

COURT OF APPEALS OF TEXAS, FOURTH DISTRICT, SAN ANTONIO

Sheila Olbrei and Richard Olbrei v. Victoria Coman aka Victoria Lemay aka Victoria Lane

No. 04-18-00552-CV (Tex. App.—San Antonio Oct. 31, 2018) (mem. op.) · No. No. 04-18-00552-CV · Decided October 31, 2018

SUMMARY

The Fourth Court of Appeals of Texas considered an appeal from a forcible detainer judgment awarding possession of residential property to Sheila and Richard Olbrei. Because Victoria Coman had been removed from the property, had not posted a supersedeas bond, and did not establish a potentially meritorious right to current possession, the court held that the appeal was moot. The court vacated the trial court’s judgment.

CASE DETAILS

COURT	Court of Appeals of Texas, Fourth District, San Antonio
WRITING FOR THE COURT	Per Curiam; Sandee Bryan Marion, Chief Justice; Karen Angelini, Justice; Marialyn Barnard, Justice
JURISDICTION	Texas
DECIDED	October 31, 2018
DOCKET	No. 04-18-00552-CV
DISPOSITION	vacated
PROCEDURAL POSTURE	Appeal from a county court at law judgment in a forcible detainer action awarding possession of residential property to the appellees.
PRECEDENTIAL VALUE	Unpublished memorandum opinion; nonprecedential
PARTIES	Victoria Coman aka Victoria Lemay aka Victoria Lane v. Sheila Olbrei, Richard Olbrei

TOPICS

eviction mootness appellate procedure remedies civil procedure

PRACTICE AREAS

civil procedure appellate procedure real estate remedies

QUESTIONS PRESENTED

1. Whether Coman’s appeal from the forcible detainer judgment remained a live controversy after she was removed from the property and failed to supersede the judgment.
2. Whether the trial court’s judgment should be vacated because the appeal became moot.

HOLDINGS

1. An appeal from a forcible detainer judgment is moot when the appellant is no longer in possession, has not superseded the judgment, and fails to show a potentially meritorious claim of right to current, actual possession, even if the appellant timely and clearly expressed an intent to appeal.
2. When an appeal becomes moot and appellate review on the merits is precluded, the appellate court must vacate the underlying trial court judgment.

KEY QUOTATIONS

“When a tenant is no longer in possession of the property and has not superseded the judgment of possession, her appeal is moot unless: (1) she timely and clearly expressed an intent to exercise the right of appeal, and (2) appellate relief is not futile.” (-1-)

“Appellate relief is not futile if the tenant holds and asserts “a potentially meritorious claim of right to current, actual possession” of the property.” (-1-)

“Therefore, this appeal is moot, and we must vacate the trial court’s judgment.” (-1-)

FACTUAL BACKGROUND

The dispute concerned possession of a residential property in Schertz, Texas, in a forcible detainer action based on nonpayment of rent into the court registry. The trial court awarded possession to the Olbreis and set a \$5,000 supersedeas bond. Coman did not post the bond, and the writ of possession was executed, removing her from the property. In response to the appellate court’s mootness inquiry, Coman stated that she had never leased or rented the property and did not assert a legal basis for current possession.

PROCEDURAL HISTORY

Olbrei initiated a forcible detainer action in justice court, which entered a judgment of eviction on June 5, 2018. Coman appealed to the County Court at Law No. 1 of Guadalupe County, where the court entered a final judgment for forcible eviction and detainer and authorized a writ of possession. The writ was executed on August 9, 2018, and Coman appealed without posting a supersedeas bond. After the court of appeals ordered Coman to show why the appeal was not moot, she asserted that she had never leased or rented the property but identified no basis for a current right of possession.

DISPOSITION

vacated

CASES CITED

- Marshall v. Hous. Auth. of San Antonio, 198 S.W.3d 782, 787–88 (Tex. 2006)
- Devilbiss v. Burch, No. 04-16-00711-CV, 2018 WL 2418476, at *2 (Tex. App.—San Antonio May 30, 2018, no pet. h.) (mem. op.)

OPINION

PER CURIAM.

Fourth Court of Appeals San Antonio, Texas MEMORANDUM OPINION No. 04-18-00552-CV Sheila OLBREI and Richard Olbrei, Appellants v. Victoria COMAN aka Victoria Lemay aka Victoria Lane, Appellee From the County Court at Law No 1, Guadalupe County, Texas Trial Court No. 2018CV0196 Honorable Robin V. Dwyer, Judge Presiding PER CURIAM Sitting: Sandee Bryan Marion, Chief Justice Karen Angelini, Justice Marialyn Barnard, Justice Delivered and Filed: October 31, 2018 VACATED Appellant Victoria Coman aka Victoria Lemay aka Victoria Lane (“Coman”) appeals the trial court’s judgment in a forcible detainer action granting Appellees Sheila Olbrei and Richard Olbrei (jointly, “Olbrei”) possession of a residential property located at 3438 Northern Heights in Schertz, Texas.

Because this appeal is moot, we vacate the judgment. -1- 04-18-00552-CV Background On May 16, 2018, Olbrei initiated this forcible detainer suit in the justice court against Coman and Michael Lemay (“Lemay”). After the justice court entered final judgment of eviction on June 5, 2018, Coman appealed to the trial court. A trial was held on August 1, 2018, at which Coman initially appeared with counsel, who withdrew, and then proceeded pro se.

After hearing the evidence, the trial court signed a final judgment for forcible eviction and detainer, finding Coman and Lemay were guilty of forcible detainer and Olbrei was entitled to a writ of possession “due to nonpayment of rent into the registry.” The trial court set the supersedeas bond at \$5,000. A writ of possession issued, and the constable’s return reflects that the writ of possession was executed on August 9, 2018.

The clerk’s record does not reflect that Coman posted a supersedeas bond. Coman timely filed a notice of appeal from the trial court’s judgment. On October 4, 2018, this court entered an order stating, in part: Because the clerk’s record reflects that [Coman] is no longer in possession of the subject premises and did not file a supersedeas bond, [Coman] is ORDERED to show cause in writing within fifteen days of the date of this order that she has “a potentially meritorious claim of right to current, actual possession” of the subject premises and this appeal, therefore, is not moot. (emphasis in original).

On October 22, 2018, Coman filed a response to the order to show cause, stating, in part: Appellant Victoria Coman appealed because she has never leased or rented the property at 3438 Northern Heights Schertz, TX 78108. Victoria Coman’s brother Joseph Russell was buying the

home 3438 Northern Heights Schertz from the Olbrei's, Olbrei's owner financing the property to Joseph Russell for him + his family, sister Victoria Coman.

In her cover letter enclosing the response, Coman stated her brother Joseph Russell "died from a tragic brain trauma injury from a fall at work." 04-18-00552-CV Discussion A forcible detainer action is intended to be a speedy, simple, and inexpensive means to obtain immediate possession of property. *Marshall v. Hous. Auth. of San Antonio*, 198 S.W.3d 782, 787 (Tex.

2006). Judgment of possession in a forcible detainer action is a determination of the right to immediate possession. *Id.* When a tenant is no longer in possession of the property and has not superseded the judgment of possession, her appeal is moot unless: (1) she timely and clearly expressed an intent to exercise the right of appeal, and (2) appellate relief is not futile.

Id. Appellate relief is not futile if the tenant holds and asserts "a potentially meritorious claim of right to current, actual possession" of the property. *Id.* (emphasis added). When a tenant's lease has expired and she identifies no basis for claiming a right to possession after that expiration, there is no longer a live controversy between the parties as to the right of current possession.

Id. In this case, Coman did not post a supersedeas bond and was removed from the subject property on August 9, 2018. Although Coman timely and clearly expressed her intent to appeal by filing a notice of appeal in the trial court, any appellate relief regarding the right to current possession is futile.

In her response to this court's order to show cause, Coman stated she never leased or rented the subject property and did not identify any other basis for claiming a right to current, actual possession of the property.

Therefore, this appeal is moot, and we must vacate the trial court's judgment. See *id.* at 788 ("One purpose of vacating the underlying judgment if a case becomes moot during appeal is to prevent prejudice to the rights of parties when appellate review of a judgment on its merits is precluded."); accord *Devilbiss v. Burch*, No. 04-16-00711-CV, 2018 WL 2418476, at *2 (Tex.

App.—San Antonio May 30, 2018, no pet. h.) (mem. op.) ("[B]ecause the issue of possession is moot, we must vacate the trial court's judgment of possession."). 04-18-00552-CV Conclusion Because this appeal is moot, the trial court's judgment is vacated. PER CURIAM