NUMBER 13-22-00349-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

DANIEL RODRIGUEZ, **Appellant,**

v.

EDUARDO DE LEON AND
EDNA M. DE LEON, **Appellees.**

ON APPEAL FROM THE COUNTY COURT AT LAW NO. 7
OF HIDALGO COUNTY, TEXAS

MEMORANDUM OPINION

Before Justices Longoria, Silva, and Peña
Memorandum Opinion by Justice Peña

Appellant Daniel Rodriguez appeals the trial court's judgment in a forcible detainer suit awarding possession of certain real property to appellees Eduardo De Leon and Edna

M. De Leon. In four issues, which we treat as three, Rodriguez argues that: (1) the trial court erred in depriving him of a jury trial; and there is legally insufficient evidence (2) the De Leons provided proper notice to vacate the premises as necessary to support an award of possession and (3) establishing attorney's fees. We affirm in part, reverse and render in part, and vacate and dismiss in part.

I. Mootness

As a threshold matter, we address whether Rodriguez's appeal from the award of possession is moot because he did not supersede the judgment and is no longer in possession of the premises.

A. Standard of Review & Applicable Law

Appellate courts lack jurisdiction to decide moot controversies and render advisory opinions. *See* Tex. Const. art. II, § 1; *In re J.J.R.S.*, 627 S.W.3d 211 (Tex. 2021); *see also State ex rel. Best v. Harper*, 562 S.W.3d 1, 7 (Tex. 2018) (providing that an appellate court must consider its jurisdiction sua sponte). A case becomes moot if at any stage there ceases to be an actual controversy between the parties. *Glassdoor, Inc. v. Andra Grp., LP*, 575 S.W.3d 523, 527 (Tex. 2019); *Nat'l Collegiate Athletic Ass'n v. Jones*, 1 S.W.3d 83, 86 (Tex. 1999). Whether a plaintiff's claims have become moot is a question of law that we review de novo. *Alanis v. Wells Fargo Bank Nat'l Ass'n*, 616 S.W.3d 1, 5 (Tex. App.—San Antonio 2020, pet. denied).

"A [tenant] who refuses to surrender possession of real property on demand commits a forcible detainer[.]" Tex. Prop. Code Ann. § 24.002(a). The person claiming a superior right of possession may file a forcible detainer action in a justice court to obtain possession of the property. *See id.* § 24.004(a). "An action for forcible detainer is intended

to be a speedy, simple, and inexpensive means to obtain immediate possession of property." *Marshall v. Hous. Auth. of City of San Antonio*, 198 S.W.3d 782, 787 (Tex. 2006) (citing *Scott v. Hewitt*, 127 Tex. 31, 90 S.W.2d 816, 818–19 (1936)). "The only issue in a forcible detainer action is the right to actual possession of the premises." *Id.* at 785. "The Texas Property Code provides that judgment in a forcible detainer action may not be stayed pending appeal unless the appellant timely files a supersedeas bond in the amount set by the trial court." *Id.* at 785–86 (citing TEX. PROP CODE ANN. § 24.007). "Thus, if a proper supersedeas bond is not filed, the judgment may be enforced, including issuance of a writ of possession evicting the tenant from the premises." *Id.* If a defendant in a forcible detainer action is no longer in possession of the premises at issue, an appeal from the forcible detainer judgment is moot unless the defendant asserts "a potentially meritorious claim of right to current, actual possession of the [premises]." *Id.* at 787.

B. Analysis

Upon our review of the record, we observed that Rodriguez did not supersede the judgment and a writ of execution had been issued. Because it appeared Rodriguez was no longer in possession of the premises, the Clerk of this Court notified Rodriguez that his appeal was at least partially moot as to the issue of possession unless Rodriguez was able to demonstrate a potentially meritorious claim of right to current, actual possession of the subject property. Rodriguez was advised that, if this Court did not receive a response within ten days from the date of receipt of the notice confirming the existence of Rodriguez's meritorious claim of right to current, actual possession of the subject property, his appeal of the award of possession was subject to dismissal. See TEX. R. APP. P. 42.3.

In his response, Rodriguez does not dispute he is no longer in possession of the premises, but he contends he has a legitimate claim to actual possession of the property because he was a purchaser under a contract for deed, which entitled him to receive a thirty-day notice to cure default pursuant to § 5.063 and § 5.064 of the property code, which he did not receive. *See* TEX. PROP. CODE ANN. § 5.063–.064. Under the contract-for-deed provisions, a seller of residential real property under an executory contract may enforce the remedies of rescission or forfeiture and acceleration against a defaulting buyer only if the seller first notifies the buyer of (a) the seller's intent to employ such a remedy, and (b) the buyer's right to cure the default within thirty days. *See id*. §§ 5.063–.064. However, the applicability of these provisions, and the remedies of recission or forfeiture, relate to the question of title, not to the question of possession. *See id.*; *Lugo v. Ross*, 378 S.W.3d 620, 624 (Tex. App.—Dallas 2012, no pet.) (concluding that the justice court had jurisdiction in forcible entry and detainer suit regardless of whether the contract-for-deed statutory provisions would apply in a title dispute because "there [was] no title dispute to be resolved" in the justice court). In other words, the De Leons's failure to give a thirty-day cure notice does not provide Rodriguez with a legitimate claim to actual possession of the property. *See Lugo*, 378 S.W.3d at 624; *Ward v. Malone*, 115 S.W.3d 267, 271 (Tex. App.—Corpus Christi–Edinburg 2003, pet. denied) (noting that a defaulting purchaser in a contract for deed may become a tenant in sufferance subject to a forcible detainer action); *see also Warren v. Hallett*, No. 05-23-00172-CV, 2024 WL 748391, at *6 (Tex. App.—Dallas Feb. 23, 2024, no pet. h.) (mem. op.) (holding that failure to give the thirty-day cure notice for a contract for deed did not prevent seller from pursuing a forcible detainer action). Further, none of Rodriguez's appellate issues present a

meritorious claim of the right to current, actual possession of the property.[1] *See Marshall*, 198 S.W.3d at 787; *Briones v. Brazos Bend Villa Apartments*, 438 S.W.3d 808, 812 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (concluding that an allegation that there was insufficient evidence that the landlord provided the statutory notice to vacate was not a basis for claiming a right to current possession where the tenant's lease was expired); *see also Bolinger v. Contreras*, No. 13-21-00151-CV, 2021 WL 3411867, at *3 (Tex. App.—Corpus Christi–Edinburg Aug. 5, 2021, no pet.) (mem. op.) (noting that a contention that the trial court improperly denied an appellant the right to a jury trial does not constitute a basis for claiming a right of possession).

For the foregoing reasons, we conclude that Rodriguez's appeal is moot as to the portion of the judgment awarding possession of the property to the De Leons. *See Marshall*, 198 S.W.3d at 787. Accordingly, we overrule Rodriguez's first issue complaining that he was denied a jury trial. However, because Rodriguez's second issue, challenging the sufficiency of the evidence on notice, bears relevance to his third issue challenging the award of attorney's fees, we overrule that issue only as it pertains to the award of possession.

II. Attorney's Fees

In his third issue, Rodriguez alleges the trial court's attorney's fees award is supported by legally insufficient evidence. As discussed below, our analysis of Rodriguez's second issue alleging insufficient evidence of statutory notice is intertwined with his third issue.

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[1] Specifically, Rodriguez does not contest that he defaulted on the contract for deed or that his default entitles the De Leons to possession of the premises. *See Marshall v. Hous. Auth. of City of San Antonio*, 198 S.W.3d 782, 787 (Tex. 2006) (noting that the tenant presented no basis for claiming a right to possession after her lease expired in explaining why tenant's appeal was moot as to possession).

An entire case "is not rendered moot simply because some of the issues become moot during the appellate process." *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005) (orig. proceeding). If only some claims or issues become moot, the case remains "live" as to those claims or issues that are not moot. *See id.* In the forcible detainer context, issues such as a challenge to the award of attorney's fees are not rendered moot by a defendant's failure to supersede the judgment and subsequent loss of possession of the property. *See Briones*, 438 S.W.3d at 813; *Daftary v. Prestonwood Mkt. Square, Ltd.*, 399 S.W.3d 708, 711–12 (Tex. App.—Dallas 2013, pet. denied).

A "prevailing" landlord is entitled to recover attorney's fees in a forcible detainer action. *See* TEX. PROP. CODE ANN. § 24.006(b). However, the failure to provide the requisite statutory notice bars a landlord from recovering its attorney's fees. *See Briones*, 438 S.W.3d at 815; *Washington v. Related Arbor Ct., LLC*, 357 S.W.3d 676, 682 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (concluding that the trial court abused its discretion in awarding attorney's fees because there was no evidence the landlord complied with the notice requirement). Therefore, we address Rodriguez's related contention that there is legally insufficient evidence he received the statutory notice to vacate. *See Briones*, 438 S.W.3d at 813–14.

A. Standard of Review & Applicable Law

A party challenging the legal sufficiency of an adverse finding on an issue on which it did not have the burden of proof must demonstrate that there is no evidence to support the adverse finding. *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 215 (Tex. 2011). "Evidence is legally sufficient if it 'would enable reasonable and fair-minded people to reach the verdict under review.'" *Id.* (quoting *City of Keller v. Wilson*, 168 S.W.3d 802,

827 (Tex. 2005)). On the other hand, evidence is legally insufficient when (1) there is a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact. *Bustamante ex rel. D.B. v. Ponte*, 529 S.W.3d 447, 455–56 (Tex. 2017) (citing *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 613 (Tex. 2016)). In conducting a legal sufficiency review, we must consider the evidence in the light most favorable to the verdict and indulge every reasonable inference that supports the verdict. *City of Keller*, 168 S.W.3d at 821–22.

A "landlord must give a tenant who defaults . . . at least three days' written notice to vacate the premises before the landlord files a forcible detainer suit, unless the parties have contracted for a shorter or longer notice period in a written lease or agreement." TEX. PROP. CODE ANN. § 24.005(a). The notice "shall be given in person or by mail at the premises in question." *Id.* § 24.005(f). To be entitled to attorney's fees in a forcible detainer action, there are additional statutory requirements for the timing of the notice and its contents. The notice must be sent by registered or certified mail, return receipt requested, at least ten days before filing suit. *Id.* § 24.006(a). The demand must state that if the tenant does not vacate before the eleventh day after the date of receipt of the notice and if the landlord files suit, the landlord may recover attorney's fees. *Id.* A landlord must strictly comply with the statutory notice requirement. *Kennedy v. Andover Place Apartments*, 203 S.W.3d 495, 497 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

B. Analysis

Here, the only evidence of a notice to vacate that was admitted is a certified mail envelope addressed to Rodriguez. However, the envelope was marked "Return to Sender Unclaimed Unable to Forward." Further, there is no evidence regarding the content of the envelope or that it contained the language required by § 24.006(a) of the property code. As such, the evidence is legally insufficient to establish that the De Leons strictly complied with the statutory notice requirements. *See Washington v. Related Arbor Ct., LLC*, 357 S.W.3d 676, 681–82 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (providing that because the landlord's first notice did not mention attorney's fees and the second notice stated only that the landlord may seek attorney's fees if tenant failed to vacate within three days, "[n]either notice satisfie[d] the requirements imposed by [§] 24.006"); *see also Rose v. Pierre*, No. 01-22-00418-CV, 2023 WL 3357658, at *4–5 (Tex. App.—Houston [1st Dist.] May 11, 2023, no pet.) (mem. op.) (concluding that the landlord did not prove notice when no copy of a written notice was admitted and there was no evidence that notice was delivered); *Whitehurst v. Thomas*, No. 01-21-00309-CV, 2023 WL 1786160, at *5 (Tex. App.—Houston [1st Dist.] Feb. 7, 2023, no pet.) (mem. op.) (holding that there was legally insufficient evidence supporting an attorney's fee award where there was no evidence that the landlord complied with § 24.006 of the property code); *Gore v. Homecomings Fin. Network, Inc.*, No. 05–06–01701–CV, 2008 WL 256830, at *2 (Tex. App.—Dallas Jan.31, 2008, no pet.) (mem. op.) (concluding that the landlord did not prove notice by mail when first-class mail envelope was labeled "return to sender" and certified mail receipts showed sections for date of delivery, signature, and printed name of receiving party were blank).

Because there is no evidence that the De Leons strictly complied with § 24.006 of the property code, there is legally insufficient evidence supporting an award of attorney's fees in any amount.[2] *See Briones*, 438 S.W.3d at 815. We sustain Rodriguez's second issue in part as it pertains to the award of attorney's fees and his third issue in its entirety.

III. Conclusion

We vacate that portion of the judgment awarding possession of the premises and dismiss the appeal as it pertains to possession. We reverse that portion of the judgment awarding attorney's fees and render judgment that the De Leons recover no attorney's fees. We affirm the remainder of the judgment.[3]

L. ARON PEÑA JR.
Justice

Delivered and filed on the
18th day of April, 2024.

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[2] The agreement in this case states that the buyer will be "asked to vacate the property immediately" if the buyer misses two monthly payments. We need not determine whether this provision shortens the statutorily required three-day-notice period that must be shown to support an award of possession because a landlord is still required to provide ten-days' notice to be entitled to an award of attorney's fees. *Compare* TEX. PROP. CODE ANN. § 24.005(b) (noting that the contracting parties can change the three-day period for a notice to vacate), *with* TEX. PROP. CODE ANN. § 24.006(a), (b) (providing no provision for shortening the ten-day notice period required for the recovery of attorney's fees, but noting that such notice is not required if the agreement entitles the landlord to recover attorney's fees, which the agreement in this case does not). At any rate, there was no evidence that the De Leons provided a notice that included the language required by § 24.006 of the property code.

[3] Rodriguez brings no issue challenging the trial court's award of damages.