

# FILED

November 17, 1999

Cecil Crowson, Jr.  
Appellate Court Clerk

## IN THE COURT OF APPEALS OF TENNESSEE AT NASHVILLE

ORLANDO RESIDENCE, LTD.,	)	
	)	
Plaintiff/Appellee,	)	
	)	Davidson Chancery
VS.	)	No. 92-3086-III
	)	
NASHVILLE LODGING COMPANY,	)	
NASHVILLE RESIDENCE CORP., and	)	Appeal No.
KENNETH E. NELSON,	)	M1998-00221-COA-R3-CV
	)	(Old #01A01-9807-CH-00357)
Defendants/Appellants,	)	
	)	
METRIC PARTNERS GROWTH	)	
SUITE INVESTORS, L.P.,	)	
	)	
Defendants/Appellee.	)	
	)	
NASHVILLE LODGING COMPANY,	)	
	)	
Plaintiff/Appellant,	)	Davidson Chancery
	)	No. 98-1536-III
VS.	)	
	)	Appeal No.
ORLANDO RESIDENCE, LTD.,	)	M1999-00943-COA-R3-CV
	)	(Old #01A01-9901-CH-00047)
Defendant/Appellee.	)	

APPEAL FROM THE DAVIDSON COUNTY CHANCERY COURT  
AT NASHVILLE, TENNESSEE

THE HONORABLE ELLEN HOBBS LYLE, CHANCELLOR

For Orlando Residence, Ltd. :

For Nashville Lodging Co.,  
Nashville Residence Corp.,

Eugene N. Bulso, Jr.  
Rebecca C. Blair  
Boult Cummings Conners & Berry  
Nashville, Tennessee

and Kenneth E. Nelson:  
Samuel L. Felker  
Joseph F. Welborn, III  
Bass Berry & Sims  
Nashville, Tennessee

## **APPEAL DISMISSED & APPEAL AFFIRMED**

### WILLIAM C. KOCH, JR., JUDGE **OPINION**

The two cases consolidated on this appeal involve related proceedings in the Chancery Court for Davidson County stemming from a judgment creditor's efforts to collect a \$250,000 federal court judgment. In the first case, the judgment creditor seeks to set aside the judgment debtor's sale of a piece of commercial property as a fraudulent conveyance. In the second case, filed after this court reversed a judgment for the judgment creditor in the first case, the purchaser of the commercial property from the judgment debtor seeks to recover possession of the property as well as all proceeds derived from the property while in the judgment creditor's possession. On this appeal, the judgment debtor and the purchaser of the property take issue with the trial court's refusal to dismiss the first suit for lack of standing or to set aside the intervening judicial sale of the property. The purchaser of the property also asserts that the trial court erred by dismissing its unjust enrichment claim against the judgment creditor in the second case. We affirm the trial court in the first case because the challenge to the sale of the property is now moot and because the law of the case doctrine prevents the judgment debtor and the purchaser of the property from challenging the judgment creditor's standing to pursue its fraudulent conveyance claim. We also dismiss the appeal in the second case based upon the parties' stipulation.

#### **I.**

The seeds of the present dispute were sown in 1981 when Samuel A. Hardige hired Kenneth E. Nelson to oversee one of his businesses. Mr. Hardige fired Mr. Nelson a short time later, thereby precipitating considerable litigation between Mr. Nelson and various business entities owned by Mr. Hardige. When the litigation was eventually settled,

Nashville Residence Corporation (“Nashville Residence”), of which Mr. Nelson was the principal stockholder, received a tract of land at 2300 Elm Hill Pike in Nashville. In return, Nashville Residence and two sureties executed a \$250,000 note to Orlando Residence, Ltd. (“Orlando Residence”), a limited partnership with Mr. Hardige as the general partner.<sup>1</sup> Thereafter Nashville Lodging Company (“Nashville Lodging”), a Tennessee-based limited partnership with Nashville Residence as its general partner, built a Marriott Hotel on the Elm Hill property.

Nashville Residence defaulted on the note to Orlando Residence. In December 1986, Orlando Residence sued Nashville Residence in the United States District Court for the Middle District of Tennessee. Shortly after Orlando Residence filed suit, Nashville Residence quitclaimed the Elm Hill property to Nashville Lodging. In 1989, Nashville Lodging sold the hotel and leased the property to Metric Partners Growth Suite Investors, L.P. (“Metric Partners”). In March 1990, Orlando Residence obtained a judgment in federal court against Nashville Residence for \$250,000 plus interest.

Armed with its \$250,000 judgment, Orlando Residence filed suit in the Chancery Court for Davidson County against Nashville Residence, Nashville Lodging, Mr. Nelson, and Metric Partners attacking the conveyance of the Elm Hill property as a fraudulent conveyance. Orlando Residence eventually succeeded with its claim and was awarded \$501,934 in compensatory and \$850,000 in punitive damages from Nashville Residence and Nashville Lodging. Both Nashville Residence and Nashville Lodging appealed to this court.

Orlando Residence decided to execute on its chancery court judgment while Nashville Residence’s and Nashville Lodging’s appeal was pending. In the summer of 1996, Orlando Residence moved to subject the Elm Hill property to an execution sale. Orlando Residence purchased the property for \$100,000, and this sale was confirmed by the trial court. Three months later, this court reversed Orlando Residence’s judgment and remanded the case for a new trial. *See Orlando Residence Ltd. v. Nashville Lodging Co.*, No. 01A01-9606-CH-00256, 1996 WL 724915, at \*4-7 (Tenn. Ct. App. Dec. 18, 1996), *perm. app. denied concurring in results only* (Tenn. May 19, 1997).

With the fraudulent conveyance judgment now vacated, Nashville Lodging and Nashville Residence, not surprisingly, requested the trial court to set aside the execution sale of the Elm Hill property to Orlando Residence. They also requested the trial court to

dismiss the case because Orlando Residence lacked standing to enforce the federal court judgment. The trial court declined to dismiss Orlando Residence's fraudulent transfer suit or to set aside the judicial sale. After several additional skirmishes, Nashville Residence and Nashville Lodging again appealed to this court.

Nashville Lodging also decided to try another legal tack after the trial court denied its motion to set aside the judicial sale. It filed a new action in the Chancery Court for Davidson County claiming that Orlando Residence was being unjustly enriched as a result of its purchase of the Elm Hill property at the judicial sale. This case was assigned to the trial court where Orlando Residence's fraudulent conveyance claim was pending. Accordingly, Nashville Lodging asserted that it was entitled to return of the property and to restitution of all rents and profits received by Orlando Residence after the execution sale.<sup>2</sup> Orlando Residence swiftly moved to dismiss this lawsuit on res judicata grounds. On September 8, 1998, the trial court dismissed Nashville Lodging's complaint. Nashville Lodging Company perfected its second appeal to this court.

The dispute over the Elm Hill property took on a new dimension prior to the oral arguments in both appeals. Metric Partners defaulted on a promissory note it had signed as part of the 1989 conveyance of the property and purchase of the hotel.<sup>3</sup> The note was secured by a first mortgage on both the Elm Hill property and the hotel. Following the default, the holder of the note notified the parties that it intended to foreclose on and sell the Elm Hill property and the hotel. The foreclosure sale was conducted shortly after this court heard oral argument in the appeal involving Orlando Residence's fraudulent conveyance claim. WBL II Real Estate Limited Partnership purchased the Elm Hill property and the hotel for \$9,050,000. The trustee of the deed of trust estimated that approximately \$500,000 in excess proceeds would be distributed to the owner of the Elm Hill property after the existing indebtedness was satisfied.

The foreclosure sale ended any possibility that either Orlando Residence, Nashville Lodging, or Nashville Residence could recover possession of the Elm Hill property. Accordingly, following oral argument in its appeal from the trial court's dismissal of its unjust enrichment complaint against Orlando Residence, Nashville Lodging moved to dismiss its appeal from the dismissal of its unjust enrichment claim.

## II.

## **Nashville Lodging's Unjust Enrichment Claim**

Appellants may request an appellate court to dismiss their appeal any time after it has been perfected. *See* Tenn. R. App. P. 15(a); *Fort v. Fort*, 118 Tenn. 103, 108-09, 101 S.W. 433, 435 (1907). Accordingly, we grant Nashville Lodging's motion to dismiss its appeal from the trial court's dismissal of its unjust enrichment action against Orlando Residence based on the parties' stipulation that the trial court's judgment "does not constitute a res judicata defense to Nashville Lodging Company's restitution claim for monetary relief in the case . . . before the Davidson County Chancery Court, Case No. 92-3086-III."

### **III.**

#### **Orlando Residence's Fraudulent Conveyance Claim**

We turn now to the appeal from the trial court's refusal to set aside the judicial sale of the Elm Hill property to Orlando Residence or to dismiss Orlando Residence's fraudulent conveyance claim for lack of standing. Nashville Residence and Nashville Lodging assert that the trial court should have ordered Orlando Residence to return the Elm Hill property to Nashville Lodging after this court vacated and remanded Orlando Residence's \$1,351,934 judgment in December 1996. They also assert that Orlando Residence does not have standing to enforce the \$250,000 federal court judgment against Nashville Residence.

### **A.**

#### **Return of the Elm Hill Property**

Courts ordinarily decline to wield their judicial power in cases that do not involve a genuine and existing controversy requiring the adjudication of present rights. *See State ex rel. Lewis v. State*, 208 Tenn. 534, 537, 347 S.W.2d 47, 48 (1961). Even though a case presented justiciable claims when it was first filed, it will be subject to dismissal on appeal if intervening events prevent or disable the appellate courts from granting the type of judicial relief that courts traditionally grant. *See Ford Consumer Fin. Co. v. Clay*, 984 S.W.2d 615, 616 (Tenn. Ct. App. 1998).

A moot case or claim is one that has lost its character as a present, live controversy. *See McCanless v. Klein*, 182 Tenn. 631, 637, 188 S.W.2d 745, 747 (1945). When a case or claim becomes moot, it no longer serves as a means to provide judicial relief to the

prevailing party. *See Knott v. Stewart County*, 185 Tenn. 623, 626, 207 S.W.2d 337, 338-39 (1948); *McIntyre v. Traughber*, 884 S.W.2d 134, 137 (Tenn. Ct. App. 1994). Thus, appellate courts ordinarily dismiss appeals in cases that become moot while on appeal. *See Hale v. State*, 548 S.W.2d 878, 878 (Tenn. 1977). Determining whether a claim or a case has become moot is a question of law. *See DiGiorgio v. Lee*, 134 F.3d 971, 974 (9th Cir. 1998); *Sivak v. State*, 769 P.2d 1132, 1133 (Idaho Ct. App. 1989).

Orlando Residence owned and possessed the Elm Hill property when this appeal began, and thus Nashville Residence's and Nashville Lodging's claim to recover the Elm Hill property presented live issues for which judicial relief was available. The posture of this claim changed, however, after the foreclosure sale. As a result of the foreclosure sale, Orlando Residence no longer owned or possessed the Elm Hill property. Because the property is now in the hands of a third-party, the courts cannot order Orlando Residence to return the property to Nashville Residence or Nashville Lodging. Accordingly, Nashville Residence's and Nashville Lodging's demand for the return of the Elm Hill property is now moot.

## **B.**

### **Orlando Residence's Standing**

The issue of Orlando Residence's standing to pursue its fraudulent conveyance claim remains to be addressed. Nashville Residence and Nashville Lodging assert that another court, in a related proceeding involving the same parties, determined that Orlando Residence was not the proper party to pursue the \$250,000 federal court judgment<sup>4</sup> and that this decision should collaterally estop Orlando Residence from proceeding with its fraudulent conveyance claim against them. We have already decided this issue adversely to Nashville Residence and Nashville Lodging.

The law of the case doctrine prevents the redetermination of issues adjudicated between the parties in a prior appeal of the same case. *See Memphis Publ'g Co. v. Tennessee Petroleum Underground Storage Tank Bd.*, 975 S.W.2d 303, 306 (Tenn. 1998).

It is based on the practical recognition that issues already considered and decided ordinarily need not be decided again, and it applies to issues actually before or necessarily decided by the appellate court in an earlier appeal. *See Memphis Publ'g Co. v. Tennessee Petroleum Underground Storage Tank Bd.*, 975 S.W.2d at 306.

Nashville Residence and Nashville Lodging challenged Orlando Residence's standing in the first appeal of this case. In our first opinion, we wrote:

During oral argument counsel stated that the gravamen of appellant's jurisdiction/standing issue is that there are two entities named Orlando Residence, Ltd., (ORL), in one of which [Samuel] Hardige is the general partner owning 98%, and in the other of which he is the sole owner. In this situation, the doctrine of 'de minimis non curat lex' (the law is not concerned with trifles) applies. Whether Mr. Hardige is 98% or 100% owner of the plaintiff, as general partner or as owner, he is entitled to prosecute this suit on behalf of the plaintiff which should be more specifically identified by amendment T.R.C.P. Rule 17.01.

No merit is found in appellants' first issue.

*Orlando Residence, Ltd. v. Nashville Lodging Co.*, 1996 WL 724915, at \*2-3. This decision, whether correctly or incorrectly, adjudicated Orlando Residence's standing for the purpose of this case. The fact that a trial judge in another action involving the same parties reached a different result does not affect the operation of the law of the case doctrine in this case.

While Nashville Residence and Nashville Lodging concede that they challenged Orlando Residence's standing in their 1996 appeal, they ask us to revisit the same issue in light of the Tennessee Supreme Court's decision to concur only in the result of our earlier opinion. It is now settled that the Court's denial of permission to appeal concurring only in the result does not weaken the application of the law of the case doctrine. *See Memphis Publ'g Co. v. Tennessee Petroleum Underground Storage Tank Bd.*, 975 S.W.2d at 307. In such cases, our decisions remain the law of the case as to the disputed issue. *See Ladd v. Honda Motor Co.*, 939 S.W.2d 83, 91 (Tenn. Ct. App. 1996).

#### IV.

We dismiss appeal No. 01A01-9901-CH-00047 upon motion of Nashville Lodging Company and tax the costs of the appeal to Nashville Lodging Company and its surety for which execution, if necessary, may issue. Further, we affirm the trial court's decision in appeal No.01A01-9807-CH-00357 declining to dismiss Orlando Residence's fraudulent

conveyance claim and remand the case to the trial court for further proceedings. We tax the costs of appeal No. 01A01-9807-CH-00357, jointly and severally, to Nashville Residence Corporation, Nashville Lodging Company, and Kenneth E. Nelson, and their sureties, for which execution, if necessary may issue.

---

WILLIAM C. KOCH, JR., JUDGE

CONCUR:

---

BEN H. CANTRELL,  
PRESIDING JUDGE, M.S.

---

WILLIAM B. CAIN, JUDGE  
For Appeal No. 01A01-9807-CH-00357

---

PATRICIA J. COTTRELL, JUDGE  
For Appeal No. 01A01-9901-CH-00047