

Beginning Of Appendix

Begin Appendix A



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

No. 05-17-00654-CV

**JUSTIN D. BURGESS, Appellant
V.**

**WILMINGTON SAVINGS FUND SOCIETY, FSB, D/B/A CHRISTIANA TRUST, NOT
INDIVIDUALLY BUT AS TRUSTEE FOR PRETIUM MORTGAGE ACQUISITION
TRUST, Appellee**

**On Appeal from the County Court at Law No. 2
Dallas County, Texas
Trial Court Cause No. CC-17-00664-B**

MEMORANDUM OPINION

**Before Justices Lang-Miers, Myers, and Boatright
Opinion by Justice Myers**

Justin D. Burgess appeals the trial court's judgment awarding possession of real property to Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, not Individually but as Trustee for Pretium Mortgage Acquisition Trust. Burgess brings one issue on appeal contending appellee's petition for forcible detainer must fail and that the right to the possession of the property must be decided in district court. We affirm the trial court's judgment.

BACKGROUND

In 2008, Burgess borrowed \$152,600.00 in a home-equity loan, secured by a deed of trust on his house. The deed of trust provided that if Burgess did not surrender possession of the property after it was sold, he "shall be a tenant at sufferance and may be removed by writ of possession or other court proceeding." Burgess defaulted, and in 2016, the loan servicers obtained

a home equity foreclosure order under Texas Rule of Civil Procedure 736. On the day of the foreclosure sale, which was the day after Labor Day in 2016, Burgess filed suit against appellee. The foreclosure suit went ahead, and the property was sold to appellee at public auction for \$280,208.06. Appellee received a substitute trustee's deed for the property. After the foreclosure sale, appellee sent Burgess and other "occupant(s) and/or tenant(s)" of the property notice to vacate the property within three days. The notice informed the occupants that a suit would be filed in ten days. Burgess did not vacate the property, and appellee filed a petition for forcible detainer in justice court. The justice court ruled in Burgess's favor. Appellee appealed the ruling to the county court at law. After a trial de novo, the county court at law ordered that appellee have judgment for possession of the property. Burgess now appeals the county court at law's decision.

FORCIBLE DETAINER

In his sole issue, Burgess contends that the county court at law lacked jurisdiction to adjudicate the forcible detainer action because a wrongful foreclosure action between the same parties was pending in district court.

A forcible detainer action is a procedure to determine the right to immediate possession of real property where there was no unlawful entry. *Rice v. Pinney*, 51 S.W.3d 705, 709 (Tex. App.—Dallas 2001, no pet.). It is intended to be a speedy, simple, and inexpensive means to obtain possession without resort to an action on the title. *Scott v. Hewitt*, 90 S.W.2d 816, 818–19 (Tex. 1936); *Williams v. Bank of N.Y. Mellon*, 315 S.W.3d 925, 926–27 (Tex. App.—Dallas 2010, no pet.). The only issue in a forcible detainer action is which party has the right to immediate possession of the property. TEX. R. CIV. P. 510.3(e); *Rice*, 51 S.W.3d at 709.

Generally, the evidence is sufficient to show the plaintiff has the greater right to immediate possession of the property when: (1) a trustee's deed states the plaintiff purchased the property in a public auction following the defendant's default on the deed of trust; (2) the deed of trust provides

that the defendant becomes a tenant at sufferance if the defendant does not vacate the property after the plaintiff purchases it; and (3) a notice to vacate informs the defendant of his tenant-at-sufferance position and requires the defendant to vacate the property. *See Shutter v. Wells Fargo Bank, N.A.*, 318 S.W.3d 467, 471 (Tex. App.—Dallas 2010, pet. dism'd w.o.j.). In this case, the substitute trustee's deed stated Burgess had "defaulted in performing the obligations of the Deed of Trust," and that the substitute trustee "sold the property to Buyer [appellee], who was the highest bidder at the public auction." The deed of trust stated, "If the Property is sold pursuant to this Section 22 [power of sale to foreclose lien], Borrower or any person holding possession of the Property through Borrower shall immediately surrender possession of the Property to the purchaser at that sale. If possession is not surrendered, Borrower or such other person shall be a tenant at sufferance and may be removed by writ of possession or other court proceeding." Appellee's counsel sent a letter to Burgess informing him that appellee had purchased the property at a foreclosure sale and demanded Burgess vacate the property within three days. Appellee's custodian of records testified the property was still occupied, and appellant testified he lived at the property. This evidence was sufficient to establish appellee's greater right to immediate possession of the property. *See id.*

Burgess argues that when he filed suit on the day of the foreclosure auction, that suit imposed an automatic stay that barred the foreclosure sale. Texas Rule of Civil Procedure 736.11 provides,

A proceeding or order under this rule is automatically stayed if a respondent files a separate, original proceeding in a court of competent jurisdiction that puts in issue any matter related to the origination, servicing, or enforcement of the loan agreement, contract, or lien sought to be foreclosed prior to 5:00 p.m. on the Monday before the scheduled foreclosure sale.

TEX. R. CIV. P. 736.11(a). Burgess testified that he tried to file the suit on the Monday before the scheduled foreclosure sale but was unable to do so because the district clerk's office was closed

for Labor Day. He filed the lawsuit at 8:17 a.m. the following morning, the day of the foreclosure sale. Burgess testified he showed the lawsuit to the person conducting the sale, and that the sale was delayed while the person determined whether to proceed. The auction did proceed, and the property was sold to appellee. Burgess argued to the trial court and this Court that the writ of possession should be denied appellee because it violated the automatic stay by proceeding with the foreclosure sale when it had notice of Burgess's suit.¹ See TEX. R. CIV. P. 736.11(b), (d).

Burgess's argument is that the foreclosure sale was invalid because of the automatic stay. The validity of the foreclosure sale was not before the trial court. "[I]n cases challenging the validity of a trustee's deed—as in this case—the legislature contemplated concurrent actions in the district and justice courts to resolve issues of title and immediate possession, respectively." *Rice*, 51 S.W.3d at 710. Therefore, even if the foreclosure sale was void for being in violation of rule 736.11(a), the justice court and county court at law had jurisdiction over appellee's forcible detainer action while the question of title was litigated in the district court. The documents and testimony appellee presented established its greater right to immediate possession of the property at that time. See *Shutter*, 318 S.W.3d at 471. Whether the foreclosure sale was invalid was not before the court.

We conclude Burgess has not shown the trial court erred. We overrule Burgess's issue on appeal.

¹ We make no determination in this case whether Burgess's suit filed the day of the foreclosure sale was timely or whether it met the requirements for a suit to invoke the automatic stay under rule 736.11(a).

CONCLUSION

We affirm the trial court's judgment.

/Lana Myers/
LANA MYERS
JUSTICE

170654F.P05



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

JUDGMENT

JUSTIN D. BURGESS, Appellant

No. 05-17-00654-CV V.

WILMINGTON SAVINGS FUND
SOCIETY, FSB, D/B/A CHRISTIANA
TRUST, NOT INDIVIDUALLY BUT AS
TRUSTEE FOR PRETIUM MORTGAGE
ACQUISITION TRUST, Appellee

On Appeal from the County Court at Law
No. 2, Dallas County, Texas
Trial Court Cause No. CC-17-00664-B.
Opinion delivered by Justice Myers.
Justices Lang-Miers and Boatright
participating.

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

It is **ORDERED** that appellee WILMINGTON SAVINGS FUND SOCIETY, FSB,
D/B/A CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS TRUSTEE FOR PRETIUM
MORTGAGE ACQUISITION TRUST recover its costs of this appeal from appellant JUSTIN
D. BURGESS.

Judgment entered this 8th day of May, 2018.

End Appendix A

Begin Appendix B

**WILMINGTON SAVINGS FUND
SOCIETY FSB, D/B/A CHRISTIANA
TRUST, NOT INDIVIDUALLY BUT
AS TRUSTEE FOR PRETIUM
MORTGAGE ACQUISITION TRUST,
Plaintiff,**

v.

**JUSTIN D. BURGESS AND ALL
OTHER OCCUPANTS OF
2611 MADERA STREET
DALLAS, TEXAS 75206
Defendants.**

§§

IN COUNTY COURT AT LAW

NO. 2

DALLAS COUNTY, TEXAS

JUDGMENT

Plaintiff, WILMINGTON SAVINGS FUND SOCIETY, FSB, D/B/A CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS TRUSTEE FOR PRETIUM MORTGAGE ACQUISITION TRUST ("Plaintiff"), appeared through its attorney of record. Defendants, Justin D. Burgess ("Defendant(s)") and all other occupants of 2611 Madera Street, Dallas, TX 75206, did / ~~did not~~ appear in person. The Court, having reviewed the pleadings and considered the testimony, exhibits and all other relevant evidence, is of the opinion that Plaintiff is entitled to the relief sought.

IT IS ORDERED that Plaintiff is entitled to possession of the premises described in Plaintiff's Original Petition for Forcible Detainer, and have restitution, for which let writ issue, of the premises commonly known as 2611 Madera Street, Dallas, TX 75206, and legally described, as:

BEING LOT 17, BLOCK 4/1974 OF ALBRIGHT'S NORTH HENDERSON ADDITION, AN ADDITION TO THE CITY OF DALLAS, DALLAS COUNTY, TEXAS, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 2, PAGE 172 MAP RECORDS, DALLAS COUNTY, TEXAS.

IT IS FURTHER ORDERED that plaintiff recover from the Defendant(s) costs of court, for which let execution issue.

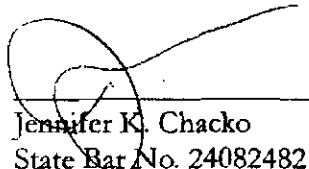
ALL RELIEF NOT EXPRESSLY GRANTED HEREIN IS DENIED.

SIGNED this 9 day of March, 2017.


JUDGE PRESIDING

SUBMITTED BY:

**BARRETT DAFFIN FRAPPIER
TURNER & ENGEL, LLP**


Jennifer K. Chacko
State Bar No. 24082482
4004 Belt Line Road, Suite 100
Addison, Texas 75001
(972) 341-5321
(972) 341-0734 (Facsimile)
Email: JenniC@BDFGroup.com
ATTORNEY FOR PLAINTIFF

End Appendix B

Begin Appendix C



DALLAS COUNTY
JUSTICE OF THE PEACE
PRECINCT 5, PLACE 1

FILED
JOHN F. WARREN
COUNTY CLERK
DALLAS COUNTY, TEXAS

2017 FEB -8 PM 12:01

CASE NO. JE-1621479-O

WILMINGTON SAVINGS FUND SOCIETY §
PLAINTIFF §

IN THE JUSTICE COURT

VS. §

PRECINCT 5, PLACE 1

JUSTIN BURGESS §
DEFENDANT §

DALLAS, COUNTY, TEXAS

JUDGMENT FOR DEFENDANT

On the 5TH day of December, 2016, came to be heard the above-styled and numbered cause, wherein WILMINGTON SAVINGS Plaintiff, and JUSTIN BURGESS Defendant, appeared and announced ready for Trial. Judge ruled in favor for the defendant, it is decreed by the court that this case be dismissed, that the Defendant go hence without pay reference to the case number above.

RENDERED, SIGNED AND ENTERED this the 5th day of JANUARY, 2017



Justice of the Peace Precinct 5-1
Dallas County, Texas

End Appendix C

Begin Appendix D

RE: Case No. 18-0711

DATE: 10/12/2018

COA #: 05-17-00654-CV

TC#: CC-17-00664-B

STYLE: BURGESS v. WILMINGTON SAVINGS FUND SOCIETY

Today the Supreme Court of Texas denied the petition
for review in the above-referenced case.

MS. LISA MATZ
CLERK, FIFTH COURT OF APPEALS
600 COMMERCE, SUITE 200
DALLAS, TX 75202-4658
* DELIVERED VIA E-MAIL *

End Appendix D

Begin Appendix E

IN THE SUPREME COURT OF TEXAS

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NO. 18-0711

JUSTIN D. BURGESS

v.

WILMINGTON SAVINGS FUND
 SOCIETY, FSB, D/B/A
 CHRISTIANA TRUST, NOT
 INDIVIDUALLY BUT AS TRUSTEE
 FOR PRETIUM MORTGAGE
 ACQUISITION TRUST

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Dallas County,

5th District.

October 12, 2018

Petitioner's petition for review, filed herein in the above numbered and styled case, having been duly considered, is ordered, and hereby is, denied.

December 7, 2018

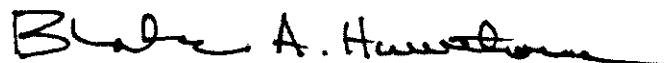
Petitioner's motion for rehearing of petition for review, filed herein in the above numbered and styled case, having been duly considered, is ordered, and hereby is, denied.

★ ★ ★ ★ ★ ★ ★ ★ ★ ★

I, BLAKE A. HAWTHORNE, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appear of record in the minutes of said Court under the date shown.

It is further ordered that petitioner, JUSTIN D. BURGESS, pay all costs incurred on this petition.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this the 7th day of December, 2018.



Blake A. Hawthorne, Clerk

By Monica Zamarripa, Deputy Clerk

End Appendix E

**Additional material
from this filing is
available in the
Clerk's Office.**