CAUSE NO. 01-23-00575-CV

IN THE COURT OF APPEALS
For The First District of Texas

LANA M STRANGE and
ROBERT F STRANGE
Appellants

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE, IN TRUST FOR REGISTERED HOLDERS OF LONG BEACH
MORTGAGE LOAN TRUST 2004-4, ASSET-BACKED CERTIFICATES,
SERIES 2004-4
Appellee

ON APPEAL FROM HARRIS COUNTY COURT AT LAW 1
CAUSE NO. 1201046

APPELLEE'S BRIEF

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CERTIFICATES, SERIES 2004-4,
APPELLEE

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III. STATEMENT OF THE CASE

Nature of the Case: This is a forcible detainer action initiated by DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE, IN TRUST FOR REGISTERED HOLDERS OF LONG BEACH MORTGAGE LOAN TRUST 2004-4, ASSET-BACKED CERTIFICATES, SERIES 2004-4 (hereinafter "Deutsche Bank" or "Appellee") seeking possession of the Property currently occupied by Lana M. Strange and Robert F. Strange ("The Stranges" or "Appellants"). The Stranges are the former owners of the Property. On May 11, 2004, The Stranges executed a Note with the original lender, Long Beach Mortgage Company, in the original principal amount of $999,992.00. On the same date, the Stranges executed a Deed of Trust with a power of sale provision encumbering the Property. Said Deed of Trust was recorded in the Harris County Real Property records on May 20, 2004, under instrument number X625215. Deutsche Bank acquired the Note on August 4, 2009, through an Assignment of Lien recorded on January 19, 2011 under instrument 20110026096. The Stranges defaulted on their mortgage payments. Deutsche Bank later accelerated the loan and then foreclosed on April 5, 2022. Deutsche Bank purchased the property on a credit bid and immediately sought possession of the property. Both the justice court and county court awarded possession of the property in favor of Deutsche Bank. This appeal followed.

County Civil Court at Law No. 1: Honorable Audrey Lawton-Evans
County Civil Court at Law No. 1
Harris County, Texas
201 Caroline, 5th Floor
Houston TX 77002
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Order being Appealed: Appellee seeks affirmation of the County Civil Court at Law No. 1's July 6, 2023 Judgment

IV. STATEMENT REGARDING ORAL ARGUMENT

DEUTSCHE BANK believes this appeal can be decided solely on the briefs. The pertinent record is not voluminous. The legal issues are not novel or unique. Accordingly, DEUTSCHE BANK does not believe that oral argument is necessary or helpful in this appeal.

However, should the Court determine that oral argument would be of value in the disposition of this appeal, then DEUTSCHE BANK would welcome the opportunity to participate.

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APPELLEE'S BRIEF

ISSUES PRESENTED FOR REVIEW

The crux of Appellants' argument revolves around Appellants' belief that Appellee acted in violation of the bankruptcy automatic stay by proceeding with eviction of Appellants. They further argue Appellees "were clever enough" to

"convince Judge Christopher M. Lopez to allow them to proceed with the eviction as a result of their prior judgment. . ." as though the Bankruptcy Judge didn't understand bankruptcy law.

It is the Appellants who do not understand the applicable bankruptcy law. They erroneously aver "It is undisputed that Appellee is not a lessor to Appellants" and therefore 11 U.S.C. 362(b)(22) [Appellant references incorrectly as 11 U.S.C. 362(22)] "is not applicable to this situation." **This is the exact same argument Appellant's bankruptcy counsel made to the bankruptcy court and which the bankruptcy court soundly rejected. The argument is barred by res judicata from the federal court ruling.**

Before addressing Appellants' arguments, Appellee requests this Court take judicial notice that the Stranges have already been locked out from the Property and Appellee now has possession, so this appeal is moot and should be dismissed.

Alternatively, if the Court does not consider the controversy as moot, the Appellants have failed to present any evidence or provide case law explaining why the lower court's judgment was erroneous. Therefore, Appellee's judgment should be affirmed.

In a forcible-detainer suit, the only issue a court determines is the right to actual and immediate possession of the property. (*Marshall v. Hous. Auth. of the*

City of San Antonio, 198 S.W.3d 782, at 785 (Tex. 2006)). *See Also* Tex. R. Civ. P. 510.3(e) (stating that in a forcible-detainer action, "[t]he court must adjudicate the right to actual possession and not title issues").

Furthermore, the Texas Supreme Court has held that if a defendant in a forcible detainer action is no longer in possession of the premises, then an appeal from a forcible detainer action is moot unless the defendant asserts "a potentially meritorious claim of right to current, actual possession of the [premises]."*Id.* at 787. However, "assertions of wrongful eviction, even if successful, would not entitle one to immediate possession. *Stone v. K Clark Prop. Mgmt., LLC*, 2020 Tex. App. LEXIS 3798, at 6.

Here, Appellee filed its original petition for forcible detainer on May 13, 2022. Judgment was entered in the County Court on July 6, 2023. Appellants never paid the supersedeas bond which was set at $80,000.00. Appellee completed the lockout on September 18, 2023, and Appellee now has sole possession of the Property. Therefore, there is no longer an active controversy, and this appeal should be dismissed.

Deutsche Bank clearly has the superior right to possession of the Property and nothing Appellants can say or do will change that fact. As such, judgment should be affirmed in Appellee's favor.

STATEMENT OF FACTS

The facts in this case are simple, undisputed, and supported by the Clerk's Record. Deutsche Bank foreclosed on the property formerly owned by the Stranges, who now seek to avoid the legal consequences by employing a number of creative, but legally unsupportable arguments. Deutsche Bank's Substitute Trustee's Deed was properly recorded in the Harris County real property records which establishes it as the sole owner of the Property.

SUMMARY OF THE ARGUMENT

The trial court properly granted judgment in Deutsche Bank's favor. On appeal, the Stranges are relying on what they believe is an ambiguity in the Bankruptcy Code text, when in fact, their argument had already been raised not only in Bankruptcy Court, but this same issue has been addressed by other courts in this jurisdiction. Additionally, the Stranges have failed to present any evidence or case law supporting their argument of a wrongful eviction, which even if they did, this Court would lack jurisdiction to hear anyways because a claim for wrongful eviction would need to be brought in a separate lawsuit.

Additionally, this court lacks jurisdiction to hear anything related to the foreclosure. The only issue on appeal is who has the superior right to immediate right to possession of the property, which in this case is clearly Deutsche Bank.

LAWSUIT IS MOOT

The case should be dismissed as moot because Appellee now has possession of the Property. Appellee filed its Motion to Dismiss the Appeal on September 20, 2023. This Court has yet to make a ruling on it. However, as will be discussed in further detail below, the court should not even address Appellant's arguments as Appellee now has possession of the Property rendering the case moot.

1. On February 20, 2023, the Justice Court Precinct 5, Place 2 in Cause No. 225200415232 granted judgment to Deutsche Bank possession of property 5531 Cedar Creek Drive Houston, TX 77056 ("Property").

2. Appellants appealed the judgment to County Court.

3. On July 6, 2023, the Harris County Court at Law No. 1 in Cause No. 1201046 granted judgment to Deutsche Bank for possession of the Property. The Judgment further stated that to supersede the judgment, Appellants would have to post an $80,000 bond.

4. On or about August 8, 2023, Appellants appealed the Judgment but did not post the bond.

5. On September 18, 2023, Appellants were locked out from the Property.

APPLICABLE LAW SUPPORTING MOOTNESS

See, e.g., *Richardson v. Daka Invs., LLC*, 2021 Tex.App.LEXIS 8242 (Oct. 2021):

> A case becomes moot when there ceases to be a justiciable controversy between the parties. *State ex rel. Best v. Harper*, 562

> S.W.3d 1, 6 (Tex. 2018) (op. on reh'g). If a supersedeas bond is not filed, the judgment in a forcible entry and detainer action may be enforced and a writ of possession may be executed, evicting the defendant from the property. *Brigandi v. American Mortg. Inv. Partners Fund I Trust*, No. 02-16-00444-CV, 2017 Tex. App. LEXIS 3544, 2017 WL 1428726, at *3 (Tex. App.—Fort Worth Apr. 20, 2017, pet. dism'd) (per curiam) (mem. op.). The failure to supersede the judgment may render the appeal moot. *Id.* A forcible entry and detainer appeal becomes moot upon an appellant's eviction from the property unless the appellant asserts a potentially meritorious claim of right to current possession of the property or unless damages or attorney's fees remain at issue. *Gillespie v. Erker*, No. 02-20-00331-CV, 2021 Tex. App. LEXIS 1388, 2021 WL 733084, at *1 (Tex. App.—Fort Worth Feb. 25, 2021, no pet.) (mem. op.).

Appellants are no longer in possession of the Property and did not supersede the county court's judgment granting Deutsche Bank possession.

Pursuant to Tex. R. Civ. P. 510.13: "A judgment of a county court may not under any circumstances be stayed pending appeal unless, *within 10 days of the signing of the judgment*, the appellant files a supersedeas bond in an amount set by the county court." Tex. Prop. Code Ann. § 24.007; *Mitchell v. Wilmington Sav. Funds Soc'y, FSB*, No. 02-18-00089-CV, 2018 Tex. App. LEXIS 7918, 2018 WL 4626396, at 1 (Tex. App.—Fort Worth Sept. 27, 2018, no pet.) (mem. Op.). In other words, the Appellants had until July 16, 2023 to post the bond, but they failed to do so.

"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." *Marshall v. Hous. Auth*., 198 S.W.3d 782, 786-787.

In *Marshall*, the tenant had failed to pay the bond to supersede the judgment, so the judgment was still enforced in spite of the appeal. *See* TEX. R. CIV. P. 621, 627; TEX. R. APP. P. 24-25.

Here, the Appellants also failed to post bond, so they have no basis to argue they were entitled to any stay of the judgment granting Deutsche Bank possession of the Property. Accordingly, they can advance no potentially meritorious claim as the county court already adjudicated possession in Deutsche Bank's favor and there was no bond post to supersede said judgment so the case should be dismissed as moot.

NO VIOLATION OF THE AUTOMATIC STAY

Appellants' arguments regarding the bankruptcy automatic stay precluding Appellee from moving forward with eviction efforts are frivolous, not supported by any case law, and are barred by res judicata as they were raised and overruled by the Bankruptcy Court – which clearly knows bankruptcy law and was not "fooled" by Appellees. As will be discussed in further details below, Appellant's argument is being raised in bad faith without merit.

It is undisputed that the trial court signed the judgment on July 6, 2023. It is also undisputed that Robert F. Strange filed for chapter 13 bankruptcy on July 11, 2023, five days after the county court judgment was signed.

Although Appellee believed it was in the right to proceed with a lockout, Appellee decided to seek a comfort order first by filing an emergency motion for relief in the bankruptcy court on or about August 1, 2023.

The Appellee's hearing on its motion was held on September 7, 2023. Appellee relied upon the language of 11 U.S.C. 362(b)(22) which states "the filing of a petition under 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operates as a stay – (22) for "any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor". 11 U.S.C. 301 includes voluntary bankruptcy cases, such as Appellants' bankruptcy case.

At evidentiary hearing in the Bankruptcy Court, the Appellants argued the same frivolous argument they are arguing to this Court - that (b)(22) did not apply because the parties had never entered into a lease in the traditional sense and therefore did not establish a traditional landlord-tenant relationship.

The bankruptcy court disagreed with Appellants' position based on the clear language of the Deed of Trust and applicable law. Although it is true that the Stranges were not "tenants" under an original lease, they became "tenants-at-sufferance" under the Deed of Trust by failing to surrender the Property after the foreclosure sale.

Whenever a property is foreclosed, the prior owners become "tenants at sufferance" and the mortgage documents are the "contract" creating such tenancy at sufferance, so a judgment for possession applies the same. (*In re Morris*, 2014 Bankr. LEXIS 1543 (Bankr.S.D.Tex. 2014)).

Here, the Deed of Trust instrument contained a "Power of Sale" provision in section 21. The relevant part states that "[if] the Property is sold … the Borrower or any person holding possession of the Property through Borrower shall immediately surrender possession of the Property to the purchase at that sale. If possession is not surrendered, the Borrower or such person shall be a *tenant at sufferance* and may be removed by writ or possession."

Texas law also does not distinguish between traditional tenants and a tenant-at-sufferance when it comes to eviction proceedings. In defining forcible detainer, Texas law states, "A person who refuses to surrender possession of real property on demand commits a forcible detainer if the person . . . is a tenant at will or by sufferance…" Tex. Prop. Code § 24.002(a)(2). The only difference is how the tenant

came to occupy the property.

Because the Stranges are "tenants at sufferance," the bankruptcy court held that it was simply applying the words as they were defined by the Texas Legislature and held that since the judgment was entered prior to the bankruptcy filing, then (b)(22) would apply and the automatic stay did not have any effect, but even if it did not apply, there was cause to lift the automatic stay anyway under the 362(d)(1).

With the comfort order at its disposal, the lockout was completed on September 18, 2023.

The bankruptcy did nothing to prevent the lockout. Succinctly, Appellants made no effort to pay the $80,000.00 bond to supersede the County Court's judgment in Appellee's favor and instead sought to usurp the bankruptcy automatic stay as a free substitute to wrongfully delay and hinder Appellee. However, the drafters of the Bankruptcy Code already thought of that . . . and that's why they included 11 U.S.C. 362(b)(22) to state that if the party already has a judgment for possession, the automatic stay doesn't apply. A party can't claim the automatic stay applies to their possessory interest if a Court has already determined they have no legal possessory interest. Appellant acted in bad faith and continues to act in bad faith by making this frivolous argument which the Bankruptcy Court already ruled upon in Appellee's favor. This is a bad faith game of "how long can we delay and hinder the lender". Appellant ran out of road at every Court, state and federal and

still refuses to give up the game.

The Bankruptcy Court held that the automatic stay did not apply because the judgment was entered prior to the bankruptcy filing, but even if it did apply, the bankruptcy court issued a comfort order granting relief and the lockout was completed a few days after the comfort order was signed.

APPELLEE HAS THE SUPERIOR RIGHT TO POSSESSION

Deutsche Bank clearly has the superior right to possession of the property. A plaintiff in a forcible-detainer suit can establish "the superior right to immediate possession by establishing the fact of a foreclosure pursuant to a deed of trust that created a tenancy at sufferance after the foreclosure." (*Onyedebelu v. Wilmington Sav. Fund Soc'y, FSB*, 2nd Court of Appeals, 2021 Tex. App. LEXIS 7871, at 6).

To prevail in a forcible detainer action, the plaintiff must prove the following: (1) it owned the property; (2) the occupant(s) became a tenant at sufferance when plaintiff bought the property under the deed of trust; (3) the plaintiff gave proper notice to the occupants to vacate the property; and (4) the occupants refused to do so. (*Id.*).

Here, Deutsche Bank has clearly met all four elements. (1) Deutsche Bank purchased the property at a foreclosure auction on April 5, 2022. The Substitute Trustee's Deed was recorded in the Harris County Real Property Records on April 21, 2022 under instrument RP-2022-209800; (2) Pursuant to the terms of the Deed

of Trust (in particular, section 21), "if the property is sold under this deed of trust, the borrower shall immediately surrender possession to the purchaser. If the borrower fails to do so, the borrower shall become a tenant at sufferance…"; (3) Deutsche Bank properly served the notices to vacate to the Stranges and to "all other occupants" at the property address on October 20, 2022 via first class and certified mail return receipt requested. Per USPS tracking, the notices were delivered on October 24, 2022; and (4) The Stranges and all other occupants refused to vacate the property.

Deutsche Bank has clearly established all elements needed to prevail in a forcible detainer lawsuit. Deutsche Bank is therefore entitled to judgment of superior right to the property and the trial court's judgment should be affirmed.

CONCLUSION AND PRAYER

In conclusion, the Court should dismiss the lawsuit as moot because Appellee now has possession of the Property. Alternatively, Appellants' arguments about the automatic stay or wrongful eviction are without merit and should not be considered. This court lacks jurisdiction to decide anything besides who has superior right to possession of the Property, which in this case, is clearly Deutsche Bank.

On appeal, the Appellants have failed to present any compelling arguments and are instead attempting to circumvent established case law, statutes and the Texas

Rules of Civil Procedure, all of which are in Deutsche Bank's favor. As such, the Court should affirm the lower court's judgment for possession in Appellee's favor.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Brief was served on the below parties this 5th day of January, 2024.

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/s/ Anthony Garcia
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