

Dismissed and Opinion filed February 21, 2002.



In The
Fourteenth Court of Appeals

NO. 14-01-01205-CV

C. MONICA CALHOUN, Appellant

V.

BANCO POPULAR NORTH AMERICA, Appellee

**On Appeal from the County Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 755,865**

MEMORANDUM OPINION

This is an appeal from a judgment in a forcible entry and detainer suit, in which judgment was entered in favor of appellee, Banco Popular, on June 20, 2001. On December 27, 2001, Banco Popular filed a motion to dismiss and objection to affidavit of indigence. We grant the motion and dismiss this appeal as moot.

Banco Popular brought the original suit in justice court to recover possession of real property from Calhoun. Judgment was entered in favor of Banco Popular on June 20, 2001. Calhoun then appealed the judgment to the county court and filed a timely pauper's affidavit. A trial de novo was held in county court and final judgment was entered on August 30, 2001, granting possession to Banco Popular. Calhoun did not file a supersedeas bond.

The Property Code provides for a stay of a judgment of possession only if, within 10 days of the signing of the judgment, the appellant files a supersedeas bond in an amount set by the county court. TEX. PROP. CODE ANN. § 24.007 (Vernon 2000). Because no supersedeas bond was filed, the clerk issued the writ of possession.

On October 2, 2001, Calhoun filed a motion for rehearing, which may be construed to be a motion for new trial. This motion was denied by order signed October 12, 2001. The record shows that the writ of possession issued on October 2, 2001. The record shows that the writ was executed on October 3, 2001. On November 26, 2001, appellant filed a notice of appeal in this court. The record does not show that a supersedeas bond was ever filed.

Banco Popular contends this appeal must be dismissed because it is moot and because the notice of appeal was not timely filed. Appellant has not filed any response that actually addresses the contentions in Banco Popular's motion to dismiss.

Turning to the timeliness of the notice of appeal, Banco Popular claims the notice of appeal was filed 40 days, rather than 30 days, after the date the judgment was signed. The record shows that the judgment was signed on August 30, 2001. Appellant filed a timely motion for new trial on October 1, 2001, which erroneously asked to set aside the judgment of August 27, 2001, the date of the hearing and not the date of the judgment. Although the motion for new trial contains an incorrect date of judgment, we do not believe that renders it ineffective to extend the appellate deadlines. Accordingly, appellant had 90 days from the date of signing of the judgment, August 30, 2001. TEX. R. APP. P. 26.1(a). The notice of appeal was filed within the 90-day period and, therefore, was timely.

We do, however, find that the appeal is moot. In *Kemper v. Stonegate Manor Apts., Ltd.*, 29 S.W.3d 362 (Tex. App.–Beaumont 2000, pet. dism'd w.o.j.), the appellant did not file a supersedeas bond as required by section 24.007 of the Property Code. The court held that it could not stay a judgment unless the appellant filed a supersedeas bond. *Id.* 363. Because appellant did not file a bond, the prevailing party took possession of the property. *Id.* The court held that, once the prevailing party took possession of the premises, the court

could no longer grant effectual relief and that the case was moot. *Id.* Accordingly, the court dismissed the appeal. *Id.*

We find *Kemper* analogous and persuasive. Appellant did not file a supersedeas bond and the writ of possession issued. Banco Popular now has possession of the premises. Accordingly, the case is moot.

Lastly, Banco Popular objects to appellant's affidavit of indigence, allegedly filed in the district court on November 21, 2001. The clerk's record contains no such affidavit. In any event, our disposition of the motion to dismiss renders this objection moot.

The appeal is ordered dismissed.

PER CURIAM

Judgment rendered and Opinion filed February 21, 2002.

Panel consists of Justices Yates, Seymore, and Guzman.

Do Not Publish — TEX. R. APP. P. 47.3(b).