed judgment in justice court to facilitate "a faster de novo appeal" conferred jurisdiction in the county court and now this Court. *See* Stine, 908 S.W.2d at 431; *Welder*, 750 S.W.2d at 932. Likewise, we cannot conclude that the justice court waived the bond by its actions and approved and transferred his appeal to the county court, conferring jurisdiction on it.[5] *See id.* Appellate jurisdiction simply cannot be conferred by the parties or by a lower court's waiver or approval where no jurisdiction exists. *See Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997); *Welder*, 750 S.W.2d at 932; *see also* TEX. R. APP. P. 2 ("On a party's motion or on its own initiative an appellate court may . . . . suspend a rule's operation . . . ; but a court must not construe this rule . . . to alter the time for perfecting an appeal in a civil case."). Caruso's arguments are without merit.

3. Summary

Reviewing the question of jurisdiction de novo, *see Parks*, 112 S.W.3d at 160, we conclude Caruso failed to timely perfect an appeal from the justice court's judgment of possession to the county court. *See id.* R. 510.9(a), (f).

[5] In support of his position that the county court had jurisdiction to hear his appeal, Caruso relies on an April 16, 2015 letter, signed by the civil clerk for the justice court. The letter's intent is not clear, although the clerk advises the parties that "this court received an Appeal on behalf of [Caruso] on April 07, 2015." The letter recites that "[t]he Appeal was approved on April 15, 2015" and as of April 16, 2015 "the case [was] being transferred to the County Clerk's office." However, the clerk's letter—dated after the five-day appellate-filing deadline had passed—references events that also occurred after that deadline.

III. CONCLUSION

We vacate the judgment of County Court at Law No. 1 of Travis County, Texas, and dismiss the county court case.[6] *See* TEX. R. APP. P. 43.2(e).

NELDA V. RODRIGUEZ
Justice

Delivered and filed the
24th day of August, 2017.

[6] Having vacated the judgment and dismissed the case, we dismiss, as moot, Young's motion that we carried with the case on October 10, 2016.