In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00094-CV

HELENA VAN ORDEN AND JASON M. BONE, Appellants

V.

DON VAN ORDEN, Appellee

On Appeal from the 284th District Court
Montgomery County, Texas
Trial Cause No. 09-09-09181 CV

MEMORANDUM OPINION

Helena Van Orden and Jason M. Bone appeal the trial court's judgment awarding damages to Helena for appellee Don Van Orden's breach of a mediated settlement agreement. During Helena and Don's divorce proceedings, they agreed as part of a mediated settlement that, among other things, Don "shall execute a $1,000,000 mortgage note to Helena Van Orden, secured by [the couple's residence which would be awarded to Don as his separate property,] payable to Helena Van Orden with 5% interest with amortized payments over 180 months." The settlement agreement stated that "[t]he

provisions of this Agreement shall be effective immediately as a contract, shall supersede any temporary orders or other agreements of the parties with respect to the subject matter hereof, . . . and its provisions are intended to be incorporated into an Agreed Decree of Divorce." At the mediation, Don received an amortization schedule entitled, "Amortization Schedule, $1,000,000 5% Mortgage Note, From Don Van Orden" and the schedule listed 180 monthly payments of $7,877.29 starting April 1, 2004 and ending March 1, 2019.

Don delivered three checks in the amount of $7,877.29 each to Helena on April 1, 2004, April 30, 2004, and May 28, 2004. On the memo line of the first check something was written that Helena admits scratching out with a pen. The second and third checks had "#2" and "#3 of 180" written on the memo lines, respectively. Helena accepted the checks.

On June 7, 2004, Don signed a promissory note in the amount of $1,000,000, at an interest rate of 5% per annum, payable to Helena in 180 monthly payments. The monthly payment amount stated in the note was $7,907.94, with the first payment due on July 7, 2004. The promissory note was secured by a deed of trust conveying the residence to Jason M. Bone, as Trustee.

For almost five years, with one exception, Don made monthly payments of $7,877.29, an amount $30.65 less than the monthly payment specified in the promissory note. He decreased the April 2009 payment (the one exception) by $1,500.00 based on

his belief that Helena misappropriated his daughter's airline miles. The same day, he wrote his daughter a check for $1,500.00 as "reimbursement of $125,000 miles." Helena accepted the checks, but at times informed him that he was paying an incorrect amount. Don responded that he was paying the amount referenced in the amortization schedule provided by an accountant at the mediation.

Don received a demand letter dated June 26, 2009, from Helena's counsel stating that Don was required to cure his default on the note by August 3, 2009. The letter demanded payment of the $1,500.00 shortfall in the April payment, $12,139.84 for his underpayment of principal and interest since the inception of the note, and $950 in attorney's fees and costs. The alleged $12,139.84 under-payment did not take into account the three checks accepted by Helena after the settlement agreement. According to Helena, these checks were not payments on the one million dollar obligation, but were instead checks for spousal support pending the final divorce decree.

After Helena sent the demand letter, she refused Don's next two checks. Don received notice from Helena's counsel dated August 7, 2009, that the note had been accelerated. The notice included a demand for payment of the unpaid principal balance. Don subsequently sent Helena a check for $61.30 for the shortfall of the last two payments. Helena also refused the $61.30 check.

In September 2009, Don received notice that his residence, which secured the promissory note, would be sold to satisfy the debt if Don did not immediately pay the full

unpaid principal balance together with all accrued and unpaid interest. Don filed an application for a temporary restraining order. He requested the trial court restrain Helena and the trustee, Jason Bone, from selling or attempting to sell the residence. From September through December 2009, Don made monthly payments of $7,907.94 for those months to Helena, who refused the payments. In December 2009, Helena and the trustee filed their amended answer and response to Don's application for a temporary restraining order. They asked the court to dismiss Don's suit or render a take-nothing judgment. They also filed a counterclaim for the unpaid balance on the note, with interest, attorney fees, and costs.

The trial court found that the mediated settlement agreement obligated Don to pay Helena one million dollars in monthly payments over 180 months, with interest at 5% per annum. The trial court determined that the payments on April 1, April 30, and May 28, 2004, were payments on the obligation. The court determined that these payments were not continuing spousal support pending the final divorce decree. The settlement agreement superseded any temporary orders, and there were no continuing spousal support obligations provided for in the settlement agreement. The trial court concluded that although the amortization schedule Don relied on was incorrect, Don believed he was making the correct monthly payments.

The court determined that Don improperly failed to pay an additional $30.65 per month for almost five years and improperly deducted $1,500.00 from his April 2009

payment. The trial court concluded that because the June 26, 2009 demand letter did not take into account the April 1, April 30, and May 28, 2004 payments, the notice of acceleration of maturity of the note was not justified and was ineffective. The total of the three checks exceeded the sum required to cure Don's default.

The trial court nevertheless found that Don's failure to make payments in accordance with the terms of the promissory note breached the note's terms. The court awarded Helena $13,639.84 for the total shortfall, plus five percent per annum interest, on the monthly payments on the note. Helena was awarded $8,900 in attorney fees and $3,383 in witness fees and costs. Don was given a credit against the total award in the amount of $23,631.87. The judgment against Don in favor of Helena was in the amount of $2,290.07. The trial court required that the checks that were timely tendered by Don through the date of trial were to be paid to her, and that Don must make future monthly payments in the amount of $7,907.94 in accordance with the terms of the promissory note.

In issue one, Helena argues the trial court violated the statute of frauds when it did not enforce the terms of the promissory note and instead considered Don's amortization schedule, the mediated settlement agreement, and the agreed final divorce decree. In her second issue, she contends the trial court erred when it found a prepayment credit existed on the note at the time it was executed. She maintains in issue three that the trial court violated the parol-evidence rule by admitting and using oral testimony to contradict and

vary the amount of indebtedness on the note. In issue four, she argues the trial court erred when it concluded the parties had stipulated the amortization schedule was incorrect. We address the issues together.

"The purpose of the statute of frauds is to prevent fraud and perjury in certain types of transactions by requiring certain agreements to be in writing and signed by the parties[.]" *Bank of Tex., N.A. v. Gaubert*, 286 S.W.3d 546, 552-53 (Tex. App.—Dallas 2009, pet. dism'd w.o.j.) (citing *Haase v. Glazner*, 62 S.W.3d 795, 799 (Tex. 2001)). *See, e.g.*, Tex. Bus & Com. Code Ann. § 26.02(b) (West 2009) (loan agreements). The statute of frauds is an affirmative defense that must be pleaded affirmatively by the party who relies on the defense. *See* Tex. R. Civ. P. 94; *Nicol v. Gonzales*, 127 S.W.3d 390, 393 (Tex. App.—Dallas 2004, no pet.). Appellants did not plead the defense or object to evidence regarding the agreements on that basis. *See First Nat'l Bank in Dallas v. Zimmerman*, 442 S.W.2d 674, 676-77 (Tex. 1969) (holding that to avoid waiving its right to assert the statute of frauds as a defense, a party must plead the defense even when party objected to the admission of the contract on the basis that its enforcement would violate the statue of frauds).

"[P]arol evidence can be used to demonstrate a prior or contemporaneous agreement that is both collateral to and consistent with a binding agreement, and that does not vary or contradict the agreement's express or implied terms or obligations." *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 451 (Tex. 2008). The documents

considered referred to the note to be executed and the same terms of the note, although the mediated settlement agreement and the agreed final divorce decree did not state the resulting monthly payment amount computed from the terms of the note.

Helena's counsel questioned Helena about the three checks from Don dated after the settlement agreement and prior to the execution of the note. Helena testified that the three checks were coincidentally the same amounts as the monthly payments Don made after the note's execution, and that these three checks were for spousal support and not note payments pursuant to the settlement agreement. Don testified that the three payments were his first three payments on the note and not spousal support, and that he believed he was to begin making payments on the note the month following the settlement agreement. Other than Helena's testimony, there was no other evidence that monthly spousal support was $7,877.29 for those months.

Don made the three payments of $7,877.29 pursuant to the settlement agreement, which did not include a provision regarding the treatment of prepayments. The promissory note, which provides that prepayments are to be applied to principal, did not exist at the time Don made the payments. Nevertheless, the parties' intent was clear. The trial court did not err in considering the three checks as payments toward the agreed debt. The trial court did not err in considering evidence that did not vary or contradict the note's express or implied terms or obligations. *See Haden*, 266 S.W.3d at 451.

Appellants apparently take issue with the trial court's finding that the parties had stipulated that the amortization schedule relied on by Don was incorrect. The trial court construed the promissory note to reflect the intent of the parties. *See Seagull Energy E & P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 345 (Tex. 2006). On this record, the trial court did not err in concluding that Don's slight deficiency in payment over the years in which Helena accepted the payments defeated the parties' intent as expressed in the promissory note. The trial court computed the cumulative deficiency on the note up to the date of trial, considered the $23,631.87 as payments on the note that were accepted by Helena prior to the note's execution, and credited that amount toward the deficiency. Because the credit more than offset the deficiency, the trial court determined there could then be no acceleration of the note and foreclosure.

We find no error in the trial court's rulings requiring reversal of the judgment. We overrule appellants' issues and affirm the trial court's judgment.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on May 3, 2011
Opinion Delivered August 31, 2011

Before McKeithen, C.J., Gaultney and Horton, JJ.