

Reversed and Rendered and Opinion filed August 10, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-00621-CV

TEXAS CAPITAL BANK, N.A., Appellant

V.

ANNIE M. HOPPE, Appellee

On Appeal from the 165th District Court
Harris County, Texas
Trial Court Cause No. 95-28100

OPINION

Texas Capital Bank, N.A.¹ (“the Bank”) brought a trespass to try title action against Annie Hoppe over a 157-acre wooded tract in north Harris County. Hoppe filed an adverse possession counterclaim. Trial was to a jury; the only questions submitted to the jury were on Hoppe’s counterclaim. The jury found that Hoppe held peaceable and adverse possession of the 157 acres for a ten-year period prior to this litigation.

¹ Coastal Banc S.S.B. (“the Bank”), successor in interest to Texas Capital Bank, is prosecuting this appeal.

In four points of error the Bank contends the trial court erred in not granting its motion for judgment non obstante veredicto; that the evidence was insufficient to support the jury's verdict; that Hoppe's recovery was barred as a matter of law; and that the trial court erred in not submitting a requested issue on ratification. Because we find the statute of limitations did not run against the Bank as a matter of law, we reverse the judgment of the trial court and render judgment that Hoppe did not acquire the 157-acre tract by adverse possession.

FACTS

Annie Hoppe was living on a 167-acre parcel of land on September 5, 1979 when her mother died. The land was the largest single asset in Martha Hoppe's estate. Hoppe and her brother, Johnnie Hoppe, were named co-administrators of the estate. Friction developed, and Annie Hoppe was removed as executor by the probate court. After her removal, in October 1982, Johnnie Hoppe negotiated sale of the entire parcel to one Faust in order to pay the estate taxes. In February 1983, Annie Hoppe sought to have a copy of her mother's will admitted to probate in a lost will proceeding; in May 1983 she sought to have the sale set aside; in June 1983 she sought to have her brother removed as administrator.

Meanwhile, in September 1983, the sale of property was closed. Johnny Hoppe, acting as administrator of the estate, conveyed to Faust the entire 167 acres; Faust in turn conveyed 10 acres surrounding Annie Hoppe's home to her. Hoppe never acknowledged these transactions.

Meanwhile, the lost will contest was tried to a jury, which found that Martha Hoppe did not revoke the will. The trial court granted judgment non obstante veredicto against the will's admission. This court reversed the trial court, ordering the will admitted to probate. *Hoppe v. Hoppe*, 703 S.W.2d 224 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

The will named Annie Hoppe as executrix and she filed several accountings. In 1990 she filed suit against Johnnie Hoppe for his handling of the estate; in that suit she acknowledged that a sale of the property had taken place, but argued the sale was void. She

settled with her brother; among the settlement agreement was an agreement to pay attorney's fees arising from the 1983 sale.

Meanwhile, Faust sold the property to a partnership, Huffmeister 157 Ltd., which planned to subdivide the property. In November 1991, the partnership defaulted on its note; the Bank acquired deed to the property in a foreclosure sale in April 1992. The Bank filed the instant action on June 7, 1995, after Annie Hoppe threatened a survey crew. Hoppe counterclaimed, arguing she had gained possession of the land by adverse possession. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.026 (Vernon 1997). The result was the jury verdict from which the Bank appeals.

In its first point of error the Bank argues that, as holder of the mortgage, limitations under the adverse possession statute did not begin to run against it until April of 1992, when it purchased the property at the foreclosure sale. We agree.

The law is well-settled in Texas that, for adverse possession purposes, the statute of limitations does not run against the mortgagee out of possession and in favor of an adverse claimant until the mortgagee acquires title to land at the foreclosure sale. *Warnecke v. Broad*, 138 Tex. 631, 161 S.W.2d 453 (1942); 30 TEX. JUR. 3d *Deeds of Trust and Mortgages* § 77 (1995); 2 TEX. JUR. 3d *Adverse Possession* § 6 (1995). This is the case because the mortgage holder has no right to eject the adverse possessor until it actually acquires title. *Wilson v. Beck*, 286 S.W. 315, 322 (Tex. App.—Dallas 1926, writ ref'd); 5 FRED A. LANGE & ALOYSIUS A. LEOPOLD, TEXAS PRACTICE: LAND TITLES AND EXAMINATION § 986 (1992). This applies whether or not the adverse possessor was on the land at the time the mortgage was given. *Hume v. Le Compte*, 142 S.W. 934, 936 (Tex. App.—San Antonio 1911, writ ref'd).

In the face of this adverse authority, Hoppe argues the Bank waived this issue by not requesting a jury question at trial. However, the point is a question of law which the Bank raised for the first time in its judgment n.o.v. The issue is preserved for our review. *See Cecil v. Smith*, 804 S.W.2d 509, 510-511 (Tex. 1991); *Salinas v. Fort Worth Cab & Baggage Co.*, 725 S.W.2d 701, 704 (Tex. 1987). The Bank's first point of error is sustained.

Because of this finding, we need not address the Bank's remaining points of error. The judgment of the trial court is reversed and judgment rendered that Annie Hoppe take nothing on her claim for adverse possession.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed August 10, 2000.

Panel consists of Justices Sears, Cannon, and Lee.*

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* Senior Justices Ross A. Sears, Bill Cannon and Norman Lee sitting by assignment.