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CASE LAW UPDATE

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CASE LAW UPDATE

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The case selection for this year's Case Law Update is the arbitrary choice of the authors, but with a guideline for cases of first impression, novel issues, detailed opinions on elements of a cause or Texas Supreme Court cases. If a case is not mentioned, it is completely the authors' fault. Cases discussed range from 547 S.W.3d through 571 S.W.3d. The references to various statutes and codes used throughout this presentation are based upon the cases in which they arise. You should refer to the case and to the statute or code in question to determine whether there have been any amendments that might affect the outcome of any issue.

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I. MORTGAGES/FORECLOSURE/LIENS

1. Forcible Detainer after Foreclosure Sale.

- *Procedural Matters*

In Isaac v. CitiMortgage, Inc., 563 S.W.3d 305 (Tex. App.—Houston [1st Dist.] 2018, pet. denied), involved the typical forcible detainer action after a non-judicial foreclosure. The deed of trust executed by Isaac contained a post foreclosure provision that read: "[i]f possession is not surrendered, Borrower … shall be a tenant at sufferance and may be removed by writ of possession…." A notice to vacate was served by CitiMortgage upon Isaac by certified mail as well as personal delivery, but Isaac refused to vacate. In response to the forcible detainer action, Isaac pled to the jurisdiction of the court alleging, first, there was no continuity between the deed of trust and CitiMortgage's substitute trustee's deed, second, the pleadings were improperly verified, and third, there was no refusal to vacate.

As to the first challenge, the court discussed the apparent defect in title raised by Isaac in a separate tribunal (which Isaac lost at trial court and on appeal), alleging lack of privity of contract between Isaac and CitiMortgage. It is well-established law in Texas that issues of title do not need to be adjudicated in a suit for possession, unless the right to immediate possession requires the resolution of a title dispute. Citing Tex. R. Civ. P. 510.3(e). In fact, the elements for a forcible detainer action require proof only that: (1) the substitute trustee conveyed the property by deed, (2) the landlord-tenant relationship existed and the occupant was a tenant at

sufferance, (3) a notice to vacate had been properly given, and (4) the occupant refused to vacate. None of these elements required proof of title. CitiMortgage proved the existence of the landlord-tenant relationship by submission of the deed of trust containing the language quoted above; therefore, CitiMortgage had the right to immediate possession. As to the jurisdictional issue, Isaac presented no evidence to contradict the deed of trust and substitute trustee deed, which established the landlord-tenant relationship. Therefore, the court had subject matter jurisdiction over the forcible detainer action.

The pleadings of CitiMortgage were verified by its attorney of record, which was challenged by Isaac as not being in "strict compliance" with the requirements of Tex. R. Civ. P. 510.3(e). However, the court noted numerous other cases supporting a petition in an eviction case verified by the party's attorney of record. The court found this was a necessity in entity parties that required execution by an individual person, and was authorized by Rule 500.4, in eviction cases, in which entities can be represented by non-attorney employees or officers. Rule 502.1 also allows execution of pleadings by an attorney of record. Therefore, the court held Isaac's argument was inappropriate due to the expressed language of applicable rules as well as the reality that business entities operate through agents.

Finally, as to Isaac's assertion that there was no evidence of their refusal to vacate the property, the court cited numerous examples of evidence Texas courts have accepted to prove refusal to vacate the property, including: (1) an appeal bond from the justice court ruling which listed the subject address for the defendant; (2) the defendant having been served with the notice of the forcible detainer suit at the property; (3) a sworn complaint stating that the defendant was given notice to vacate and refused to do so; and (4) that there is a tacit admission that the tenant remains in possession of the property by the continuation to prosecute an appeal awarding possession to the lienholder. In addition to the foregoing, the court noted that Isaac actually was served the notice to vacate by certified mail at the property, and was served with notice of the forcible detainer petition at the property. Consequently, the refusal to vacate was deemed sufficiently proven by evidence submitted by CitiMortgage.

- *Landlord-Tenant Relationship v. Title Issues*.

In Jelinis, LLC v. Hiran, 557 S.W.3d 59 (Tex. App.—Houston [14th Dist.], 2018, pet. filed), the court addressed, in a post-foreclosure forcible detainer action, the requisites for the jurisdiction of the court to determine the issue of possession. Hiran signed a home equity note and mortgage and later defaulted on same. The district court granted judgment to the lender, which foreclosed and sold the property to Jelinis, which filed a forcible detainer action against Hiran. Hiran filed a second suit in the district court alleging title issues based upon a claim that the original mortgagee had switched pages in the note and deed of trust changing the rate of interest from a 2% fixed rate to an 8% adjustable rate. The second district court granted a temporary injunction to Hiran enjoining Jelinis from its eviction action. Jelinis appealed, arguing the justice court had exclusive jurisdiction to determine possession of the property.

The primary issue in this case, being the jurisdiction of the justice court, is summed up by the court in the following summary of the law: "[t]he justice court has jurisdiction over its forcible detainer case and a district court may not enjoin a justice court from hearing a forcible detainer case if the justice court does not have to make a determination regarding title." Jelinis

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