

Affirmed and Opinion Filed July 7, 2020



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-19-00315-CV

**PHYLLIS HOWARD AND ALL OTHER OCCUPANTS OF
624 MISSION LANE, LANCASTER, TEXAS 75146, Appellants**

V.

**U.S. BANK NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL
CAPACITY BUT SOLELY AS TRUSTEE ON BEHALF OF OWS REMIC
TRUST 2013-1, Appellee**

**On Appeal from the County Court at Law No. 5
Dallas County, Texas
Trial Court Cause No. CC-18-05873-E**

MEMORANDUM OPINION

**Before Justices Schenck, Osborne, and Reichek
Opinion by Justice Osborne**

Phyllis Howard and all other occupants of 624 Mission Lane, Lancaster, Texas 75146 (collectively Howard) appeal the county court's final judgment awarding U.S. Bank National Association, not in its individual capacity but solely as trustee on behalf of OWS REMIC Trust 2013-1, possession of the property. Howard raises four issues on appeal arguing: (1) the presuit notice to vacate was defective; (2) defects in the foreclosure sale deprived U.S. Bank of standing to pursue its claim for possession; (3) the county court abused its discretion when it

overruled her objection to the substitute trustee's deed; and (4) the evidence is insufficient to show that U.S. Bank owns the property or had privity with Howard which would allow U.S. Bank to use the deed's tenancy-at-sufferance clause to dispossess her of the property. The county court's judgment is affirmed.

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 23, 2008, Howard executed a deed of trust to secure payment of an extension of credit concerning the real property. The security agreement provided that in the event of default, the lender may require immediate payment of all sums secured under the terms of the loan and invoke the power of sale. It also authorized the foreclosure sale of the property to the highest bidder and permitted purchase of the property by the lender or its designee. In addition, the security instrument stated that, if the property was sold at a foreclosure sale, Howard shall immediately surrender the property to the purchaser. However, if Howard did not surrender possession, she would become a tenant at sufferance and could be removed by writ of possession.

Howard defaulted under the terms of the loan and the mortgage servicer initiated foreclosure proceedings. On December 5, 2017, U.S. Bank acquired the property at a non-judicial foreclosure sale for \$238,206.56. On August 13, 2018, U.S. Bank sent written notice to vacate and demand for possession of the property to Howard.

On August 21, 2018, U.S. Bank filed its original petition for forcible detainer in justice court (trial court cause no. JE1801523K). On September 25, 2018, after a bench trial, the justice court rendered a judgment in favor of U.S. Bank for possession of the property. Howard appealed the justice court's judgment to the county court (trial court cause no. CC-18-05873-E) for a trial de novo.¹

At a bench trial before the county court, U.S. Bank offered three exhibits to support its claim for possession: (1) a substitute trustee's deed documenting U.S. Bank's purchase of the property at a foreclosure sale and the transfer of the deed of trust to U.S. Bank; (2) a deed of trust documenting the security interest; and (3) notices to vacate sent by U.S. Bank to Howard. The substitute trustee's deed and deed of trust were admitted without objection. Howard objected to the notices to vacate on the basis that the documents were not properly authenticated. The county court overruled her objection and admitted the notices to vacate into evidence. The county court rendered judgment in favor of U.S. Bank and awarded it possession of the property. Howard filed a request for written findings of fact and conclusions of law, but the county court did not file any findings of fact and conclusions of law. Howard did not file a notice of past due findings and conclusions. Also, Howard filed a motion for new trial which was overruled by operation of law.

¹ See TEX. R. CIV. P. 510.10(c).

II. ADEQUACY OF PRESUIT DEMAND

In issue one, Howard argues the presuit notice to vacate was defective. She contends that under the language of the statute, only U.S. Bank could have properly sent her the notice, and the actions of U.S. Bank's agent do not suffice. Howard maintains that Texas Property Code §§ 24.002(b) and 24.005 limit the types of parties who may send the notice to vacate. As a result, she argues that only a demand sent by U.S. Bank would be sufficient.

A. Applicable Law

To establish a superior right to immediate possession, the person entitled to possession has the burden to prove: (1) it owns the property; (2) the person who refuses to surrender possession is a tenant at will, tenant at sufferance, or a tenant or subtenant willfully holding over after the termination of the tenant's right of possession; (3) the person entitled to possession gave proper notice to vacate the premises to the person refusing to surrender possession; and (4) the person refusing to surrender possession refused to vacate the premises. TEX. PROP. CODE ANN. § 24.002; *Shields L.P. v. Bradberry*, 526 S.W.3d 471, 478 (Tex. 2017); *see also Enriquez v. Capital Plus Fin., L.L.C.*, No. 02-19-00184-CV, 2020 WL 719441, at *1 (Tex. App.—Fort Worth Feb. 13, 2020, no pet.) (mem. op.).

In a suit involving a tenant at will or tenant by sufferance, § 24.005(b) requires the plaintiff to give the tenant written notice to vacate three days before the plaintiff files a forcible detainer suit unless the parties contracted for a different notice period.

PROP. § 24.005(b); *see also Enriquez*, 2020 WL 719441, at *1. The demand for possession must be made in writing by a person entitled to possession of the property. PROP. § 24.002(b). The Texas Property Code does not forbid a corporation or other business entity from using an agent to deliver demand for possession. *Enriquez*, 2020 WL 719441, at *1. This sort of agency arrangement is approved and contemplated by the governing rules for this type of suit, which recognize that “in an eviction case,” a corporation may “be represented by a *property manager or other authorized agent*.” TEX. R. CIV. P. 500.4(b)(2) (emphasis added); *Enriquez*, 2020 WL 719441, at *1. Written demand for possession by a corporation’s or business entity’s property manager or other authorized agent is sufficient to satisfy the requirement in § 24.005 of the Texas Property Code that the demand for possession be made in writing by a person entitled to possession of the property. *Enriquez*, 2020 WL 719441, at *1.

B. Application of the Law to the Facts

Howard does not contend that she did not receive a notice to vacate or deny that she refused to vacate the premises. Rather, she claims that the notice to vacate was inadequate under the statute because it was sent by U.S. Bank’s agent. The record shows that the notices to vacate were sent by a law firm representing U.S. Bank. This sort of agency arrangement is approved and contemplated by the governing rules for this type of suit, which recognize that “in an eviction case,” a corporation may “be represented by a property manager or other authorized agent.”

See TEX. R. CIV. P. 500.4(b)(2); *Enriquez*, 2020 WL 719441, at *1. Here, the law firm stated in the demand that it was representing U.S. Bank. Accordingly, we conclude that U.S. Bank acted properly through its law firm in sending the presuit demand.

Issue one is decided against Howard.

III. STANDING

In issue two, Howard argues that defects in the foreclosure sale deprived U.S. Bank of standing to pursue its claim for possession.² Howard claims that U.S. Bank lacks standing based on a series of dependent events. She maintains that: (1) because U.S. Bank failed to submit an affidavit verifying its observance of certain requirements prior to the sale of the property, there are defects in the sale; (2) because there are defects in the sale, the resulting substitute trustee's deed is invalid; (3) because the substitute trustee's deed is invalid, U.S. Bank lacks standing to prosecute its claim; and (4) because U.S. Bank lacks standing, its petition is invalid and the trial court lacks jurisdiction.

² The record shows that Howard raised the issue of U.S. Bank's standing in its motion for new trial, which was overruled by operation of law. We also note that, although Howard appears to argue standing in a jurisdictional sense, she asks us to render judgment in her favor rather than dismiss the forcible detainer action for want of jurisdiction. *See Pike v. Tex. EMC Mgmt., L.L.C.*, No. 1700557, 2020 WL 3405812, at *6 (Tex. June 19, 2020).

A. Standard of Review

Standing is a legal question regarding subject-matter jurisdiction, so an appellate court conducts a de novo review of a trial court's ruling. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998).

B. Applicable Law

To have standing, the pleader bears the burden of alleging facts that affirmatively demonstrate the court's jurisdiction to hear the case. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). When the issue of standing is unchallenged, a trial court looks solely at the plaintiff's pleadings. *Fitness Evolution, L.P. v. Headhunter Fitness, L.L.C.*, No. 05-13-00506-CV, 2015 WL 6750047, at *13 (Tex. App.—Dallas Nov. 4, 2015, no pet.) (mem. op.). However, when standing is challenged, the burden of proof is on the person whose interest is challenged to present sufficient evidence to prove that he is an interested person. *Id.*

Standing is a component of subject-matter jurisdiction. *Tex. Air Control Bd.*, 852 S.W.2d at 445–46. Under Texas law, the standing inquiry requires examination of the following: (1) the plaintiff must be personally injured—he must plead facts demonstrating that he (rather than a third party) suffered the injury—and the injury must be concrete and particularized, actual or imminent, not hypothetical; (2) the plaintiff's alleged injury is fairly traceable to the defendant's conduct; and (3) the plaintiff's alleged injury is likely to be redressed by each form of requested relief.

Meyers v. JDC/Firethorne, Ltd., 548 S.W.3d 477, 484 (Tex. 2018); *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 155 (Tex. 2012).

C. Application of the Law the Facts

In its original petition for forcible detainer, U.S. Bank alleged that it purchased the property at a non-judicial foreclosure sale as evidenced by the substitute trustee's deed, the substitute trustee's deed sets forth that the sale of the property occurred after a declaration of default and the giving of notices as required by law, written demand was made upon Howard to vacate the premises, and Howard has not vacated the premises. Further, U.S. Bank has alleged a concrete injury suffered personally by the company that is fairly traceable to Howard's failure to vacate the property, which would likely be resolved by the county court's writ of possession. *See Meyers*, 548 S.W.3d at 484–85; *Enriquez*, 2020 WL 719441, at *2. Also, the following documents were admitted into evidence: (1) a substitute trustee's deed documenting U.S. Bank's purchase of the property at a foreclosure sale and the transfer of the deed of trust to U.S. Bank; (2) a deed of trust documenting the security interest; and (3) notices to vacate sent by U.S. Bank to Howard. The record reveals no defect in standing. *See Heckman*, 369 S.W.3d at 149–50; *Enriquez*, 2020 WL 719441, at *2.

The foreclosure defects of which Howard complains do not relate to standing and are not at issue in this suit. *See Shields*, 526 S.W.3d at 478; *Enriquez*, 2020 WL 719441, at *2. The sole issue in a forcible detainer action is the right to immediate

possession of real property. TEX. R. CIV. P. 510.3(e); *Shields*, 526 S.W.3d at 478; *see also In re Catapult Realty Capital, L.L.C.*, No. 05-19-00109-CV, 2020 WL 831611, at *7 (Tex. App.—Dallas Feb. 20, 2020, orig. proceeding) (mem. op.); *Enriquez*, 2020 WL 719441, at *2. Any defects in the foreclosure process or with the title to the property may not be considered in a forcible-detainer action.³ *Enriquez*, 2020 WL 719441, at *2. Those defects may be pursued in suits for wrongful foreclosure or to set aside the substitute trustee’s deed, but they are not relevant in a forcible detainer action. *Id.* Howard’s allegations concerning foreclosure defects relate to the question of which party has the right to title or damages, not standing. The existence of a quarrel over title does not deprive the justice court, the county court, or this appellate court of jurisdiction. *See id.*

Issue two is decided against Howard.

³ When there are grounds for determining immediate possession independent from title, the justice court and county court will have jurisdiction to hear the forcible-detainer action. *In re Catapult Realty*, 2020 WL 831611, at *7. Not only can the right to immediate possession be determined separately from the right to title, but the Texas Legislature purposely established just such a system. *See id.* Challenges to the validity of a foreclosure sale do not deprive the justice court or county court of jurisdiction. *See id.*

Generally, a justice or county court is not required to determine questions of title when considering a forcible-detainer suit if the contract provides for a landlord–tenant relationship upon default, that the buyer becomes a tenant by sufferance in the event of default, or that the buyer is subject to a forcible-detainer suit upon default. *See id.* at *8. Tenant-by-sufferance clauses separate the issue of possession from the issue of title. *See id.* Under these provisions, a foreclosure sale transforms the borrower into a tenant by sufferance who must immediately relinquish possession to the foreclosure-sale purchaser. *See id.* Accordingly, if a deed of trust provides that in the event of foreclosure, the previous owner will become a tenant by sufferance if he does not surrender possession, the justice court and county court can resolve possession without resort to title. *See id.*

IV. ADMISSION OF EVIDENCE

In issue three, Howard argues that the county court abused its discretion when it overruled her objection to the substitute trustee's deed. Howard contends that defects in the affidavit supporting this exhibit should have precluded its admission into evidence. To preserve error for appellate review, a party must make her complaint to the trial court by a timely request, objection, or motion that states the grounds for the ruling sought with sufficient specificity to make the trial court aware of the complaint. TEX. R. APP. P. 33.1(a)(1)(A); *see also Enriquez*, 2020 WL 719441, at *3. The record shows that Howard did not object to the admission of the substitute trustee's deed. Instead, when U.S. Bank offered the substitute trustee's deed into evidence, Howard stated, "No objection to admissibility." Accordingly, Howard has not preserved this issue for appellate review. *See* TEX. R. APP. P. 33.1(a)(1)(A); *Enriquez*, 2020 WL 719441, at *3.

Issue three is decided against Howard.

V. SUFFICIENCY OF THE EVIDENCE

In issue four, Howard argues that the evidence is insufficient to show that U.S. Bank owns the property or had privity with Howard which would allow U.S. Bank to use the deed's tenancy-at-sufferance clause to dispossess her of the property.

As a preliminary matter, we note that Howard does not specify whether she is challenging the legal or factual sufficiency of the evidence. Because Howard argues and prays only for rendition of judgment in her favor, we construe her issue as raising

only a legal sufficiency argument. *See Scott Pelley P.C. v. Wynne*, No. 05-15-01560-CV, 2017 WL 3699823, at *7 (Tex. App.—Dallas Aug. 28, 2017, pet. denied) (mem. op.).

A. Standard of Review

If the reporter's record is filed on appeal, as it was here, implied findings may be challenged on insufficiency grounds in the same manner as jury findings or a trial court's express findings of fact. *Shields*, 526 S.W.3d at 480; *see also Enriquez*, 2020 WL 719441, at *3. Evidence is legally insufficient to support a finding when: (1) the record bears no 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 to prove a vital fact is no more than a mere scintilla; or (4) the evidence conclusively establishes the opposite of a vital fact. *Shields*, 526 S.W.3d at 480; *see also Enriquez*, 2020 WL 719441, at *3. When determining whether legally sufficient evidence supports a finding, we must consider evidence favorable to the finding if the factfinder could reasonably do so and disregard evidence contrary to the finding unless a reasonable factfinder could not. *Shields*, 526 S.W.3d at 480; *see also Enriquez*, 2020 WL 719441, at *3.

B. Application of the Law to the Facts

There was evidence that Howard executed a deed of trust to secure payment of an extension of credit concerning the property. After Howard's default, the mortgage servicer-initiated foreclosure proceedings and the substitute trustee's deed

shows that U.S. Bank acquired the property at a non-judicial foreclosure sale, making U.S. Bank the rightful owner. The substitute trustee's deed gave U.S. Bank a right to enforce the tenancy-at-sufferance clause against Howard. Viewing the evidence in the light most favorable to U.S. Bank, we conclude the evidence is sufficient to demonstrate U.S. Bank's ownership of the property. *See Enriquez*, 2020 WL 719441, at *3.

Issue four is decided against Howard.

VI. CONCLUSION

We affirm the county court's final judgment.

/Leslie Osborne/
LESLIE OSBORNE
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

PHYLLIS HOWARD AND ALL
OTHER OCCUPANTS OF 624
MISSION LANE, LANCASTER,
TEXAS 75146, Appellants

No. 05-19-00315-CV V.

U.S. BANK NATIONAL
ASSOCIATION, NOT IN ITS
INDIVIDUAL CAPACITY BUT
SOLELY AS TRUSTEE ON
BEHALF OF OWS REMIC
TRUST 2013-1, Appellee

On Appeal from the County Court
at Law No. 5, Dallas County, Texas
Trial Court Cause No. CC-18-
05873-E.

Opinion delivered by Justice
Osborne. Justices Schenck and
Reichek participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee U.S. BANK NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS TRUSTEE ON BEHALF OF OWS REMIC TRUST 2013-1 recover its costs of this appeal and the full amount of the trial court's judgment from appellants PHYLLIS HOWARD AND ALL OTHER OCCUPANTS OF 624 MISSION LANE, LANCASTER, TEXAS 75146 and from the cash deposit in lieu of cost bond.

After all costs and the judgment have been paid, the clerk of the Dallas County District Court is directed to release the balance, if any, of the cash deposit to appellants PHYLLIS HOWARD AND ALL OTHER OCCUPANTS OF 624 MISSION LANE, LANCASTER, TEXAS 75146.

Judgment entered July 7, 2020.