No. 12-23-00282-CV

In the Twelfth Court of Appeals
Tyler, Texas

Udo Birnbaum,
Appellant,

v.

CSD Van Zandt, LLC,
Appellee.

Appellee's Brief

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ATTORNEYS FOR APPELLEE

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Statement of the Case

Nature of the Case	This is a suit for declaratory judgment and to quiet title brought by CSD Van Zandt, LLC regarding property it bought from nonparties (Lisa Girot, Patrcia Barclay, and James Moore III). Udo Birnbaum was occupying part of the property at the time of suit and had refused to vacate. Birnbaum had previously owned the property, years ago, but had sold it to Gwendolyn Thibodeaux, a predecessor in interest of the parties that sold the property to CSD Van Zandt.
Trial Court	Hon. Chris Martin, 294th Judicial District, Van Zandt County, Texas
Proceedings	After granting CSD Van Zandt LLC's Traditional Motion for Summary Judgment, the trial court signed a final summary judgment that: (1) granted all relief requested in CSD Van Zandt's Traditional Motion for Summary Judgment, (2) granted judgment as a matter of law on Plaintiff's declaratory judgment and suit-to-quiet-title claims, (3) held CSD Van Zandt was a bona-fide purchaser of the property and that the warranty deed conveying the property to CSD Van Zandt conveys full legal title to CSD Van Zandt, (4) held the warranty deed purporting to convey the property from Louis Thibodeaux to Udo Birnbaum is unenforceable, (5) enjoined Birnbaum from entering or loitering near the property and from harassing CSD, (6) awarded CSD Van Zandt attorney's fees, and (7) denied all other claims. CR281-82.

Statement of Facts

In 1981, T.C. and Carolyn Ann Travis deeded Udo Birnbaum 150 acres in Van Zandt County. CR121; CR51. Years later, in 2002, Birnbaum sold the property to Gwendolyn Wright Thibodeaux. CR125-25; CR55-56.

Ms. Thibodeaux later died intestate, in 2006. CR129; CR59. A Van Zandt County Court then determined her heirs and established their respective shares in the property as: Louis Thibodeaux – 50 precent; Particia Moore Barclay – 25 percent; James T. Moore, III – 25 percent. CR135-36; CR65-66. So, following Gwendolyn's death, Louis Thibodeaux, Barclay, and Moore owned the 150 acres.

In 2019, Louis Thibodeaux died, leaving a will that conveyed his interest in his real property to Lisa Girot. CR138; CR68. As a result, Girot acquired a 50 percent interest in the 150 acre property.

CSD Van Zandt bought the property from Girot, Barclay, and Moore by Warranty Deed with Vendor's Lien in June, 2022. CR89; CR23. CSD then began paying taxes on the property. *E.g.*, CR96-100. Around this time, Girot informed CSD's registered agent, Robert Dow, that Birnbaum had been occupying a portion of the property, *with permission*, for some time before and during the period when she had owned an interest in the property. *See* CR207.

CSD Van Zandt sent Birnbaum a Notice to Vacate. CR109-19; CR30-40. Six days later, Birnbaum filed a Warranty Deed that purported to have been executed in

April of 2017 and purported to transfer title in the property from Louis Thibodeaux to Birnbaum. CR143.

This proceeding followed.

Argument

I. Birnbaum has waived most of his appellate arguments—arguments 1, 2, 4, 5, 6, and 8—through inadequate briefing.

As the Court knows, every appellant's brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. TEX. R. APP. P. 38.1(i). Here, the burden is on Birnbaum to file a brief with adequate and accurate record references showing that the appellate record supports his complaints. *Russell v. City of Bryan*, 919 S.W.2d 689, 706 (Tex. App.-Houston [14th Dist.] 1996, writ denied). An appellant that fails to do this waives his argument. *Rendleman v. Clarke*, 909 S.W.2d 56, 59 (Tex. App.-Houston [14th Dist.] 1995, writ dism'd).

Although appellate courts liberally construe pro se litigants' briefs, those litigants still are held to the same standards as parties represented by counsel. *See Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184-85 (Tex. 1978); *In re L.K.*, 2012 Tex. App. LEXIS 10569 *9 (Tex. App.-Tyler Dec. 20 2012, pet. denied) (mem. op.). To hold otherwise would give pro se litigants an unfair leg up over litigants who hire attorneys. *Cohn*, 573 S.W.2d at 185; *In re L.K.*, 2012 Tex. App. LEXIS 10569 at *9-10. So, even as to pro se litigants, an appellate court has no duty or right to perform an independent review of the record and applicable law to determine whether there was error. *In re L.K.*, 2012

Tex. App. LEXIS 10569 at *10, citing *Valadez v. Avitia*, 238 S.W.3d 843, 845 (Tex. App.-El Paso 2007, no pet.). To do that would be to abandon the role as a neutral adjudicator. *Id.*

Here, Birnbaum fails to cite the record in connection with his arguments 1, 2, 4, 5, 6, and 8. This violates the appellate rules of procedure and is a waiver. TEX. R. APP. P. 38.1(i). As for the arguments where Birnbaum does reference "proof," discussed below, they go nowhere.

II. Birnbaum has failed to raise any argument that warrants reversing the trial court's judgment.

A. Birnbaum's first, fourth, and eight arguments go nowhere: Because Birnbaum raised no genuine issues of fact, he was not entitled to a jury trial notwithstanding that he paid a jury fee.

In his arguments 1, 4, and 8, Birnbaum says he was entitled to a jury trial (and was denied due process without one) because he claims he paid the jury fee and claims this was a trespass to try title suit. Brief at 12, 16, 20.

A party, however, is not entitled to a jury trial when the trial court finds there are no material issues of fact necessitating adjudication. *Alvardo v. Bowles*, 2013 Tex. App. LEXIS 6172 *2-3 (Tex. App.-Amarillo May 17, 2013, no pet.) (mem. op.). That is what happened here. *See* CR308 (order granting traditional summary judgment); CR281 (Final Judgment). Likewise, it is not unconstitutional or a denial of due process for a trial court to grant a summary judgment in this situation. *Alvardo*, 2013 Tex. App. LEXIS 6172 at *2 ("[A]nd to the extent he suggests that granting summary judgment denied him due

process because he was denied his 'day in court,' rules providing for summary judgment are not unconstitutional"), citing *Swafford v. Holman*, 446 S.W.2d 75, 80 (Tex. Civ. App.-Dallas 1969, writ ref'd n.r.e.). Here, moreover, the record does not show that Birnbaum preserved his due-process and constitutionality challenges below.[1] *Hutson v. Tri-County Props., LLC*, 240 S.W.3d 484, 488 (Tex. App.-Fort Worth 2007, pet. denied), quoting *City of San Antonio v. Schautteet*, 706 S.W.2d 103, 104 (Tex. 1986) ("A constitutional challenge 'not expressly presented to the trial court by written motion, answer or other response to a motion for summary judgment will not be considered on appeal as grounds for reversal'").

Despite what Mr. Birnbaum argues, the propriety of summary judgment does not change merely because the case involves real-property issues. Trial courts across the state regularly grant traditional summary judgments on claims adjudicating title to real property. *E.g.*, *Hughes v. 21st Mortg. Corp.*, 2022 Tex. App. LEXIS 7303 *1 (Tex. App.-Austin Sept. 30, 2022, no pet.). And the appellate courts uphold those summary judgments unless they are proved invalid on some other preserved and proved grounds. *Id.* To sustain Birnbaum's argument—that no trial court can grant a summary judgment in a case involving title when the nonmovant paid a jury fee—would turn Texas jurisprudence on its head.

[1] Birnbaum says he preserved this argument in three post-judgment filings. Brief at 13. But the cited filings contain no such argument. CR285-290.

B. Birnbaum's second argument falters because (i) it attacks a writ of possession, which is not an appealable order, and (ii) any issues arising from the writ's enforcement are now moot.

In his second argument, Birnbaum appears to claim that the trial court erred in signing the writ of possession. Brief at 13-14. A writ of possession, however, is an unappealable interlocutory order. *See Neuse v. Nationstar Mortg. LLC*, 2022 Tex. App. LEXIS 1931 *3 (Tex. App.-Corpus Christi Mar. 24, 2022, no pet.) ("And to the extent that appellant seeks to appeal the writ of possession issued on February 17, 2022, an order for a writ of possession is neither a final judgment nor an appealable interlocutory order); *see also Henderson v. Everbank*, 2018 Tex. App. LEXIS 997, *1 (Tex. App.-Houston [1st Dist.] Feb. 6, 2018, no pet.) (per curiam) (mem. op.) (dismissing an appeal from a post-judgment order regarding a writ of possession).

In this case, any controversy over the writ of possession is now moot because, as Birnbaum admits, he no longer possesses the property[2] and he has no basis to claim that he is entitled to current, actual possession of the property. *See Guillen v. U.S. Bank, N.A.*, 494 S.W.3d 861, 865 (Tex. App.-Houston [14th Dist.] April 14, 2016, no pet.) ("[i]f, as a result of the issuance of the writ of possession, the tenant relinquishes possession of the property and vacates according to the court's order, then the controversy is moot unless the tenant can provide a potential basis for a claim that he is entitled to current, actual possession of the property").

[2] Brief at 12 ("The dispossession of one's 42 year 150 acre homestead …").

C. Birnbaum's third argument, concerning the rules governing summary judgments, is not a basis for reversal.

In his third argument, Birnbaum asserts that the trial court erred in granting summary judgment because (a) discovery had not started, and (b) there were genuine issues of material fact. Brief at 15. He is wrong.

1. Birnbaum misreads Rule 166a.

Regardless when discovery did or didn't "start," the summary judgment in CSD's favor was proper. There is no requirement that discovery be conducted before a traditional summary judgment is filed or granted. *Nemeth v. Republic Title of Tex., Inc.*, 2018 Tex. App. LEXIS 4603, *2-3 (Tex. App.-Dallas June 21, 2018, no pet.) ("[a] traditional summary judgment is not subject to the same restrictions as a no-evidence summary judgment, which may not be granted until an adequate time for discovery has passed."). Rather, "Rule 166a(a) permits a party to file a traditional summary judgment motion "at any time after the adverse party has appeared or answered." *Id.* at *3, citing TEX. R. CIV. P. 166a(a). Birnbaum does not contend that the summary-judgment motion was filed before his appearance.

2. Birnbaum cites no proof supporting his issues of fact.

Birnbaum says genuine issues of material fact precluded a summary judgment, but he offers no record cites to support the allegation. Brief at 15-16. As stated earlier, this is a waiver. *See* TEX. R. APP. P. 38.1(i). Rather than comply with Rule 38.1.(i) of the Appellate Rules of Procedure, Birnbaum asks the Court to consult his summary-

judgment briefing "for further details." Brief at 15-16. This—asking CSD and the Court to wade through Birnbaum's summary-judgment briefing and to determine what discussions he may be referencing and whether they might somehow have raised a genuine issue of material fact—is impermissible. *In re L.K.*, 2012 Tex. App. LEXIS 10569 at *10, citing *Valadez v. Avitia*, 238 S.W.3d 843, 845 (Tex. App.-El Paso 2007, no pet.). CSD, like the Court, is entitled to be informed through Birnbaum's brief as to what it is that Birnbaum is touting as a material fact issue and as to what proof it is that Birnbaum claims as support. But Birnbaum's appellate brief does not give that notice.

D. Birnbaum's conclusory and unsupported fifth argument also is no basis for reversal.

Birnbaum appears to make three claims in his fifth numbered argument. *First*, he claims that a telephone recording by CSD's principal, Robert Dow, makes CSD's filings and proof "hearsay upon hearsay." Brief at 17. Of course, such objections can be waived. And Birnbaum would have waived his hearsay objection by failing to press it below and failing to get a trial-court rule on the objection. *Hamilton Metals, Inc. v. Global Metal Servs.*, 597 S.W.3d 870, 881 (Tex. App.—Houston [14th Dist.] Aug. 13, 2019, pet. denied), citing *Mock v. Nat'l Collegiate Student Loan Trust*, 2018 Tex. App. LEXIS 5136 (Tex. App.-Houston [1st Dist.] July 10, 2018, no pet.). Worse, Birnbaum does not even identify which documents he is attacking. And, he doesn't say how the recording might

show the documents to be hearsay or cite to authority. This is another waiver. *See* TEX. R. APP. P. 38.1(i).[3]

Second, Birnbaum claims a trial would have "brought out the fraud." Brief at 17. What fraud? All Birnbaum's brief offers is surmise. His appellate burden, in contrast, is to show—by citing to proper summary-judgment evidence—that there actually is a material fact issue of some fraud. Maybe Birnbaum is reupping his invalid complaint that summary judgments are improper when a jury fee has been paid. As we have explained, that is wrong.

And finally, Birnbaum seems to claim that some deed or group of deeds was defective. Brief at 17. His brief notes that a deed can only convey what the grantor owns. But the brief never explains how that principle applies here. In fact, it doesn't identify the deed or deeds Birnbaum is complaining about, identify the alleged defect, or prove the defect with evidence. Without more from Birnbaum, CSD has no ability to offer a meaningful response. So, Birnbaum's fifth argument is both hopelessly conclusory and waived, due to inadequate briefing. *See* TEX. R. APP. P. 38.1(i).

[3] As previously noted, Birnbaum offers no record cites to support his claim. This is a third waiver. *See* TEX. R. APP. P. 38.1(i).

E. Birnbaum's sixth argument should likewise be rejected.

1. A mortgagor has standing to sue to protect its property interest.

Because CSD occupies the 150 acres subject to a deed of trust in favor of its lender, Sanger Bank, Birnbaum alleges that *neither* CSD nor the bank had standing to sue to adjudicate title. Brief at 18. He cites not authority for this novel position. It is, of course, wrong.

The standing to sue merely requires that the plaintiff be personally aggrieved. *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008). To sue to quiet title, as CSD has done, one must merely claim *some* interest, regardless how large or small, in the property involved. *See Ayati-Ghaffari v. JP Morgan Chase Bank N.A.*, 2019 U.S. Dist. LEXIS 46003, *27 (E.D. Tex. Feb. 10, 2019) (applying Texas law) ("Notably, '[a] suit to quiet title or remove a cloud on title can be maintained only by a person owning an interest in the property involved.'"); *accord Garst v. Reagan*, 2014 Tex. App. LEXIS 2494, *10-11 (Tex. App.-Austin Mar. 6, 2014, no pet.) (mem. op.); *see also Thomson v. Locke*, 1 S.W. 112, 115 (1886) (describing the availability of "suits necessary, as occasion may require it, to enable the holder of the feeblest equity to remove from his way to legal title any unlawful hindrance").

In Texas, a mortgagor—the property's buyer—has an equitable title and a right of present possession. This set of rights gives the mortgagor—here, CSD—the standing to challenge any activity that would interfere with those rights. *Vazquez v. Deutsche Bank*

Nat'l Trust Co., N.A., 441 S.W.3d 783, (Tex. App.—Houston [1st Dist.] 2014, no pet.) (homeowner-mortgagor had standing to challenge assignment of a deed of trust in the chain of title of a rival claimant to the land that she owned). Birnbaum's contrary argument position—where only a person holding both the legal *and* equitable title, *i.e.*, the fee simple title, would have standing—would mean that property subject to a mortgage could never be the subject of a suit to quiet title. And that, in turn, would enable squatters to avoid civil consequences for their actions.

2. CSD's purchase, under a deed of trust, was no contract for deed.

Birnbaum alternatively tries to recharacterize CSD's deed as a contract for deed: he says there was no chain of "actual land title deeds" because, he claims, the deed that CSD filed with the County Clerk actually was only a contract to obtain a deed in the future from Sanger Bank. Brief at 19. But that is just not so.

As this Court explained in *Smith v. Davis*, Birnbaum's own cited authority, a contract for deed exists where no deed at all is given and the *seller* retains the title until after a series of installments is fully paid. *Smith v. Davis*, 2013 Tex. App. LEXIS 6838, *10-11, 14-15 (Tex. App.-Tyler June 5, 2013, no pet.) (mem. op. on reh'g). Here, in contrast, CSD's sellers (Barclay, Moore, and Girot) already have relinquished possession and have forever relinquished their title, in a warranty deed subject to a vendor's lien in favor of Sanger bank, for the borrowed portion of the purchase price. CR 88-94 (recorded warranty deed with vendor's lien, from Moore to CSD, referencing a deed of

trust in favor of Sanger Bank). Birnbaum has not identified anything about this transaction that would be characterizable as a contract for deed.

Equally important, even if the parties would have entered a contract for deed—which, again, they did not—Birnbaum still would have no logical basis for denying CSD's standing to sue. Even a buyer under a contract for deed has an equitable interest in the property under contract—including a right to possession—that is sufficient to support a suit to quiet title. *See, e.g., Bell v. Ott*, 606 S.W.2d 942, 952 (Tex. Civ. App.—Waco 1980, writ ref'd n.r.e.) (plaintiff may maintain suit to quiet title even if he asserts only "the feeblest equity").

Birnbaum's argument six, about a supposed contract for deed and equitable title, is just a wild goose chase.

F. Birnbaum's seventh argument, raising the statute of limitations for adverse possession, does not support reversal.

Birnbaum raises the statute of limitations for adverse possession as a defense. The argument goes nowhere.

The statute of limitations is an affirmative defense. *See* TEX. R. CIV. P. 94; *see also Texas Beef Cattle Co., v. Green*, 921 S.W.2d 203, 212 (Tex. 1996). To defeat a summary judgment by raising such a defense, the non-movant must do more than just assert the defense. *American Petrofina, Inc. v. Allen*, 887 S.W.2d 829, 830 (Tex. 1994). He must present summary-judgment proof raising a fact issue on each and every one of the defense's elements. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984). Otherwise—

if the proof on even one element is insufficient to raise a fact issue—there is no defense. *Id.*

Every statute-of-limitations defense invoking adverse possession must not only prove possession for the required period but must also show that the possession was:

- adverse and hostile to the claim of the record title owner;
- open and notorious;
- peaceable;
- exclusive; and
- continuous. *See, e.g., Kazmir v. Benavides*, 288 S.W.3d 557, 561 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

So, Birnbaum's summary-judgment burden was to present admissible proof making out fact issues for trial on each of the bulleted elements—hostility, notoriety, peaceableness, exclusivity, and continuity. *See*, *e.g.*, *"Moore" Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 936-37 (Tex. 1972); *accord Luxurkey Mgmt., LLC v. Fuller,* 2019 Tex. App. LEXIS 5400, *5-6 (Tex. App.—Houston [1st Dist.] June 27, 2019, no pet.) ("[T]o stave off a summary judgment based on an affirmative defense, the nonmovant must raise a fact issue as to each element of the defense."). That is, Birnbaum needed to elicit sufficient admissible proof establishing whether and when the occupancy became adverse and hostile to the record owner, and whether and how it was peaceable, exclusive, and continuous. And his appellate brief needed to cite to such proof.

Birnbaum's brief makes no effort to show that he met this burden of production below. In fact, the brief cites no evidence at all respecting limitations but merely quotes from Birnbaum's answer. *See* Brief at 19 (quoting Defendant's Second Amended

Answer). That pleading, of course, was not proof when filed, it is not proof now, and it certainly never shifted any burden onto CSD to negate limitations. *Weekley Homes v. Paniagua*, 646 S.W.3d 821, 824 (Tex. 2022) (per curiam) (pleadings are not summary-judgment proof); *Regency Field Servs., LLC v. Swift Energy Operating, LLC*, 622 S.W.3d 807, 818-19 (Tex. 2021) ("[c]learly, a party cannot rely on its own pleaded allegations as evidence of facts to support its summary-judgment motion or to oppose its opponent's summary-judgment motion."). So, Birnbaum's argument seven fails.

Here, moreover, the quoted excerpt from the answer would not raise a triable issue of adverse possession even if pleadings could count as proof, because the quote doesn't mention the hostility and exclusivity requirements of adverse possession[4], and it states only a legal conclusion as to the peaceable-possession element. *See* Brief at 19 ("Defendant UDO BIRNBAUM pleads statute of limitation claim preclusion against any and all claims by reason of 41 years peaceable possession of cultivating, using, and enjoying the 150-acre premises at issue."). When attempting to raise a required fact issue, a party's legal conclusions do not suffice. *See Mercer v. Daoran Corp.*, 676 S.W.2d 580, 583 (Tex. 1984) ("A legal conclusion in an affidavit is insufficient to raise an issue of fact in response to a motion for summary judgment[.]"); *Ellis v. Jansing*, 620 S.W.2d 569, 571 (Tex. 1981) ("This portion of the affidavit in which Mr. Copeland states he

[4] To merely say, as Birnbaum does, that he has lived on the property for a certain period of time says nothing about when and whether the occupancy became adverse and hostile to the owner, or whether it was exclusive.

held open, notorious, exclusive, continuous and adverse possession to the property in question, represents legal conclusions and is ineffective to raise a fact issue in a summary judgment hearing."); *Lippert v. Eldridge*, 2016 Tex. App. LEXIS 11086 (Tex. App.—Austin Oct. 12, 2016, no pet.) ("Statements are conclusory when they are not supported by any underlying facts, and statements asserting mere legal conclusions are insufficient to establish the existence of a fact issue.").

Additionally, apart from the immaterial quotation, Birnbaum's brief does not discuss any adverse-possession element or cite to evidence raising a material fact issue as to any such element. *See* Birnbaum's Brief at 19-20. If that is not bad enough, the brief's entire argument on limitations is conclusory, consisting of two sentences: a non-substantive statement that merely introduces the quoted pleading, and a concluding sentence stating: "IN SHORT, statute of limitations long ago precluded CSD Van Zandt LLC, Robert O. Dow, Sanger Bank, Lenders, Insurers, Lisa Girot, or ANYONE ELSE from attacking Defendant's possession." Brief at 20.

Each of these failings is fatal to Birnbaum's statute-of-limitations ground. For Birnbaum to address these failings with new grounds or arguments raised in a reply brief will be too late. *See Stovall & Assocs., P.C. v. Hibbs Fin. Ctr., Ltd.*, 409 S.W.3d 790, 803 (Tex. App.—Dallas 2013, no pet.).

III. Birnbaum has not challenged material aspects of the judgment.

"It is axiomatic that an appellate court cannot reverse a trial court's judgment absent properly assigned error." *Pat Baker Co. v. Wilson*, 971 S.W.2d 447, 450 (Tex. 1998)

(per curiam). Birnbaum has not challenged the judgment's pronouncements that: (1) CSD is a bona fide purchaser for value, (2) Birnbaum's 2017 deed is invalid and unenforceable, and (3) CSD is entitled to attorney's fees in the amount of $16,582.00. These rulings should be accepted, *see Pat Baker Co.*, 971 S.W.2d at 450, and Birnbaum cannot dispute them on reply. *Sheard v. Tarrant Reg'l Water Dist.*, 2024 Tex. App. LEXIS 2242, *10 n.4 (Tex. App.-Tyler Mar. 28, 2024, no pet. h.), citing *HMT Tank Serv. LLC v. Am. Tank & Vessel, Inc.*, 565 S.W.3d 799, 812 n.10 (Tex. App.-Houston [14th Dist.] 2018, no pet.).

Conclusion and Prayer

Because ample proof supports the trial court's judgment, and because Birnbaum has not offered any legitimate reason why it should be disturbed, the Court should affirm the judgment in all respects.

Respectfully submitted,

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Certificate of Compliance with Appellate Rule 9.4(i)

1. This brief complies with the type-volume limitations of TEX. R. APP. P. 9.4 because it contains 3,731 words, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(2)(B).

2. This brief complies with the typeface requirements of TEX. R. APP. P. 9.4(e) because it has been prepared in the proportionally spaced typeface using Word in 14-point Garamond font.

Dated: April 15, 2024

/s/ **Gregory D. Smith**
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