

RECENT DEVELOPMENTS

Property Code, a landlord must comply within seven days or the tenant “may exercise his remedies under [the] subchapter.” Tex. Prop. Code Ann. § 92.202(a)(2). Using this section of the Texas Property Code, the court reasoned that McBeath did not have to direct Estrada to a specific section of the Code which gave her the right of action and the specific section of Code requiring Estrada to provide the information. The court further held that McBeath’s letter notifying Estrada that the consequences of failure to act would result in legal action was enough to comply with the Property Code. Therefore, the court reversed the judgment and granted summary judgment in favor of McBeath.

PROPERTY CODE SECTION 24.007 IS NOT INTENDED TO PRECLUDE APPELLATE REVIEW OF ALL ISSUES ARISING FROM AN EVICTION PROCEEDING INVOLVING COMMERCIAL PROPERTY

Gibson v. Dynegy Midstream Services, 138 S.W.3d 518 (Tex. App.—Fort Worth 2004).

FACTS: Hattie Lucille Gibson filed suit against Dynegy Midstream Services, L.P. (“Dynegy”) for forcible entry, detainer, and forcible detainer. In filing her suit, she asserted her right to immediate possession of a two-acre tract of land in Young County, Texas. Dynegy filed a plea asserting that the justice court lacked subject matter jurisdiction over Gibson’s claim because the claim was an effort to have the court determine ownership or title of the property. After hearing arguments from both sides, the court dismissed Gibson’s suit and she appealed the ruling

to the county court. After a hearing, the county court also dismissed Gibson’s suit for want of jurisdiction. Gibson appealed the trial court’s dismissal of her eviction claiming that the Texas Court of Appeals had jurisdiction over her appeal despite the limitation of Section 24.007 of the Texas Property Code
HOLDING: Affirmed.

REASONING: The Texas Constitution and Legislature have vested the courts of appeals with jurisdiction over civil appeals from final judgments of district and county courts in which the amount in controversy or the judgment exceeds \$100. In eviction proceedings, the grant of appellate jurisdiction is restricted by section 24.007, which provides, in pertinent part: “A final judgment of a county court in an eviction suit may not be appealed on the issue of possession unless the premises in question are being used for residential purposes only.” The property in this case was being used for commercial purposes.

The court held that the plain and ordinary language of section 24.007 was not intended to preclude appellate review of all issues arising from an eviction proceeding involving commercial property, but only to limit review over appeals raising the issue of possession. In this case possession was not an issue on appeal, therefore, section 24.007 did not prevent Gibson from appealing the propriety of the justice and the county courts’ orders dismissing her suit for want of subject matter jurisdiction and the court did have appellate jurisdiction over this appeal.

MISCELLANEOUS

LANGUAGE IN DEED RESTRICTIONS PREVAILS OVER CHAPTER 204 OF THE PROPERTY CODE

Brooks v. Northglen Ass’n, ___ S.W.3d ___ (Tex. 2004.)

FACTS: Northglen Association (“Northglen”) is the homeowners association for six Harris County subdivisions encompassing more than 1600 single-family residences. Each of the six Sections has and is governed by a separate set of deed restrictions. In 1994, Northglen’s Board of Directors (“Board”) amended the deed restrictions to expand the Board, to assess late fees on unpaid assessments, and to determine and adjust rates. Plaintiff Brooks organized a committee called the “Committee to Remove the Board” (“Committee”) to remove Board members that the Committee deemed to be acting outside the bounds of the deed restrictions by adopting the amendments. Northglen sued for injunctive and declaratory relief, seeking an order to enjoin the eight-member Committee from conveying the false impression that the Committee was formed according to Northglen’s bylaws and to refrain from other activities designed to disrupt the Board’s business. Brooks counterclaimed for a declaratory judgment that Northglen had no authority to raise assessments or charge late fees without a vote of the property owners.

The trial court granted summary judgment for Northglen holding that chapter 204 of the Texas Property Code authorized the Board to raise assessments and charge late fees unilaterally. The court of appeals reversed in part, holding that Sections 1 through 3 had deed restrictions disallowing annual assessments exceeding \$120, however Sections 4 through 6 had no language disallowing annual assessments, so accumulation of assessments was allowed for those Sections. The court also held that section 204.010(10) of the Property Code gave Northglen the right to assess a \$35 late fee in addition to the interest charge permitted by the deed restrictions, however, because the property owners did not have prior notice of the late fee, the court held that Northglen could not foreclose on any homesteads to collect those fees. Both parties appealed.

HOLDING: Affirmed in part, reversed in part.

REASONING: The Northglen deed restrictions for Sections One and Two subjected each property owner to “an annual maintenance charge and assessment not to exceed \$10 per month or \$120 per annum, for the purpose of creating ... the ‘maintenance fund’...” The restrictions further provided that the rate at which each Lot would be assessed would be determined annually by Northglen and that the rate and the date the assessment must be paid could be adjusted from year to year by Northglen as the needs of the Subdivision may

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in the judgment of Northglen require. The court held the plain language of the deed restriction allowed Northglen to unilaterally assess up to \$120 per annum.

In addition, Sections Four and Five contained an additional clause allowing a ten percent increase over the prior year's annual assessment. Section 204.010 of the Texas Property Code provides that "(a) Unless otherwise provided by the restrictions or the association's article of incorporation or bylaws, the property owners' association, acting through its board of directors or trustees may: ... (16) if the restrictions allow for an annual increase in the maximum regular assessment without a vote of the membership, assess the increase annually or accumulate and assess the increase after a number of years."

TERM "ACTUAL DAMAGES" IN THE BANKRUPTCY CODE DOES NOT INCLUDE CLAIM FOR EMOTIONAL DISTRESS

In re Dawson, 367 F.3d 1174 (9th Cir. 2004).

FACTS: George and Barbara Dawson bought a home in Richmond, California ("the Property") in 1987. The Property was purchased with a loan from the predecessor of Washington Mutual Bank and secured by a first deed of trust. In 1989 the Dawsons secured another loan by executing a second deed of trust in favor of the Dixons, who were friends of the Dawsons. As a result of financial difficulties, the Dawsons filed a Chapter 13 bankruptcy petition in May of 1993, and in October a reorganization plan was confirmed. After the Dawsons repeatedly failed to make payments as promised, the Bank, on January 16, 1996 recorded a notice of sale scheduling a foreclosure sale on February 8, 1996.

Meanwhile, in 1994 the Dixons filed a notice of default against the Property, and in October of 1995 conducted a foreclosure sale. In February of 1996 a trustee's deed was recorded transferring title of the Property to the Dixons, who assigned a second deed of trust transferring their interest to the Jamesons, who were relatives of the Dawsons. The Dawsons and the Jamesons executed an agreement under which the Jamesons agreed to deed the Property back to the Dawsons if a series of conditions were met within 30 days of the execution of the contract.

On February 6, 1996, George Dawson filed a petition for Chapter 7 bankruptcy protection. On February 8, 1996, the date set for the foreclosure sale by the Bank, a grant deed was recorded, transferring the Dixon's interest in the Property to the Jamesons. On February 14, 1996, after the foreclosure sale had taken place, the Bank took title to the Property. No later than February 20, 1996, the Bank became aware of Mr. Dawson's Chapter 7 petition, and on that same date served Mr. Dawson a notice to quit the premises. On February 27, 1996, the Bank instituted an unlawful detainer action against the Dawsons, and also received notice of Mr. Dawson's Chapter 7 filing. The Bank dismissed the unlawful detainer action on March 14, 1996, and Mr. Dawson's Chapter 7 bankruptcy case was closed on July 23, 1996.

In June of 1998, the Dawsons filed for Chapter 13 bankruptcy. The Bank filed a proof of claim as to the Dawsons'

debt, secured by the Property, and the Dawsons responded by filing an adversary complaint, claiming emotional distress damages under 11 U.S.C. § 362(h) for the Bank's violation of the automatic stay in George Dawson's Chapter 7 proceeding. The bankruptcy court held that the agreement between the Dawsons and the Jamesons was an option agreement that did not convey any equitable ownership interest in the Property to the Dawsons, and thus the Bank's February 1996 foreclosure sale did not violate the stay. Although the bankruptcy court recognized that the Bank did violate the stay between February 20 and March 14, 1996, the court denied Mr. Dawson's claim for emotional distress damages on the ground that no nexus appeared between the Bank's violation of the stay and the emotional distress claimed. The district court held that the agreement with the Jamesons was actually a marketing contract that could transfer an equitable interest in the property to the Dawsons.

Whether the Bank violated the automatic stay with its February 1996 foreclosure sale depended on several disputed facts as to whether the Dawsons held such an interest. The district court remanded the case to the bankruptcy court for further findings of fact. The Dawsons appealed.

HOLDING: Affirmed.

REASONING: The Court began by noting that the text of § 362(h) suggests that it is aimed at economic damages, and that the term "actual damages", as used within the statute, included costs and attorneys' fees, both of which were types of economic harm. The Court also looked at several other federal statutes that used the term "actual damages," including section 17 U.S.C. § 504(b) of the Copyright Act, and 15 U.S.C. § 78bb(a) of the Securities Act. Both of these statutes, as well as the case law of the 9th Circuit surrounding them, referred to actual damages only in terms of economic or financial losses. The Court also reviewed the 7th Circuit's position that the automatic stay in bankruptcy proceedings was primarily for the protection of the unsecured creditors as a group, not the debtor, and that such protection was financial in character and not intended as protection of peace of mind. The 7th Circuit had also noted that section 362(h) was not intended to redress tort violations but to protect the rights conferred by the automatic stay. Any potential tort remedy that a debtor might be able to assert would only be incidental to monetary relief held applicable due to a violation of the stay by a creditor. Declaring that it was persuaded by the 7th Circuit's approach, the Court held that the interests served by § 362(h) were economic, and that "actual damages" under § 362(h) did not include damages for emotional distress.

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