In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-19-00271-CV

SUITE 900, LLC, Appellant

V.

ARCADIO VEGA A/K/A ARCADIO VEGA, JR. AND ARCADIO VEGA A/K/A ART VEGA, Appellees

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On Appeal from the 342nd District Court
Tarrant County, Texas
Trial Court No. 342-284301-16

Before Sudderth, C.J.; Gabriel and Bassel, JJ.
Memorandum Opinion by Justice Bassel

MEMORANDUM OPINION

In two issues, Appellant Suite 900, LLC challenges the trial court's sustaining special exceptions and its signing of a final judgment against Suite 900, both of which Suite 900 contends summarily dismissed its counterclaims against Appellees Arcadio Vega a/k/a Arcadio Vega, Jr. and Arcadio Vega a/k/a Art Vega (together, the Vegas) in this quiet-title action.

The Vegas were judgment debtors in an earlier lawsuit whose purported homestead was sold at a public auction under the authority of a writ of execution that was issued in violation of the automatic bankruptcy stay. The writ of execution also had a life of only sixty days, but the writ was not fully executed and returned within sixty days of the writ's issuance. The sale proceeds in excess of the judgment against the Vegas were deposited into the county court at law's registry. When the Vegas brought this suit against those who were involved in the seizure, levy, and execution of the Vegas' property, Suite 900 intervened. Suite 900 purportedly acquired title to the property from the purchaser at the auction. The Vegas then joined Suite 900 as a defendant in this case and asserted an action to quiet their title to the property. Suite 900 then filed what was styled as an amended plea in intervention that asserted a slander-of-title counterclaim against the Vegas. The Vegas obtained summary judgment dismissing the counterclaim and quieting their title to the property.

When Suite 900 continued to assert that it had a pending counterclaim, the Vegas specially excepted to every substantive paragraph of Suite 900's amended

pleading, arguing that the summary-judgment ruling rendered those paragraphs moot. The day before the date of trial, the trial court sustained the Vegas' special exceptions after Suite 900's counsel acknowledged that the summary-judgment ruling had left Suite 900 with no remaining claims; the Vegas then nonsuited all claims not resolved by summary judgment, leaving no claims for a trial to resolve. Several days later, Suite 900 filed a second amended pleading that asserting new theories of affirmative relief and a defense based on a new allegation that the Vegas had withdrawn the surplus sale proceeds from the county court at law's registry. Nonetheless, the trial court entered a final judgment, which made the summary-judgment ruling final, and did not consider Suite 900's second amended pleading.

As a preliminary matter, the Vegas argue that Suite 900 has no standing to bring this appeal. We disagree. Suite 900 is a party to the final judgment that made the summary-judgment ruling—which dismissed Suite 900's counterclaim and removed Suite 900's claim as a cloud on the Vegas' title to the property—final. And Suite 900 is complaining of errors on appeal that injuriously affected its own rights, not just those of other parties in the proceedings below.

In its first issue, relying upon the acceptance-of-benefits doctrine, Suite 900 argues that the Vegas' withdrawal of the surplus sale proceeds from the county court at law's registry divested the trial court of subject-matter jurisdiction. We disagree. The Vegas' attacking the validity of the judgment-execution sale was not an attack on the validity of the underlying judgment against them in the prior lawsuit.

In its second issue, Suite 900 argues that the trial court erred in two ways: (1) by sustaining the Vegas' special exceptions because that ruling effected a summary dismissal of the counterclaim that Suite 900 had asserted against the Vegas in its first amended pleading; and (2) by entering a final judgment and summarily dismissing the claims Suite 900 asserted against the Vegas in its second amended pleading. We again disagree. First, the trial court had already dismissed Suite 900's counterclaim on summary judgment, and Suite 900 conceded this at the special-exceptions hearing; the special-exceptions order merely confirmed this state of affairs and did not itself dismiss any claims. Second, Suite 900 filed its second amended pleading several days after the date of trial without obtaining leave of court in violation of Texas Rule of Civil Procedure 63. The trial court thus did not err by not considering Suite 900's second amended pleading and entering a final judgment.

Accordingly, we will affirm the trial court's judgment.

I. BACKGROUND[1]

A. The Vegas' purported homestead was sold at a judgment-execution sale.

The genesis of this case is an earlier boundary-dispute lawsuit (the Boundary Lawsuit) filed in Tarrant County Court of Law No. 1 in which Cardarelli Properties, LP obtained a monetary judgment against the Vegas. An Original Writ of Execution

[1]Our background discussion is limited to facts necessary to give context to the parties' arguments. Our discussion of the issues raised on appeal will set forth additional facts necessary to our resolution of those issues.

to enforce the judgment was issued by which the Vegas' purported homestead was posted to be sold by Constable Darrell Huffman and Deputy Constable Sergeant Ken Daulton (the Constable Defendants). One of the Vegas then filed for bankruptcy. The Original Writ of Execution was not executed and expired. While the bankruptcy stay was in effect, an Alias Writ of Execution was issued. After the bankruptcy case was dismissed, the Constable Defendants executed on the Vegas' property under the authority of the Alias Writ of Execution and sold the property to DET Management, LLC (DET) at a public auction.

A portion of the sale proceeds was sent to Cardarelli Properties to satisfy the judgment, and the remaining proceeds were deposited into the Tarrant County Court at Law's registry (the County Court Registry).

B. Suite 900 purportedly acquired the property from DET, the purchaser at the judgment-execution sale.

The same day as the sale, but before the Constable Defendants conveyed the property to DET, DET apparently executed a quitclaim deed conveying the property to Robert Holly. DET then purportedly conveyed the property to Suite 900 by special warranty deed. The record is unclear about whether Holly is Suite 900's agent.

C. The Vegas sued to declare the sale void, Suite 900 intervened, and then the Vegas sued Suite 900 to quiet their title to the property.

The Vegas filed the suit underlying this appeal against the Constable Defendants and Cardarelli Properties, asserting a number of claims contending that the property was the Vegas' homestead and was thus exempt from execution and that

the sale was void because it was conducted under the purported authority of the Alias Writ of Execution, which was issued in violation of the bankruptcy stay and was not fully executed and returned within sixty days of its issuance.

Cardarelli Properties alleged in a verified denial that there was "a defect in the parties" because the Vegas sought "recovery of the property but did not join the present owner of the property or the entity that purchased the property a[t] the sale." In response, the Vegas filed a First Amended Original Petition joining Paul Cardarelli, DET, and Holly; the Vegas also added a quiet-title action.[2]

Suite 900 then filed a Plea in Intervention, claiming that it held title to the property.[3] After that, the Vegas amended their petition again, named Suite 900 a defendant, and asserted their quiet-title action against Suite 900 along with all of the other defendants. In a subsequent amendment, the Vegas added a claim against Suite 900 for alleged violations of Section 34.0445 of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code Ann. § 34.0445.

[2]We refer to Cardarelli Properties and Paul Cardarelli jointly as the "Cardarelli Defendants."

[3]Although it requested damages for the loss of the benefit of its bargain, Suite 900 did not allege any claim against any party to this suit.

D. Suite 900 asserted a counterclaim against the Vegas and a crossclaim against the Constable Defendants, and the trial court dismissed both claims in separate summary-judgment orders.

Although already made a defendant by the Vegas, Suite 900 filed an Amended Plea in Intervention and Claim for Slander of Title (First Amended Pleading). In its First Amended Pleading, Suite 900 asserted a slander-of-title counterclaim against the Vegas seeking unspecified damages and a crossclaim against the Constable Defendants seeking damages for the amount paid for the property and attorney's fees if Suite 900 lost title.

In November 2017, the Vegas obtained an interlocutory summary judgment against Suite 900 and all other defendants on their quiet-title claim; the summary-judgment order also dismissed Suite 900's slander-of-title counterclaim. In April 2018, the Constable Defendants obtained an interlocutory summary judgment that the Vegas and Suite 900 take nothing as to all remaining claims and crossclaims asserted against them.

E. The Vegas filed special exceptions to confirm that Suite 900 had no claims left when Suite 900 filed a proposed jury charge indicating that it believed otherwise.

In October 2018, the case was gearing up for a November 2018 trial setting, and Suite 900 filed a proposed jury charge that included questions seeking findings on claims that the trial court had dismissed in its summary-judgment orders.[4] To

[4]For example, Suite 900 proposed questions asking if it was a bona fide

confirm that Suite 900's claims had indeed been dismissed, the Vegas filed special exceptions to all of the substantive paragraphs in Suite 900's First Amended Pleading "for the reason that said paragraphs . . . have been dismissed and are therefore moot as a matter of law" based on the trial court's granting of the Vegas' summary-judgment motion. These exceptions were not heard immediately because the trial court continued the November 2018 trial setting and specially set the case for trial on January 7, 2019.

F. The trial court held a pretrial hearing during which it set the Vegas' special exceptions for hearing and Holly's counsel stated that the Vegas had withdrawn the surplus sale proceeds.

On January 3, 2019, the case was called to trial for January 8, 2019, and the trial court held a pretrial hearing to rule on motions in limine, to pre-admit trial exhibits, and to set deadlines to exchange exhibits. The trial court also made it clear that the case was going to trial on January 8, 2019. Counsel for all parties were present.[5] At the pretrial hearing, the trial court also set the Vegas' special exceptions for hearing on January 7, 2019, with the agreement of Suite 900's counsel.

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purchaser of the property; if it paid $91,000 for the property; if Suite 900 was entitled recover the $91,000 it paid for the property; if the Vegas had received $71,790.43 in surplus sale proceeds; how much the Vegas and the Cardarelli Defendants should each pay Suite 900 (although Suite 900 had not pleaded any claims against the Cardarelli Defendants); if Suite 900 was entitled to attorney's fees; and the amount of attorney's fees to award Suite 900.

[5]The Constable Defendants, however, did not appear presumably because there were no remaining claims pending against them.

During the pretrial hearing, Holly's counsel (who had just been retained) told the trial court and all counsel that he was just looking at the online records and saw that the Vegas had withdrawn the surplus sale proceeds from the County Court Registry. Holly's counsel argued in front of all present at the hearing that the sale proceeds' withdrawal raised an estoppel issue and deprived the trial court of subject-matter jurisdiction. The trial court stated that Holly's counsel's assertion did not give the court "anything to rule on" and told Holly's counsel that he needed "to file the appropriate paperwork and case law" to give the trial judge "something to rule on with everyone [having] an opportunity to respond." The following day, the Vegas and Holly reached an agreement to jointly nonsuit all remaining claims between them.

G. At the special-exceptions hearing, after Suite 900 conceded that it had no claims left, the trial court sustained the special exceptions out "of an overabundance of caution." The Vegas then nonsuited all claims not resolved by summary judgment, leaving no claims for trial.

At the January 7, 2019 special-exceptions hearing, the trial court noted that Suite 900's only pled claim against the Vegas was "slander of title," and it reviewed the order on the Vegas' summary-judgment motion, which stated that the purchaser at the sale (DET) acquired no title and that Suite 900's slander-of-title claim was "denied and dismissed." The trial court stated that it didn't "have anything left to rule on" after the summary-judgment order. Suite 900's counsel initially argued that Suite 900 had a pending claim against the Vegas seeking title as a good-faith purchaser of the

property and for attorney's fees.[6] But he eventually conceded that he had not read the summary-judgment order properly and that Suite 900 had no claims left.

The Vegas asked the trial court to sustain the special exceptions out of "an overabundance of caution" to "mak[e] it clear that there [was] nothing left by way of a counterclaim" so that they could nonsuit all claims not resolved by summary judgment, thereby eliminating the need for trial. The Vegas explained that they had reached agreements with the other parties to jointly nonsuit their remaining, unresolved claims.

The trial court sustained the Vegas' special exceptions and struck all substantive paragraphs in Suite 900's First Amended Pleading. The Vegas then orally nonsuited all "remaining" claims they had against Suite 900 and the other defendants, stating that they were "standing on the Court's orders regarding the voiding of title. . . . All we're doing is nonsuiting what was left." There was no trial the following day, which was the day the trial court had called the case to trial.

[6]But Suite 900's First Amended Pleading did not include any requested relief relating to retaining title to the property; the substance of Suite 900's pleading requested damages for the amount it purportedly paid for the property, not title. And its only request for attorney's fees (though on unspecified grounds) was against the Constable Defendants.

H. After the date of trial, Suite 900 filed an amended pleading seeking affirmative relief based on the Vegas' withdrawal of the sale proceeds. The trial court entered a final judgment without considering Suite 900's amended pleading.

Without seeking leave of court, Suite 900 filed a Second Amended Plea in Intervention and Counterclaim (Second Amended Pleading) four days after the special-exceptions hearing where Suite 900's counsel had conceded that Suite 900 had no remaining claims. Suite 900 continued to allege that it was an innocent third-party purchaser, but now it also alleged that the Vegas' withdrawal of the surplus sale proceeds (1) constituted an "election of remedies" that deprived the trial court of subject-matter jurisdiction and rendered moot all action taken in the case; (2) constituted an impermissible double recovery giving rise to the "affirmative defense of election of remedies"; and (3) constituted unjust enrichment. Suite 900 prayed for title to the property or damages. Shortly thereafter, Suite 900 filed a summary-judgment motion requesting the trial court to find that it lacked subject-matter jurisdiction over the case *and* to confirm Suite 900's title to the property. The Vegas subsequently moved for entry of a final judgment.

At the hearing on both motions, Suite 900 argued that it had a right to replead after the trial court sustained the Vegas' special exceptions. The trial court stated that "[t]hose special exceptions . . . were just like out of an abundance of caution, because whatever he had pled in his counterclaim was already poured out by . . . the prior [summary-judgment] order." Suite 900, now additionally represented by the attorney

who had represented Holly, asked the trial court "to look at what's fair. Keeping the money and the property is inherently unfair."[7] The trial court responded that it had called the case to trial, and it emphasized that the reason the case did not proceed to trial was because Suite 900's counsel, who had not realized that the summary-judgment order had dismissed Suite 900's counterclaim against the Vegas, conceded at the special-exceptions hearing that he had not properly read the summary-judgment order and that Suite 900 had no claims left:

> THE COURT: But here's the problem that I see . . . [. E]verybody nonsuited the claims, and we had a discussion about [how Suite 900] had no existing causes of action left and that [Suite 900's counsel] told me that [he] hadn't read [the summary-judgment] order . . . [and] didn't realize that all [of Suite 900's] claims were poured out. And so at that point, everybody here decided that there was no case left and everybody left.
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> [SUITE 900'S ADDITIONAL COUNSEL]: I understand that, Your Honor, and I know it's not ideal. I'm here trying to make sure that justice is done, and justice is not done by having a party keep a property and $75,000.

At no point did Suite 900 state that it had requested leave to file the Second Amended Pleading nor did it request leave at the hearing.

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[7]The Vegas' counsel argued that Suite 900 had been made aware of the Vegas' withdrawal of the surplus sale proceeds at a hearing back in April 2018. Suite 900's original counsel, who was also present at the hearing, stated that he did not "recall having discussed it" at the April 2018 hearing. We note that the jury charge Suite 900 proposed in October 2018 specifically included a question asking the jury to find that the Vegas "received the sum of . . . $71,790.43" in surplus sale proceeds. But any issue raised about when Suite 900 knew or should have known about the Vegas' withdrawal of the surplus sale proceeds is not necessary to the disposition of this appeal. *See* Tex. R. App. P. 47.1.

The trial court denied Suite 900's summary-judgment motion and entered a final judgment based on "the pleadings that [it had] on file and the evidence [it had] . . . and with what happened at the last hearing."

Suite 900 now appeals the trial court's sustaining the special exceptions and entry of the final judgment, claiming that both acts effected a summary dismissal of its counterclaims against the Vegas and that the trial court lacked subject-matter jurisdiction.

II. SUITE 900 HAS STANDING TO BRING THIS APPEAL.

Before we address Suite 900's issues on appeal, we must first address the Vegas' argument that Suite 900 lacks standing to bring this appeal. Because it is a party to the final judgment and is complaining of errors that it contends injuriously affected its own rights, Suite 900 has standing.

A. A party of record whose interest is prejudiced by an error has standing to appeal.

Generally, a party of record whose interest is prejudiced by an error has standing to appeal. *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 843 (Tex. 2000); *see Hanna v. Godwin*, 876 S.W.2d 454, 457 (Tex. App.—El Paso 1994, no writ). An appealing party cannot complain of errors that do not injuriously affect its rights or that merely affect the rights of others. *See Buckholts ISD v. Glaser*, 632 S.W.2d 146, 150 (Tex. 1982); *McWherter v. Agua Frio Ranch*, 224 S.W.3d 285, 290 (Tex. App.—El Paso 2005, no pet.). Whether a court has subject-matter jurisdiction is a legal question that

we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

B. Suite 900 has standing because it is a party to the final judgment and complains of errors that injuriously affected its own rights.

The Vegas suggest that Suite 900 is not a party to the final judgment. They argue that they had nonsuited all claims against Suite 900—including Suite 900 as a party to the quiet-title action—on January 7, 2019, before entry of final judgment. We disagree.

The record establishes that Suite 900 is a party to the final judgment because the final judgment made the summary judgment that the Vegas had obtained against Suite 900 final. The Vegas had named Suite 900 as a defendant in their quiet-title action,[8] alleging that Suite 900's claim to an interest in the property that it had acquired from DET clouded the Vegas' title. The Vegas further alleged that Suite 900's slander-of-title claim was invalid because the conveyance from the Constable Defendants to DET "was void . . . and never passed an interest in and to the property." The Vegas then obtained an interlocutory summary judgment against Suite 900 on their quiet-title claim and on Suite 900's slander-of-title counterclaim, and the trial court declared the sale and the deed to DET void. The resulting final

[8]The case style in the Vegas' pleadings after it joined Suite 900 as a defendant, the summary-judgment order, and the final judgment all identified Suite 900 as a named defendant.

judgment effectively removed Suite 900's claim as a cloud on the Vegas' title to the property.[9]

The Vegas did not nonsuit Suite 900 from their quiet-title action on January 7, 2019. When announcing their nonsuits at that hearing, the Vegas made it clear that they were "standing on the Court's [summary-judgment] orders regarding the voiding of title," and that they were only "nonsuiting what was left"—their "remaining causes of action." The only "remaining cause[] of action" that the Vegas had pending against Suite 900 on January 7, 2019, if any, was their claim under Chapter 34 of the Texas Rules of Civil Procedure.[10] The final judgment expressly stated that the Vegas' oral nonsuit on January 7, 2019, did not include the Vegas' claims resolved on summary judgment.

The Vegas also assert a number of other reasons why they contend Suite 900 has no standing.[11] But in making each argument, the Vegas continue to ignore the

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[9]The summary-judgment order did not specifically state that Suite 900's claim to the property was invalid. But the Vegas' motion had requested that the trial court quiet title to the property and specifically declare Suite 900's claim to title to the property invalid; the trial court granted the Vegas' summary-judgment motion in its entirety, declared the Alias Writ of Execution invalid, and dismissed Suite 900's counterclaim for "slander of title."

[10]The Vegas had also asserted a declaratory-judgment claim under Chapter 37 of the Texas Civil Practice and Remedies Code against Suite 900 (and others), but they orally nonsuited this claim against all defendants in April 2018.

[11]Specifically, the Vegas make the following arguments: (1) Suite 900 was not a party to the judgment-execution sale; (2) even if there was a defense to the

fact that in their own pleadings (1) they named Suite 900 as a defendant in the quiet-title action; (2) they acknowledged that Suite 900 claimed title to the property; (3) they acknowledged that the basis for Suite 900's claim was the validity of the judgment-execution sale, which the Vegas successfully attacked on summary judgment against Suite 900; and (4) they sought to remove Suite 900's claim as a cloud on their title to the property and did so through summary judgment and entry of a final judgment.

The record and Suite 900's brief also establish that Suite 900 is complaining on appeal of errors that injuriously affected its own rights. Suite 900 challenges whether the trial court had subject-matter jurisdiction over the case below wherein the Vegas obtained a judgment quieting the Vegas' title to the property, contrary to Suite 900's claim of title. And Suite 900 contends that the trial court erred by "summarily dismissing" its claims when it sustained the Vegas' special exceptions and when it entered a final judgment after Suite 900 had filed its Second Amended Pleading.

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judgment-execution sale, that defense did not accrue to Suite 900 because it was not a party to the sale; (3) Suite 900 did not intervene, and could not have intervened, in the action that the Vegas brought against the Constable and Cardarelli Defendants; (4) Suite 900's slander-of-title claim was not an intervention into the Vegas' claims against the Constable and Cardarelli Defendants; (5) Suite 900 has no injury traceable to the Vegas, did not introduce evidence of injury in the trial court, and its slander-of-title claim is inapplicable as a matter of law and is not the subject of the appeal; and (6) Suite 900 has no justiciable interest in any part of the case because the sale and resulting deed are void.

Nonetheless, the Vegas argue that Suite 900 was not injured, has no valid claim to title, and was not an innocent purchaser *because* the judgment-execution sale is void. This circular argument attacking Suite 900's standing is not persuasive. It ignores the fact that the Vegas, in this quiet-title action, obtained a judgment removing Suite 900's claim as a cloud on their title to the property by arguing that the sale was void[12] and that Suite 900 argues on appeal that the trial court lacked subject-matter jurisdiction to make that ruling or to enter a final judgment against Suite 900.

The Vegas also argue that Suite 900 has no standing to raise any issue relating to the validity of the sale because they did not assert any claim against Suite 900 for wrongful seizure, levy, and execution and because Suite 900's pleadings did not allege a legally cognizable claim to confer Suite 900 standing as an intervenor. But these arguments do not undermine the fact that the Vegas obtained a judgment against Suite 900 quieting the Vegas' title to the property by arguing that Suite 900 had

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[12]"A suit to quiet title relies on the invalidity of the defendant's claim to the property." *Vernon v. Perrien*, 390 S.W.3d 47, 61 (Tex. App.—El Paso 2012, pet. denied). "A cloud on title exists when an outstanding claim or encumbrance is shown, which on its face, if valid, would affect or impair the title of the owner of the property." *Essex Crane Rental Corp. v. Carter*, 371 S.W.3d 366, 388 (Tex. App.—Houston [1st Dist.] 2012, pets. denied) (op. on reh'g) (quotation marks omitted); *see also Mortg. Elec. Registration Sys., Inc. v. Groves*, No. 14-10-00090-CV, 2011 WL 1364070, at *5 (Tex. App.—Houston [14th Dist.] Apr. 12, 2011, pet. denied) (mem. op.) ("In order to maintain a suit to quiet title, there must be an assertion by the defendant of a claim to some interest adverse to plaintiff's title; and the claim must be one that, if enforced, would interfere with the plaintiff's enjoyment of the property."). "The effect of a suit to quiet title is to declare invalid or ineffective the defendant's claim to title." *Essex Crane Rental Corp.*, 371 S.W.3d at 388.

acquired no title because the sale was void. Additionally, whether Suite 900 alleged a legally cognizable plea in intervention is irrelevant because the Vegas named Suite 900 a defendant and obtained a final judgment against it, and Suite 900 complains on appeal about the trial court's entry of that judgment.

Accordingly, Suite 900 is a party to the final judgment and complains on appeal of errors that injuriously affected its own interests. *See Torrington Co.*, 46 S.W.3d at 843; *Buckholts ISD*, 632 S.W.2d at 150. Suite 900 thus has standing to bring this appeal.

III. THE TRIAL COURT DID NOT LOSE SUBJECT-MATTER JURISDICTION WHEN THE VEGAS WITHDREW THE SURPLUS SALE PROCEEDS.

In its first issue, Suite 900 argues that although the trial court initially had subject-matter jurisdiction over the Vegas' claims, the Vegas divested the trial court of that jurisdiction when they withdrew the surplus sale proceeds from the County Court Registry.[13] According to Suite 900, under the acceptance-of-benefits doctrine, the Vegas lost standing to maintain their suit seeking to declare the judgment-execution sale void (and claiming that the sale was a wrong) after they accepted the benefits of that sale (and thus ratifying the sale as a right) by withdrawing the surplus sale proceeds. Because the Vegas had no standing to maintain their claims, Suite 900

[13]The Vegas argue that Suite 900 failed to preserve error regarding its first issue concerning subject-matter jurisdiction. However, subject-matter jurisdiction is an issue that may be raised for the first time on appeal. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993).

argues, the trial court lost subject-matter jurisdiction before it entered a final judgment. We conclude that the Vegas' withdrawal of the surplus sale proceeds did not deprive the trial court of subject-matter jurisdiction.

A. Standard of review and applicable law

Standing focuses on who may bring an action and is a prerequisite to subject-matter jurisdiction. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 502 (Tex. 2010). Standing is implicit in the concept of subject-matter jurisdiction. *Tex. Ass'n of Bus.*, 852 S.W.2d at 443–45.

For a plaintiff to have standing, a controversy must exist between the parties at every stage of the legal proceedings. *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001). For common-law standing, a plaintiff must allege and show that he has suffered a distinct injury and that there is a real controversy between the parties that the judicial declaration sought will actually resolve. *Hernandez v. Truck Ins. Exch.*, 553 S.W.3d 689, 698 (Tex. App.—Fort Worth 2018, pets. denied) (citing *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001), and *Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 850 (Tex. App.—Fort Worth 2005, no pet.)). If a controversy ceases to exist—the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome—the case becomes moot. *Williams*, 52 S.W.3d at 184. As noted above, whether a court has subject-matter jurisdiction is a question of law that we review de novo. *Tex. Dep't of Parks & Wildlife*, 133 S.W.3d at 226.

Under the acceptance-of-benefits doctrine, "[l]itigants cannot enjoy the fruits of a judgment while simultaneously challenging its validity." *Kramer v. Kastleman*, 508 S.W.3d 211, 217 (Tex. 2017). This estoppel-based principle precludes a party from "first adopting [a] judgment as right, and then repudiating it as a wrong, [so as to take] advantage[] of its being both right and wrong." *Id.* (quoting *Matlow v. Cox*, 25 Tex. 578, 580–81 (Tex. 1860)). Estoppel prevents litigants from taking contrary positions as a means of gaining an unfair advantage from the inconsistency. *Id.* "Conceptually, the doctrine confers an agreement to terminate the litigation because the judgment has been voluntarily paid and accepted, or implies a waiver, release of errors, or admission that the decree is valid." *Id.* at 218. Generally, under this doctrine, "[a] litigant cannot treat a judgment as both right and wrong, and if [the litigant] has voluntarily accepted the benefits of a judgment, [the litigant] cannot afterward prosecute an appeal therefrom." *Carle v. Carle*, 234 S.W.2d 1002, 1004 (Tex. 1950).

B. The acceptance-of-benefits doctrine does not apply because the judgment-execution sale was not a judgment that the Vegas accepted the benefits of when they withdrew the surplus sale proceeds from the County Court Registry.

Suite 900's reliance upon the acceptance-of-benefits doctrine to argue that the trial court lacked subject-matter jurisdiction is misplaced. This lawsuit is not an appeal from the judgment that Cardarelli Properties obtained against the Vegas in the Boundary Lawsuit. In fact, this lawsuit involves no collateral attack on the underlying final judgment in the Boundary Lawsuit whatsoever, even though the Vegas contend

that the resulting judgment-execution sale was void. According to their pleadings and summary-judgment motion, the Vegas argued that the judgment-execution sale that generated the surplus proceeds was void for two reasons. The first was because the Alias Writ of Execution purporting to authorize the sale was issued in violation of the bankruptcy automatic stay. *See Cont'l Casing Corp. v. Samedan Oil Corp.*, 751 S.W.2d 499, 501 (Tex. 1988) (per curiam) ("An action taken in violation of the automatic stay is void, not merely voidable."). Because the Alias Writ of Execution was void, the Vegas argued, all acts executed in reliance on that void writ of execution were likewise void—namely, the sale and resulting deeds to DET, Holly, and Suite 900. The second reason was because the Alias Writ of Execution, if valid, would have had a life of only sixty days, but the Constable Defendants' execution of the void writ was not fully executed and returned within sixty days of the writ's issuance. *See* Tex. R. Civ. P. 621; *KSF, Ltd. v. Voager Ventures, Inc.*, No. 05-95-00757-CV, 1996 WL 403985, at *2 (Tex. App.—Dallas 1996, no writ) (not designated for publication) ("[A]n execution sale made after the return date stated in the writ is void and passes no title to the purchaser."). The Vegas did not challenge the validity of the underlying judgment.

Suite 900 next argues that the acceptance-of-benefits doctrine applies because the Vegas accepted the benefits of a *judgment* when they withdrew the surplus sale proceeds. In Suite 900's view, when the Vegas challenged the validity of the judgment-execution sale in this case, they were also challenging the validity of the underlying judgment in the Boundary Lawsuit. But, according to Suite 900, the Vegas

lost standing to challenge the validity of the sale when they withdrew the surplus sale proceeds. Suite 900, however, cites no authority to support its contention that challenging the validity of a judgment-execution sale is tantamount to challenging the validity of the underlying judgment.

A void judgment is a nullity that renders any writ of execution issued under that judgment also void. *See Dews v. Floyd*, 413 S.W.2d 800, 804 (Tex. App.—Tyler 1967, no writ) ("A void judgment . . . [is] an absolute nullity; and all acts performed under it are also nullities."); *see also Poynor v. Bowie ISD*, 627 S.W.2d 517, 519 (Tex. App.—Fort Worth 1982, writ dism'd) ("A void judgment is not res judicata in a subsequent suit involving the same parties and subject matter."). But the converse proposition is not necessarily true. A party may challenge a writ of execution as being void for reasons that do not implicate the validity of a final judgment, as in this case. *See Howard v. North*, 5 Tex. 290, 298 (1849) (stating that a judgment upon which an execution was issued was rendered by a court of competent jurisdiction; the "acts of *femes covert in pais* may be and frequently are void; yet this does not impair the conclusive force of judgments"); *see also Union Square Fed. Credit Union v. Clay*, Nos. 2-07-167-CV, 2-07-168-CV, 2009 WL 1099434, at *3 n.12 (Tex. App.—Fort Worth 2009, no pet.) (mem. op.) ("[W]here there exists a valid judgment, a writ of execution[,] though defective and irregular in failing to comply with some of the statutory requirements . . . is only voidable." (quoting *Hous. Oil Co. of Tex. v. Randolph*, 251 S.W. 794, 797 (Tex. Comm'n App. 1923, holding approved))); *Smith v. Adams*, 333 S.W.2d 892, 895–96 (Tex.

App.—Eastland 1960, writ ref'd n.r.e.) (same); *Jarrett v. Ross*, 132 S.W.2d 286, 289 (Tex. App.—Fort Worth 1939, writ dism'd judgm't cor.) (acknowledging that a sale on an execution under a valid judgment may be void). The Vegas' contentions that (1) the Alias Writ of Execution and, thus, the sale were void because the writ was issued in violation of the bankruptcy stay, and (2) the sale was void regardless of the writ's validity because the Constable Defendants did not fully execute and return the writ within sixty days of its issuance, were not challenges to the validity of the final judgment against the Vegas in the Boundary Lawsuit.

Accordingly, by withdrawing the surplus sale proceeds from the County Court Registry, the Vegas did not accept the benefits of a judgment that they then appealed or even challenged in this case. Thus, even if we assume without deciding that the acceptance-of-benefits doctrine implicates standing, the trial court did not lose subject-matter jurisdiction when the Vegas withdrew the surplus sale proceeds.

C. Even if we construe the acceptance-of-benefits doctrine as an affirmative defense, Suite 900 fails to identify any applicable error committed by the trial court.

At the end of its first issue, Suite 900 makes a two-sentence argument that to the extent its acceptance-of-benefits-doctrine argument implicates an affirmative defense rather than subject-matter jurisdiction, the Vegas nonetheless lost the right to challenge or rescind the sale by accepting the benefits of the judgment-execution sale

of the property.[14] Suite 900, however, does not point to any error it contends the trial court committed when ruling on the applicability of an acceptance-of-benefits-related affirmative defense, such as quasi-estoppel.

The record reflects that Suite 900 raised its acceptance-of-benefits argument in the summary-judgment motion that it filed *after* the trial court sustained the Vegas' special exceptions to Suite 900's First Amended Pleading. But Suite 900's two-sentence argument on appeal raises no issue challenging the trial court's denial of its summary-judgment motion. *See* Tex. R. App. P. 38.1(f).

Even if we construe Suite 900's brief as fairly including a challenge to the trial court's denial of Suite 900's summary-judgment motion, we conclude that the trial court did not err by denying that motion. Suite 900 had no pleadings to support the granting of its summary-judgment motion because it raised its arguments relating to the Vegas' withdrawal of the surplus sale proceeds in its pleadings for the first time after the date of trial without requesting or obtaining leave of court, as we explain below in our discussion of Suite 900's second issue. *See Gillis v. MBNA Am. Bank, N.A.*, No. 2-08-058-CV, 2009 WL 51027, at *1 (Tex. App.—Fort Worth 2009, no

[14]Quasi-estoppel is an affirmative defense that precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken. *Lindley v. McKnight*, 349 S.W.3d 113, 131 (Tex. App.—Fort Worth 2011, no pet.). The defense applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced or from which he accepted a benefit. *Id.* Thus, quasi-estoppel forbids a party from accepting the benefits of a transaction and then subsequently taking an inconsistent position to avoid corresponding obligations or effects. *Id.*

pet.) (mem. op.) ("[A] motion for summary judgment must be supported by the pleadings on file, and the final judgment of the court must conform to those pleadings. A trial court may not grant a summary judgment on an unpled cause of action." (footnote omitted) (citations omitted)); *Baker v. John Peter Smith Hosp., Inc.*, 803 S.W.2d 454, 456 (Tex. App.—Fort Worth 1991, writ denied) ("Summary judgments must be supported by the pleadings on file . . . .").[15]

In conclusion, the Vegas' withdrawal of the surplus sale proceeds did not divest the trial court of subject-matter jurisdiction over the Vegas' claims challenging the validity of the sale and not the underlying final judgment. And to the extent Suite 900's first issue implicates an affirmative defense, Suite 900 has not challenged the trial court's denying its summary-judgment motion in which Suite 900 raised its acceptance-of-benefits-doctrine argument. Even if Suite 900's brief fairly includes a challenge to the trial court's denial of Suite 900's summary-judgment motion, the trial court did not err by denying that motion. We overrule Suite 900's first issue.

[15]The Vegas argue that if Suite 900's first issue raises an argument related to an affirmative defense, then Suite 900 preserved nothing for appeal because it did not plead any affirmative defenses in the trial court. Although we agree that Suite 900 did not raise an acceptance-of-benefits-related affirmative defense in its First Amended Pleading, it is not necessary to determine whether Suite 900's Second Amended Pleading alleged a legally cognizable affirmative defense because the determination would not alter the disposition of this case on appeal. *See* Tex. R. App. P. 47.1.

IV. THE TRIAL COURT DID NOT ERR BY NOT CONSIDERING SUITE 900'S SECOND AMENDED PLEADING AND ENTERING A FINAL JUDGMENT.

In its second issue, Suite 900 contends that the trial court erred by "summarily dismissing" its Second Amended Pleading when it entered a final judgment. According to Suite 900, when the trial court sustained the Vegas' special exceptions to its First Amended Pleading, Suite 900 was entitled as a matter of right to amend its pleadings to cure the alleged defects. Instead, it argues, the trial court summarily dismissed "Suite 900's claims against the Vegas" by entering a final judgment when there was "no procedural device" to support such dismissal. Suite 900 also argues in a footnote that the trial court erred by sustaining the special exceptions in the first instance because it "effected a dismissal of Suite 900's claims." We resolve this issue against Suite 900.

A. The special-exceptions order was a confirmation that the trial court had long-ago dismissed Suite 900's affirmative claims through summary judgment.

Suite 900's contention that the trial court erred by sustaining the special exceptions because it effectively dismissed Suite 900's claims is without merit.

We review a trial court's order sustaining special exceptions for abuse of discretion. *Ford v. Performance Aircraft Servs., Inc.*, 178 S.W.3d 330, 335 (Tex. App.—Fort Worth 2005, pet. denied). The test for abuse of discretion is whether the trial court acted without reference to any guiding rules and principles or whether the act

was arbitrary and unreasonable. *Id.* A trial court has broad discretion in ruling on special exceptions. *Id.*

Here, the Vegas' special exceptions did not focus on a failure of Suite 900 to give fair notice of its claim or to plead a legal basis for the claim; the special exceptions were intended to obtain assurance that Suite 900 had no counterclaims left when Suite 900 filed a proposed jury charge indicating that it did not realize that the trial court's summary-judgment order had dismissed its counterclaim. The Vegas asked the trial court to strike all substantive paragraphs in Suite 900's First Amended Pleading because all of those allegations had been rendered moot by the trial court's summary-judgment ruling.[16] Agreeing with the Vegas, the trial court sustained the special exceptions. In doing so, the trial court, in effect, confirmed that Suite 900 had no claims for affirmative relief pending by the time of the special-exceptions hearing.[17] The trial court did not abuse its discretion by reaching this conclusion.

In its First Amended Pleading, Suite 900 asserted only a slander-of-tile counterclaim against the Vegas and a crossclaim for damages and attorney's fees against the Constable Defendants. The trial court expressly dismissed the slander-of-title counterclaim when it granted the Vegas' summary-judgment motion, and it later

[16]Suite 900 had never asked the trial court to reconsider the summary-judgment ruling.

[17]The trial judge that heard and ruled on the Vegas' summary-judgment motion is not the same trial judge that heard and ruled on the Vegas' special exceptions.

ordered that Suite 900 take nothing on its crossclaim when the trial court granted the Constable Defendants' summary-judgment motion. Thus, the record establishes that Suite 900 had no claims left for the trial court to dismiss at the special-exceptions hearing.

On appeal, Suite 900 argues that the portion of the summary-judgment order dismissing Suite 900's slander-of-title counterclaim was merely a "finding of fact" that is not permissible in a summary-judgment order. Thus, it implies, the trial court did not, in fact, dismiss Suite 900's counterclaim on summary judgment; rather, the trial court dismissed the counterclaim by sustaining the special exceptions. The record demonstrates to the contrary.

The Vegas requested dismissal of Suite 900's counterclaim in their summary-judgment motion. They argued that they were not divested of title to the property because the Alias Writ of Execution was issued in violation of the bankruptcy stay and because that writ, even if valid, was not fully executed and returned within sixty days of its issuance. Therefore, they argued, Suite 900's slander-of-title counterclaim failed. Although their motion left much to be desired with respect to clarity (like most of the pleadings, motions, and orders in this case), the substance of their request was for dismissal of the counterclaim because they conclusively established as a matter of law that Suite 900 did not have a possessory interest in the property, negating an essential element of Suite 900's slander-of-title counterclaim. *See Dorfman v. JPMorgan Chase Bank, N.A.*, No. 02-17-00387-CV, 2018

WL 5074769, at *5 (Tex. App.—Fort Worth Oct. 18, 2018, no pet.) (listing elements to slander-of-title claim). Suite 900 opposed the motion by arguing, among other things, that it was an innocent purchaser for value and that the Vegas failed to prove a right of title.

Thus, the Vegas requested dismissal of Suite 900's counterclaim, Suite 900 argued against that relief, and then the trial court granted the Vegas' motion and dismissed the counterclaim. The ruling in the trial court's summary-judgment order that Suite 900's slander-of-title counterclaim "is denied and summarily dismissed" is not a factual finding—it is an order—regardless of whether the basis of this ruling is included in the summary-judgment order.[18]

In fact, at the special-exceptions hearing, Suite 900's counsel admitted that he had not properly read the summary-judgment order previously; after reviewing the order at the hearing, Suite 900's counsel conceded that Suite 900 had no claims left:

> THE COURT: . . . . [T]his [summary-judgment order] has been signed last year, two years ago. Well, in 2017. So if the purchaser acquired no title and your counterclaim was dismissed, what am I left with?
>
> [SUITE 900 COUNSEL]: I don't know, as I stand here. . . . I don't guess I read the order that way when it was done . . . .
>
> . . . .
>
> THE COURT: . . . . I mean, did you look at the order? My concern is that I don't have anything left to rule on.

[18]On appeal, Suite 900 does not challenge the merits of the trial court's granting of summary judgment.

[SUITE 900 COUNSEL]: Yes, ma'am.

THE COURT: I don't even think there's anything I need to rule on based on the summary judgment.

[SUITE 900 COUNSEL]: I agree.

Accordingly, the trial court did not summarily dismiss any of Suite 900's claims when it sustained the special exceptions because the trial court had already dismissed those claims.[19] The special-exceptions order simply confirmed a state of affairs that had existed for more than a year after the summary-judgment order and was entered out "of an overabundance of caution" to assure the Vegas that Suite 900 had no pending counterclaims, not to effect an actual dismissal of any of Suite 900's claims.[20] The trial court did not abuse its discretion by sustaining the Vegas' special exceptions.

[19]In its reply brief, Suite 900 also argues on appeal that the Vegas waived their special exceptions by failing to request and obtain a hearing at least thirty days prior to the trial setting in violation of the Tarrant County Local Rules. But Suite 900 may not raise new grounds for seeking reversal of the trial court's ruling for the first time in its reply brief. *See* Tex. R. App. P. 38.1, .3; *In re Commitment of Gipson*, 580 S.W.3d 476, 488 n.6 (Tex. App.—Austin 2019, no pet.).

[20]In its reply brief, Suite 900 argues in a footnote that the Vegas acknowledged that Suite 900 still had pending counterclaims when they requested the trial court to dismiss those claims in their special exceptions. This argument is not persuasive. The Vegas were clear in their written special exceptions and throughout the resulting hearing that they did not believe that Suite 900 had any claims left; they asked the trial court to sustain the special exceptions so that they could have some assurance that there were no pending claims against them before nonsuiting their "remaining" causes of action against Suite 900 to eliminate the need for trial the following day.

B. Suite 900 was not entitled to amend its pleading as a matter of right after the date of trial without leave of court.

Next, Suite 900 contends that it was entitled as a matter of right to amend its pleading after the trial court had sustained the Vegas' special exceptions and that it so amended only a matter of days later. It argues that the trial court nonetheless "summarily dismissed" the claims in Suite 900's Second Amended Pleading—when "there was no procedural device" supporting such relief—by entering a final judgment. To support its argument, Suite 900 invokes case law stating that when a trial court sustains a special exception, a party may either (1) amend its pleading to cure the alleged defects or (2) stand on its pleading and test the validity of the trial court's decision on appeal. *See Friesenhahn v. Ryan*, 960 S.W.2d 656, 658 (Tex. 1998). Suite 900, however, is relying upon a body of law that is inapplicable to the facts of this case.[21]

1. Suite 900 was not entitled as matter of right to amend because the special exceptions the trial court had sustained were not based on a curable pleading defect.

Generally, when a trial court sustains special exceptions, it must give the pleader an opportunity to amend its pleading, *unless the pleading defect is of a type that*

[21]Suite 900 also argues that the trial court's dismissal of the claims in its Second Amended Pleading was erroneous because Suite 900 alleged sufficient facts to support confirmation of title to the property in Suite 900 or reimbursement of Suite 900's money. Whether Suite 900 alleged a legally cognizable claim for affirmative relief or affirmative defense, however, is not necessary to the disposition of this appeal because we conclude that Suite 900 was not entitled to amend its pleading to assert any such new claims or defenses, as we discuss below. *See* Tex. R. App. P. 47.1.

amendment cannot cure. *Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 635 (Tex. 2007). Here, Suite 900 was not entitled to an opportunity to amend because the special exceptions were not based on a curable pleading defect.

In sustaining the special exceptions, the trial court merely confirmed—as did Suite 900 at the hearing—that Suite 900 had no claims left after entry of the summary-judgment order. Although the Vegas' special exceptions included some "alternative" arguments for specially excepting to Suite 900's pleading based on a failure to allege certain facts with particularity, the substance of their complaint was that if Suite 900 was asserting a counterclaim *other* than the one dismissed on summary judgment, that the Vegas lacked fair notice of that counterclaim. As we noted above, at the special-exceptions hearing, Suite 900 acknowledged to the trial court that it had no claims left for the trial court to rule on. Thus, there was no curable defect at issue that could have been the subject of a pleading amendment. Indeed, Suite 900's Second Amended Pleading did not simply clarify or "expound upon its claims," as it argues on appeal. Rather, Suite 900's Second Amended Pleading asserted entirely new theories of recovery and defense based on the Vegas' withdrawal of the surplus sale proceeds.[22]

[22]In its reply brief, Suite 900 argues on appeal that it had alleged in its First Amended Pleading that it was entitled to recover all costs and expenses, including the amount paid for the property and attorney's fees, and that this was sufficient to put the Vegas on fair notice that Suite 900 expected either to retain title to the property or to be refunded for the purchase price. This is inaccurate. As explained above,

2. In order to amend its pleading within seven days of the date of trial or thereafter, Suite 900 was required to request and obtain leave of court. Suite 900 did neither.

Although Suite 900 characterizes the trial court's actions as summarily dismissing the claims in Suite 900's Second Amended Pleading, that characterization is inaccurate; the trial court simply did not consider those claims when it entered a final judgment.[23]

A trial court does not abuse its discretion by refusing to consider an amended pleading filed in violation of Texas Rule of Civil Procedure 63. *See Jones v. Pesak Bros. Constr., Inc.*, 416 S.W.3d 618, 632–33 (Tex. App.—Houston [1st Dist.] 2013, no pet.). Rule 63 provides that any pleadings "offered for filing within seven days of the date of trial or thereafter . . . shall be filed only after leave of the judge is obtained." Tex. R. Civ. P. 63. Here, the record shows that Suite 900 filed its Second Amended Pleading on January 11, 2019, several days after the January 8, 2019 trial date. Suite 900 was required to obtained leave of court to file its Second Amended Pleading, but it never requested such leave. The fact that the trial court did not hear the special exceptions until the day before the date of trial did not excuse Suite 900

Suite 900's First Amended Pleading did not include any requested relief relating to retaining title, and its only request for attorney's fees was against the Constable Defendants.

[23] *See Goswami v. Metro. Savs. & Loan Ass'n*, 751 S.W.2d 487, 490 (Tex. 1988) ("Texas courts have held that in the absence of a sufficient showing of surprise by the opposing party, the failure to obtain leave of court when filing a late pleading may be cured by the trial court's action in considering the amended pleading.").

from its obligation to seek leave to amend its pleading under Rule 63. *See id.*; *Fuentes v. McFadden*, 825 S.W.2d 772, 779 n.5 (Tex. App.—El Paso 1992, no writ) ("Due to the fact that the special exceptions were granted less than seven days before trial, Fuentes was required to seek leave of court before amending his pleadings."). Thus, the trial court did not abuse its discretion by refusing to consider Suite 900's Second Amended Pleading.

On appeal, Suite 900 does not argue that the trial court erroneously denied it leave to amend its pleading.[24] Rather, Suite 900 argues that Rule 63 did not apply because there was no "trial on the merits." Suite 900's argument misconstrues Rule 63.

The operative language of Rule 63 is "within seven days of *the date of trial* or thereafter." Tex. R. Civ. P. 63. "The date of trial" means the day a case is set for trial and not the day the case actually goes to trial. *Forest Lane Porsche Audi Assocs. v. G & K Servs., Inc.*, 717 S.W.2d 470, 473 (Tex. App.—Fort Worth 1986, no writ); *accord AmSav Grp., Inc. v. Am. Savs. & Loan Ass'n of Brazoria Cty.*, 796 S.W.2d 482, 490 (Tex. App.—Houston [14th Dist.] 1990, writ denied). Here, it is beyond dispute that "the date of

[24]Thus, it is not necessary for the disposition of this appeal to address the Vegas' argument that Suite 900 failed to preserve error regarding a request for leave to amend.

trial" was January 8, 2019. And, moreover, the trial court actually called this case to trial for that date.[25]

The trial did not take place because the Vegas and Suite 900 represented to the trial court on January 7, 2019, that there were no claims left for a trial to resolve. The Vegas announced that they had reached an agreement with all defendants other than Suite 900 to jointly nonsuit all claims not resolved on summary judgment; Suite 900 agreed that the summary-judgment order disposed of its counterclaim; the trial court assured the Vegas that Suite 900 had no remaining claims against the Vegas by sustaining the special exceptions; and then the Vegas orally nonsuited in open court all claims not resolved on summary judgment, including those against Suite 900.[26]

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[25]Suite 900 disputes the trial court ever called this case to trial. We disagree. In November 2018, the trial court specifically set this case for trial on January 7, 2019. The trial court held a pretrial hearing on January 3, 2019, wherein the trial court ruled on motions in limine, admitted trial exhibits, set deadlines for the exchange of exhibits, set the size of the venire panel, and set the length of voir dire and opening and closing statements. The trial court made it clear that the case was called to trial on January 8, 2019. Also, although we may not use a docket sheet to contradict a trial court order and although docket entries are not trial court orders or findings themselves, we may review docket entries to determine what transpired in the trial court. *See Haut v. Green Café Mgmt., Inc.*, 376 S.W.3d 171, 178–79 (Tex. App.—Houston [14th Dist.] 2012, no pet.). And here, on the same date as the pretrial hearing, the trial court's docket sheet specifically stated, "Case called for 1-8-19 @ 8:30 am."

[26]The Vegas followed up its oral notices of nonsuit with written joint notices of nonsuit for each defendant, except for Suite 900, and the trial court entered orders granting each nonsuit.

Thus, Rule 63 applies and "the date of trial" in this case was January 8, 2019. Suite 900's filing of its Second Amended Pleading on January 11, 2019, without obtaining leave of court, violated Rule 63. *See* Tex. R. Civ. P. 63.

On a final note, we understand Suite 900's concerns that the Vegas are keeping both title to the property and the surplus sale proceeds. And we note that, curiously, the Vegas did not move to withdraw the surplus sale proceeds from the County Court Registry until *after* they had prevailed on their summary-judgment motion quieting title to the property—and roughly two years after the sale. But that said, the question before us is whether the trial court erred. The trial court operated on the basis of Suite 900's representation at the January 7, 2019 hearing that there was nothing left for the trial court to rule on because of the summary-judgment ruling. The trial court took action based on the belief that all issues were resolved. But then after the date of trial had passed, and without seeking any grace from the trial court to relieve it of the

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On appeal, Suite 900 argues in its reply brief that the transcript for the January 7, 2019 hearing does not reflect that the Vegas orally nonsuited their claims against the Cardarelli Defendants. But the order granting the joint notice of nonsuit of claims as between the Vegas and Cardarelli Defendants stated that the joint notice of nonsuit was "given in open Court on January 7, 2019." And the transcript from the January 7, 2019 hearing reflects that the Vegas informed the trial court that the Cardarelli Defendants—whose counsel was present for the hearing—had, in fact, also agreed to a joint nonsuit. And then at the end of the hearing, the Vegas confirmed that there was no need for trial the following day, even though it had omitted the Cardarelli Defendants among those parties it listed when it orally nonsuited its claims. The record does not reflect counsel for the Cardarelli Defendants doing anything at the hearing to contradict the Vegas' representation to the trial court that they had agreed to a joint nonsuit and that there was no need for a trial.

effects of Suite 900's statements, Suite 900 filed an amended pleading seeking affirmative relief from the Vegas, who had just nonsuited their remaining claims against Suite 900. Were we to hold the Texas Rules of Civil Procedure did not apply every time a party viewed their application as unjust, the injustice of chaos in the ability of parties to resolve their cases and in the ability of judges to control their dockets would ensue.

On this record, the trial court did not err by not considering Suite 900's Second Amended Pleading filed in violation of Rule 63 and entering a final judgment. We overrule Suite 900's second issue.

V. CONCLUSION

Having overruled Suite 900's two issues, we affirm the trial court's judgment.

/s/ Dabney Bassel

Dabney Bassel
Justice

Delivered: May 21, 2020