Affirm in part; Reverse and Render in part; Opinion Filed July 19, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00578-CV

MUTUAL FIRST, LLC, SERIES 77, AS SUCCESSOR-INTEREST-TO NATIONAL CITY MORTGAGE, Appellant
V.
KEVIN BUTLER, Appellee

On Appeal from the 101st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-14-09219

MEMORANDUM OPINION

Before Justices Bridges, Evans, and O'Neill[1]
Opinion by Justice Evans

Appellant Mutual First, LLC, Series 77, as successor-in-interest to National City Mortgage (Mutual First) asserts that the trial court committed reversible error by granting appellee Kevin Butler's motion for summary judgment and awarding court costs and interest to Butler. We reverse the trial court's judgment in favor of Butler for court costs and interest and render judgment that Butler is not entitled to such costs and interest. We otherwise affirm the trial court's judgment.

[1] The Hon. Michael J. O'Neill, Justice, Assigned

BACKGROUND

In 2007, Butler purchased a home located at 6010 Amberwood Court, Arlington, Texas 76016. Butler financed his purchase with two loans from National City Mortgage—one promissory note in the amount of $420,000 and a second promissory note in the amount of $105,000. The two promissory notes were secured by two deeds of trust which were simultaneously executed. In late 2007 or early 2008, Butler stopped making mortgage payments. On December 2, 2008, National City Mortgage conducted a non-judicial foreclosure on the property.

After a series of assignments, the $105,000 note was ultimately assigned to Mutual First. On June 25, 2014, Mutual First gave Butler notice of intent to accelerate followed on August 11, 2014, by Mutual First's notice of acceleration and default on note notifying Butler that all amounts remaining due on the note were due in full.

On August 22, 2014, Mutual First filed a lawsuit against Butler alleging breach of contract. Butler filed a summary judgment motion asserting Mutual First's breach of contract claim was barred by the statute of limitations. The trial court granted Butler's summary judgment motion. Mutual First then filed this appeal.

ANALYSIS

A. Objections to Butler's Summary Judgment Evidence

Mutual First challenges the trial court's evidentiary rulings regarding the summary judgment evidence.

1) Standard of review

We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *See Service Corp. Int'l. v. Guerra*, 348 S.W.3d 221, 235 (Tex. 2011). A trial court abuses its discretion when it rules without regard for any guiding rules or principles. *See Owens-*

Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 43 (Tex. 1998). An appellate court must uphold the trial court's evidentiary ruling if there is any legitimate basis for the ruling. *Id.* We will not reverse a trial court for an erroneous evidentiary ruling unless the error probably caused the rendition of an improper judgment. *DeSoto Wildwood Dev., Inc. v. City of Lewisville*, 184 S.W.3d 814, 828 (Tex. App.—Fort Worth 2006, no pet.).

2) Analysis

Butler attached a deed of trust for the $420,000 loan as exhibit 2 to his motion for summary judgment. During the hearing, Mutual First noted that this exhibit was marked "unofficial copy" and objected orally several times to the exhibit on the basis of hearsay, lack of foundation, and lack of authentication. The trial court deferred its ruling on these objections and Mutual First never obtained a ruling. The trial court never ruled on the objections in writing. Mutual First contends that the trial court must have either "implicitly overruled" the objections or "refused to rule" on the objection. Mutual First argues that the trial court committed error by not sustaining its objections. We agree in part.

First, to the extent Mutual First is arguing that the trial court must have implicitly overruled the objections because it granted Butler's motion for summary judgment, such argument has been rejected by other courts. *See Well Solutions, Inc. v. Stafford,* 32 S.W.3d 313, 317 (Tex. App.—San Antonio 2000, no pet.) ("In short, a trial court's ruling on an objection to summary judgment evidence is not implicit in its ruling on the motion for summary judgment; a ruling on the objection is simply not 'capable of being understood' from the ruling on the motion for summary judgment."); *Allen ex rel. B.A. v. Albin*, 97 S.W.3d 655, 663 (Tex. App.—Waco 2002, no pet.) ("We agree with the San Antonio court that the granting of a summary-judgment motion does not necessarily provide an implicit ruling that either sustains or overrules objections to the summary-judgment evidence."). Second, to the extent that Mutual First is arguing that the

trial court refused to rule on the hearsay and lack of foundation objections, the issue has not been preserved for appeal. In order to preserve error for appeal, a complaining party must not only object, but must obtain an adverse ruling on the record or object to the trial court's refusal to rule on the objection. *See* TEX. R. APP. P. 33.1(a)(2). As Mutual First did not object to the trial court's failure to rule on the hearsay and lack of foundation objections, it has not preserved these objections for appeal.

Butler's lack of authentication objection, however, may be raised for the first time on appeal. *See Blanche v. First Nationwide Mortg. Corp.*, 74 S.W.3d 444, 451 (Tex. App.—Dallas 2002, no pet.) ("A complete absence of authentication is a defect of substance that is not waived by a party failing to object and may be urged for the first time on appeal."). Here, in addition to Mutual First's argument that exhibit 2 was marked "unofficial," Mutual First also notes that Butler's affidavit failed to authenticate this exhibit. In fact, none of the documents attached to Butler's motion for summary judgment were properly authenticated as Butler failed to identify or reference the documents in his affidavit. *Id.* Mutual First raises this argument on appeal by noting that "Butler's documents are not self-authenticating" and "Butler failed to otherwise authenticate the documents." We conclude that the trial court erred in failing to sustain Mutual First's lack of authentication objection.

B. Motion for Summary Judgment

Having resolved Mutual First's procedural issues, we turn to the merits of Butler's motion. Mutual First argues the trial court erred in granting the summary judgment motion because: (1) the evidence raised a genuine issue of material fact; (2) Butler did not prove his affirmative defense of statute of limitations; and (3) Butler did not present clear and unequivocal evidence that the $105,000 note was accelerated.

1) Standard of review

We review the trial court's traditional summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2003). The party moving for summary judgment bears the burden of proof. *Neely v. Wilson*, 418 S.W.3d 52, 59 (Tex. 2013). Under Texas Rule of Civil Procedure 166a(c), the moving party must show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *W. Inv., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005). Further, in reviewing a summary judgment, we consider the evidence in the light most favorable to the non-movant and resolve any doubt in the non-movant's favor. *Id.*

2) Material issue of fact regarding statute of limitations

Mutual First argues that Butler failed to prove his affirmative defense of statute of limitations. Mutual First's premise is there is conflicting testimony on whether the holder of the $105,000 promissory note accelerated the second loan, so a material fact issue exists which must be tried by the jury. We disagree.

Butler asserted the affirmative defense of statute of limitations in his motion for summary judgment. Under Texas law, a person must bring a suit for a debt not later than four years after the day the cause of action accrues. *See* TEX. CIV. PRAC. & REM. CODE ANN. §16.004(a)(3) (2002). If a note or deed of trust secured by real property contains an optional acceleration clause, default does not start the limitations running on the note. *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001). Rather, the action accrues only when the holder actually exercises its option to accelerate. *Id.* Effective acceleration requires two acts: (1) notice of intent to accelerate, and (2) notice of acceleration. *Id.* In this case, Butler testifies that he received notices for both loans on the property and that the bank conducted a non-judicial foreclosure on the property on December 2, 2008. Butler argued in his summary judgment

motion that because Mutual First did not file this lawsuit until August 22, 2014, it is barred by the statute of limitations.

In Butler's affidavit in support of his summary judgment motion, Butler testified as follows:

> Towards the end of 2007, or the first of 2008, I began experiencing financial difficulties. The entire economy was crashing, and I was having problems generating business and income to support. At that time I stopped making my monthly mortgage payments. I then received a notice of intent to accelerate and acceleration notices for both loans on the Property.

In response, Mutual First submitted the affidavit of Benjamin Garter, the manager of Mutual First, who testified that:

> Plaintiff acquires only original unsecured second mortgages that have not been accelerated by the predecessors-in-interest, including the Note. Upon acquiring the Note, Plaintiff received the file for the Note, which includes the *originals* of the following: Note, recorded Purchase Money Deed of Trust, Mortgagee Policy of Title Insurance, Assignment of Mortgage and Promissory Note, and Allonge to Promissory Note. Nothing in the Note's file indicates acceleration of the Note by a predecessor-in-interest. True and correct copies of these documents are included in the Business Records attached hereto and incorporated herein for all purposes by reference as Exhibit "1". Plaintiff would not have acquired the Note if it had been accelerated.

Based on this testimony, there is no issue of fact to be decided by the trier of fact. Butler specifically testified that he received notices of intent to accelerate and acceleration notices for both notes. Mutual First made no objection, either at trial or on appeal, that Butler's statement was conclusory. Further, nothing in Garter's testimony disproves Butler's statement that he received the notices. Although Garter testifies that Mutual First only purchases "unsecured second mortgages that have not been accelerated" and Mutual First "would not have acquired the Note if it had been accelerated," this testimony fails to state that this loan was not accelerated. In addition, Garter's testimony that there was no correspondence in the loan file evidencing acceleration does not create a genuine issue of material fact because Garter did not testify that

the entirety of the loan file was preserved intact and transferred to Mutual First. Accordingly, there is no evidence to rebut Butler's testimony that both notes were accelerated.

3) Clear and unequivocal notice

Mutual First also argues that Butler failed to produce evidence of "clear and unequivocal" notice of intent to accelerate and notice of acceleration of the second note. We disagree.

Mutual First appears to assert that Butler cannot prove that the second note was accelerated since he cannot produce the actual written notices. Mutual First, however, fails to provide any authority for this conclusion. Further, the "clear and unequivocal" cases cited by Mutual First reference this language in the context of "how definite or specific a waiver of presentment and notice must be to be effective." *See Shumway v. Horizon Credit Corp*., 801 S.W.2d 890, 893 (Tex. 1991); *Ogden v. Gibraltar Sav. Ass'n*, 640 S.W.2d 232, 234 (Tex. 1982). Here, however, the record lacks any assertion by Mutual First that the notices were not sufficiently definite or specific.

For all the reasons described above, we affirm the trial court's grant of summary judgment.

C. Court Costs and Interest

In its last issue, Mutual First argues that the trial court erred in its final judgment by ordering Butler to recover court costs in the amount of $327.00 and interest. We agree.

Texas Rule of Civil Procedure 131 provides that the "successful party to a suit shall recover of his adversary all costs incurred therein, except where otherwise provided." Here, however, there is no evidence that Butler incurred courts costs in the amount of $327.00. The record indicates that Mutual First paid the filing fee and citation costs in this action. We review a trial court's decision regarding whether to award court costs for an abuse of discretion. *Henry*

v. Masson, 453 S.W.3d 43, 51 (Tex. App.— Houston [1st Dist.] 2014, no pet.). Accordingly, we conclude that the trial court abused its discretion in ordering Butler to recover court costs and interest and resolve this issue in favor of Mutual First.

CONCLUSION

We reverse that portion of the trial court's judgment awarding court costs and interest to Butler and render judgment that Butler is not entitled to such court costs and interest. We otherwise affirm the trial court's judgment.

/David Evans/
DAVID EVANS
JUSTICE

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JUDGMENT

MUTUAL FIRST, LLC, SERIES 77, AS SUCCESSOR-INTEREST-TO NATIONAL CITY MORTGAGE, Appellant

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Opinion delivered by Justice Evans.
Justices Bridges and O'Neill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** that portion of the trial court's judgment awarding Kevin Butler court costs and interest and **RENDER** judgment that Kevin Butler not be awarded such costs and interest. In all other respects, the trial court's judgment is **AFFIRMED**.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 19th day of July, 2016.