**Motion Granted, Appeal Dismissed, and Memorandum Opinion filed March 23, 2017.**


**In The**

# Fourteenth Court of Appeals

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**NO. 14-15-01079-CV**

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**ROBERT MANDALA, Appellant**

**V.**

**PNC BANK N.A. AND WELLS FARGO BANK, N.A., Appellees**

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**On Appeal from the 434th Judicial District Court**
**Fort Bend County, Texas**
**Trial Court Cause No. 12-DCV-197023**

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## M E M O R A N D U M  O P I N I O N

This case concerns appellant Robert Mandala's alleged default on a commercial real estate loan. On December 21, 2015, appellant appealed the judgment obligating him to pay to appellees PNC Bank N.A. and Wells Fargo Bank, N.A. the amount in default and attorney's fees. Briefing is complete.

On December 6, 2016, appellees filed a motion to dismiss the appeal. The motion asserts the appeal is moot because appellant has paid the total amount due

and did not express an intent to continue the appeal. At the court's request, appellant filed a response to the motion. He contends the appeal is not moot because his payment was involuntary and made under duress.

## BACKGROUND

On October 20, 2016, appellant's lawyer Paul McConnell emailed Christopher Chauvin, counsel for appellees, about appellant paying off the loan. McConnell's email stated, "We are in the process of closing a potential loan next week and need a payoff good through November 1 so we can see if the deal will work. Please get this to me ASAP." Chauvin sent McConnell the requested information on October 24, 2016.

On November 2, 2016, Thomas Osborne of Old Republic Title, the title company involved in the "potential loan" McConnell referenced, emailed Chauvin. Osborne wrote, "In addition to a release of lien, my underwriter is requiring confirmation that the lawsuit/appeal will be dismissed, or if not fully disposed, adequate assurance that all claims involving the subject property will be severed from the suit." Chauvin responded, "The lawsuit and appeal will be dismissed upon confirmation of receipt of funds by our side." Full payment was wired to appellees' loan servicer on November 8, 2016.

Within the next few days, agreed pleadings to dismiss the appeal were sent to appellant's counsel. The motion to dismiss does not identify that lawyer. It appears from appellant's response, however, that the pleadings were sent directly or made their way to David Sadegh, appellant's trial counsel. Appellant's response suggests Sadegh was unaware of the communications between McConnell, Chauvin, and Osborne concerning dismissal of the appeal. The motion states that "[appellant's] counsel responded that [appellant] refused to dismiss any portion of this appeal." Presumably "counsel" in that statement refers to Sadegh, not

McConnell.

On November 17, 2016, appellant personally filed an application in the district court to have his cash bond of more than $430,000 released to him. The pre-printed form states "No Motion for New Trial or Notice of Appeal has been filed and all matters have been concluded in the above case." A file-stamped copy of the application is attached to the motion to dismiss. Appellant acknowledges the application in his response but says Sadegh "replaced [appellant's] form application with a Motion for Disbursement which did not contain any erroneous language about all matters being concluded in the case." A document entitled "Motion for Disbursement of Cash Bonds" is attached to appellant's response. It does not bear a file-stamp or other indication that it was filed. The certificate of service says it was served to Chauvin by email on December 6, 2016. The motion for disbursement does not mention this appeal.

## ANALYSIS

"The Texas rule is not, and never has been, simply that any payment toward satisfying a judgment, including a voluntary one, moots the controversy and waives the right to appeal that judgment." *Miga v. Jensen*, 96 S.W.3d 207, 211 (Tex. 2002) ("*Miga I*"). A controversy is not mooted by a payment made under economic duress, such as the duress implied by the threat of statutory penalties and accruing interest. *See id.*; *Highland Church of Christ v. Powell*, 640 S.W.2d 235, 236 (Tex. 1982). But, a controversy is mooted if a judgment debtor (1) satisfies a judgment, and (2) does not "clearly express[] an intent . . . to exercise his right of appeal." *Id.* at 211, 212; *see BMG Direct Mktg., Inc. v. Peake*, 178 S.W.3d 763, 770 (Tex. 2005) ("[T]he payment of a judgment without an 'expressed intent' to continue an appeal moots the appeal, but payment with such an expression does not."). Under those circumstances, the debtor waives his right to appeal and the

appeal must be dismissed. *Id.*

In *Miga I*, the debtor, Jensen, made a payment pursuant to an agreed order, which stated the purpose of the payment was to terminate the accrual of post-judgment interest. *Id.* at 212. The evidence in *Miga I* established that "Jensen informed Miga that he believed the Agreed Order would not moot his complaint, and that he would continue to pursue appellant review." *Id.* The supreme court held that because Jensen's payment was coupled with an expressed intent to pursue his appeal, he did not waive his right to continue to contest the judgment. *Id.* Therefore, the appeal was not moot.[1] *Id.*

In this case, there is no evidence that appellant "clearly express[ed] an intent" to continue the appeal despite his payment of the judgment, and appellant does not contend otherwise. Instead, appellant's response focuses on his silence regarding the appeal:

> No mention was made of Mandala wanting to resolve the lawsuit or appeal—the payoff was needed to close a new loan for Mandala's property so that Defendants would no longer be associated with the property. . . . The purpose of the payoff was to facilitate the refinance and sale of the property, not to resolve the lawsuit.

[1] After concluding the *Miga I* appeal was not moot, the supreme court held Miga was entitled to only a fraction of the $23 million he was awarded in the trial court. *Miga I*, 96 S.W.3d at 217. Jensen then sought restitution of the difference between the amount he paid Miga and the amount Miga was entitled to under the modified judgment. When Miga refused to tender that amount, Jensen sued Miga for restitution. The Texas Supreme Court considered the restitution dispute in *Miga v. Jensen*, 299 S.W.3d 98 (Tex. 2009) ("*Miga II*"). Miga asserted the voluntary-payment rule as a defense to Jensen's claim for restitution. In considering that defense, the *Miga II* court wrote that "Jensen never led Miga to believe that the matter [*Miga I*] was closed." *Id.* at 103. Whether Jensen misled Miga to believe the matter was closed is a separate question from whether Jensen clearly expressed the intent to appeal, which was the question in *Miga I*. The supreme court's discussion of whether Jensen misled Miga suggests the voluntary-payment rule as a defense to a claim for restitution (*Miga II*) may have additional elements (i.e. proof that the judgment creditor was led to believe the matter was closed) that are not required when the question is whether the payment moots an appeal (*Miga I*).

Appellant's silence is insufficient maintain the appeal, because *Miga I* (as interpreted in *BMG Direct Marketing*) requires appellant to couple his payment with "an expressed intent to pursue his appeal." *Miga I*, 96 S.W.3d at 212; *see also BMG Direct Mktg.*, 178 S.W.3d at 770.

Because appellant paid the judgment and did not clearly express an intent to continue the appeal, his appeal is moot. Accordingly, appellees' motion to dismiss is **GRANTED** and the appeal is **DISMISSED**.

PER CURIAM

Panel consists of Justices Boyce, Busby, and Wise.