Affirmed and Opinion Filed April 11, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00053-CV

LUIS A. SANTIAGO, Appellant
V.
THE BANK OF NEW YORK MELLON, AS SUCCESSOR TRUSTEE TO JPMORGAN CHASE BANK, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2004-2. NOVASTAR HOME EQUITY LOAN ASSET-BACKED CERTIFICATES, SERIES 2004-2, AND OCWEN LOAN SERVICING, LLC, Appellees

On Appeal from the 296th Judicial District Court
Collin County, Texas
Trial Court Cause No. 296-01232-2015

MEMORANDUM OPINION

Before Justices Lang, Brown, and Whitehill
Opinion by Justice Whitehill

This appeal is appellant's fourth trip here regarding this dispute. In this instance, he challenges (i) a summary judgment dismissing his current suit aimed at preventing a foreclosure on his home and awarding appellee its attorney's fees and (ii) an order releasing to the lender funds held in the court's registry pending the borrower's first appeal.[1] As discussed more fully below, we affirm the trial court's judgment because (i) even if the trial court erred in granting the summary judgment or releasing the registry funds, appellant has not shown any resulting harm,

[1] Appellant's wife also signed the note, but she is not a party to this appeal.

(ii) appellant's arguments attacking an order from a prior suit are an impermissible collateral attack on that order, and (iii) the trial did not actually award appellee any attorney's fees.

I. Background

A. The Home Equity Loan and Default

In 2004, Luis Santiago, Borrower, signed a home equity promissory note secured by a first lien on his property. Novastar Mortgage, Inc. was the original lender on the home equity promissory note. The security instrument was granted in Mortgage Electronic Registration Systems, Inc.'s (MERS) favor as nominee for Novastar Mortgage Funding Trust, its successors and assigns. The note and security instrument were subsequently transferred to Bank of New York Mellon (BONY), which retained Ocwen to act as its attorney-in-fact and servicer-in-fact on the loan. We refer to BONY and Ocwen together as "Lender."

Borrower defaulted on the Note in August 2010, and Lender sent a default notice three months later.

In May 2011, Lender filed a verified home equity foreclosure application seeking an expedited foreclosure on the home equity loan following Borrower's default. *See* TEX. R. CIV. P. 736. At that time, the August 2010 payment was past due and Borrower owed Lender $1,015,521.31 on the note.

B. The First Lawsuit

Lender's Rule 736 proceeding was automatically stayed when Borrower filed a separate lawsuit alleging fraud, and breach of contract claims and a suit to quiet title asserting that the loan was void, illegal, and unenforceable (the First Lawsuit). *See* TEX. R. CIV. P. 736.11. Lender filed counterclaims against Borrower and asserted third-party claims against his wife, seeking a judgment permitting foreclosure on the property according to the security instrument.

Lender later moved for and was granted a summary judgment ordering that Borrower take nothing on all claims and that Lender "may conduct a non-judicial foreclosure of the property that is the subject of this cause" (the First Summary Judgment").

Borrower appealed the First Summary Judgment (the First Appeal), and the trial court entered an "Agreed Order Staying Enforcement of Judgment" (Agreed Order), which stayed the First Summary Judgment's enforcement during the First Appeal if Borrower (i) made monthly $2,500 payments into the court's registry, (ii) made three month's payments in advance, and (iii) kept the property insured and in good repair. The Agreed Order further provided that the money deposited in the court's registry would be paid to Lender against Borrower's debt if the First Appeal failed. Lender in April 2014 sent Borrower an erroneous foreclosure notice, but Borrower states that he has "forgiven" Lender and does not include this notice as part of the alleged breach.

While the First Appeal was pending, Lender filed a motion to clarify the Agreed Order regarding the tolling of any limitations periods that might preclude it from exercising its right to foreclose if it did not do so within certain time limits (the Clarification Motion). *See* TEX. CIV. PRAC. & REM. CODE § 16.035(b). Lender argued that the First Summary Judgment gave it an absolute right to foreclose if Borrower's First Appeal failed, but Lender filed the Clarification Motion out of an "abundance of caution" to clarify the parties' intent regarding limitations tolling. Specifically, Lender asked the trial court to clarify that the Agreed Order "includes an implied provision that limitations are tolled during such time as the Agreed Order is in effect."

The trial court granted Borrower's Clarification Motion on December 17, 2014, but did not explain why or include the requested clarifying language (the Clarification Order). The Clarification Order, however, granted the motion "in its entirety." In a jurisdictional brief to this

court in the First Lawsuit, however, Borrower acknowledged that the Clarification Order "mandate[d] that the statute of limitations would be tolled within the contract."

Borrower challenged the Clarification Order in a mandamus proceeding in this court, which we denied. Borrower then filed an untimely direct appeal (the Second Appeal), which we dismissed for want of jurisdiction.

In the First Appeal, we affirmed the trial court's First Summary Judgment for Lender. *See Santiago v. Novastar Mortg. Inc.*, 443 S.W.3d 462,479 (Tex. App.—Dallas 2014, pet. denied) (abrogated by *Wood v. HSBC Bank, USA, N.A.*, 505 S.W.3d 542, 547 (Tex. 2016)). Borrower filed a petition for review, which the supreme court denied in February 2015.

On March 3, 2015, after the supreme court denied Borrower's petition for review, Lender notified Borrower that it would sell the property on April 7th (the March 2015 Notice). But the April foreclosure did not occur because Lender recognized that Borrower still had time to file a motion for rehearing in the supreme court. Borrower so moved, and rehearing was denied on April 17, 2015.

C. The Present Suit

After receiving the March 2015 Notice, Borrower filed the present lawsuit and obtained a temporary restraining order blocking the April foreclosure sale and prohibiting the withdrawal of the registry funds. Borrower alleged that Lender breached, anticipatorily breached, and rescinded the Agreed Order by sending the March Notice while the First Appeal was still pending (we did not issue the mandate in that case until May 12, 2015), and he sued to quiet title in the property. His quiet title claim asserted that any foreclosure was barred by limitations. At a later hearing, however, the trial court denied Borrower's requested temporary injunction. We dismissed as moot Borrower's appeal of the injunction denial because a final judgment was

rendered before Borrower filed the appeal. *See Santiago v. Bank of New York Mellon*, No. 05-15-00664-CV, 2016 WL 297383, at *1 (Tex. App.—Dallas Jan. 25, 2016).

At the temporary injunction hearing, the court also considered Lender's motion to withdraw the funds Borrower had deposited in the court's registry. The trial court granted the motion and signed an order releasing the funds to Lender.

On September 29, 2015, Lender moved for traditional summary judgment on all of Borrower's claims. That motion asserted these grounds:

> A. Plaintiff's suit is an improper collateral attack on a judgment in a prior case and, therefore, must be dismissed for want of jurisdiction.
>
> B. [Not relevant to the appeal.]
>
> C. Defendants are entitled to summary judgment on all claims because the March 3, 2015 Notice of Reposting and Sale was proper.
>
> 1. Plaintiff exhausted the initial litigation and appeals before Defendants mailed the Notice of Reposting and Sale was proper.
>
> 2. Defendants were previously awarded a final judgment allowing foreclosure.
>
> 3. Plaintiff agreed that foreclosure could occur after his appeal was completed.
>
> 4. The statute of limitations was tolled while Plaintiff's appeals were pending.
>
> D. Alternatively, Plaintiff's quiet title claim is barred by *res judicata*.

Borrower's response to that motion distills to two basic arguments: (i) Lender's March Notice breached the Agreed Order because the First Appeal was still pending since Lender re-posted the property and sent the March Notice before we issued the mandate in that case and (ii) the Clarification Order was void as the trial court issued it after its plenary jurisdiction had expired and, consequently, Lender could no longer lawfully sell the property.

The trial court granted Borrower's motion. The summary judgment order states that the trial court took judicial notice of, *inter alia*, the trial and appellate court judgments, opinions, and

mandate in the First Lawsuit. The order further states that it is a final judgment. That judgment is the subject of the current appeal, which is Borrower's third appeal (the Third Appeal), and fourth trip to this court, involving this dispute.

II. Analysis

A. Introduction

Without directly addressing the grounds stated in Lender's summary judgment motion, Borrower's appellate brief asserts one issue—the trial court erred in granting Lender's summary judgment motion—with five subparts. Three of those subparts address the summary judgment dismissing Borrower's claims. A fourth subpart asserts that the trial court order releasing the registry funds to Lender was improper. Borrower's fifth subpart posits that the trial court erred in awarding attorney's fees to Lender.

Borrower's summary judgment based arguments collectively assert that fact issues precluded the summary judgment dismissing his contract breach, anticipatory breach and rescission claims for two reasons. One, Lender's March 2015 foreclosure notice sent before we released our mandate following the supreme court's denial of Borrower's petition for review in the First Appeal breached the Agreed Order's bar against foreclosing while the appeal was still pending. And, two, any attempt to sell the property was unlawful because (i) the Agreed Order did not toll limitations on Borrower's right to foreclose and (ii) the trial court lacked jurisdiction to enter the Clarification Order. Borrower's registry funds arguments similarly complain that the trial court erred by releasing the registry funds to Lender before we released the First Appeal mandate.

As discussed below, we affirm the trial court's summary judgment for Lender because (i) assuming the trial court erred in granting the summary judgment or releasing the registry funds, Borrower has not shown any resulting harm and (ii) Borrower's challenge to the Clarification

Order in this Third Appeal is an impermissible collateral attack on that order. Finally, the trial court did not erroneously award attorney's fees to Lender because Borrower has not shown that the trial court actually made any such award.

B. Standard of Review

We review de novo the trial court's ruling on a motion for summary judgment. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fieldin*g, 289 S.W.3d 844, 848 (Tex. 2009). In a traditional summary judgment motion, the movant must establish that no genuine issue of material fact exists and the movant is thus entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). When reviewing a summary judgment, we take as true all evidence favorable to the non-movant and resolve any doubts in the non-movant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). If the trial court's order does not specify the grounds for its summary judgment ruling, we affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious. *Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003).

C. Borrower's First, Second, and Fourth Subparts: Borrower's Contract and Quiet Title Arguments

Subparts one, two, and four of Borrower's appellant's brief reiterate Borrower's summary judgment response and further assert that (i) he had to request injunctive relief to stop the sale and "the loss of real estate results in irreparable harm" and (ii) it would be "impossible to accurately measure, in monetary terms, the damage and injury caused as a result of an illegal foreclosure sale" because his property rights are unique. More specifically, Borrower argues that Lender's March 2015 Notice was premature because the First Appeal was still pending at that time and was not final until we released the mandate in that case on May 12, 2015—more than two months after Lender re-posted the property and sent the March Notice. Furthermore, the trial court entered the Clarification Order twenty-one months after the trial court's final summary

judgment in the First Lawsuit and was therefore void as having been issued after the trial court's plenary jurisdiction lapsed. As a void order, Borrower argues, the Clarification Order has no effect and thus the Agreed Order did not toll limitations during the First Appeal. As explained below, we reject Borrower's arguments for two reasons.

First, we reject Borrower's limitations argument based on the premise that the Clarification Order is void, because that argument is an impermissible collateral attack on that order. As our memorandum opinion dismissing Borrower's appeal from the Clarification Order for lack of jurisdiction confirms, Borrower did not timely appeal from that order. *See Santiago v. The Bank of New York Mellon*, No. 05-15-00342-CV, 2015 WL 2375400, at *1 (Tex. App.—Dallas, May 18, 2015, no pet). Because Borrower did not timely appeal the Clarification Order, he may not collaterally attack that order in this present case. *Estate of Mitchell*, 20 S.W.3d 160, 161-62 (Tex. App.—Texarkana 2000, no pet.). Accordingly, we reject Borrower's contention that limitations presents a bar to Lender's right to foreclose on the property.

Second, we reject Borrowers' arguments based on Lender's March Notice being premature because, even if that were so, Borrower has not shown any resulting harm as is necessary for an error to constitute reversible error. *See* TEX. R. APP. P. 44.1(a). In addition to showing that the trial court made an error of law, to obtain a reversal of the ensuing judgment, under the harmless error rule we

> must also find that the error amounted to such a denial of the appellant's rights as was reasonably calculated to cause and probably did cause 'the rendition of an improper judgment,' or that the error 'probably prevented the appellant from presenting the case [on appeal].' Tex. App. P 44.1(a). The rule applies to all errors. *Lorusso v. Members Mut. Ins. Co.*, 603 S.W.2d 818, 819-20 (Tex. 1980).

G & H Towing Co. v. Magee, 347 S.W.3d 293, 297–98 (Tex. 2011).

We find that no such harm occurred here for three reasons:

One, as just discussed, Borrower is barred from attacking in this proceeding the Clarification Order's effect that the Agreed Order tolled during the First Appeal any limitations accruing against Lender's ability to enforce the First Summary Judgment authorizing Lender to sell the property.

Two, Borrower's arguments assume that re-posting the property and sending the March 2015 Notice breached the Agreed Order. That argument, however, erroneously assumes that the Agreed Order prevented Lender from doing so before we issued the First Appeal mandate. But the Agreed Order did not tie Lender's ability to enforce the First Summary Judgment to the First Appeal's finality. Rather, the Agreed Order stayed enforcement so long as Borrower complied with his Agreed Order obligations. And read with the First Summary Judgment, "enforcement" under the Agreed Order meant a completed sale, not merely posting the property and sending notice to Borrower. *See Young v. Young*, 810 S.W.2d 850, 851 (Tex. App.—Dallas 1991, writ denied) (clarification order must only be consistent with the prior judgment). Furthermore, the undisputed facts show that (i) Borrower quit paying under the Agreed Order beginning with his May 1, 2015 payment, (ii) the mandate issued on May 12, 2015, (iii) the trial court granted lender's summary judgment six months later on November 16, 2015, and (iv) the foreclosure sale occurred on February 2, 2016. That is, Borrower admits that (i) he breached the Agreed Order's payment obligations as of May 1, 2015 and (ii) the First Appeal was indisputably over on May 12, 2015. It is further undisputed that either circumstance was sufficient to lift the Agreed Order's stay of Lender's right to foreclose. Moreover, Borrower does not suggest that it suffered any harm from the March 2015 re-posting and notice other than his litigation costs related to those events. We address that argument in the next paragraph.

Three, we reject Borrower's argument that he suffered damages due to the March 2015 Notice because he had to file suit to stop the foreclosure scheduled for April 2015. Litigation

expenses are not damages unless expressly provided for by statute or contract. *Eberts v. Businesspeople Personnel Svcs., Inc*., 620 S.W.2d 861, 863 (Tex. App.—Dallas 1981, no writ). There is no such statute or contract provision here.

Accordingly, based on this case's unique and narrow facts, we conclude that Borrower has not shown any harm resulting from the judgment that amounted to such a denial of his rights as was reasonably calculated to cause and probably did cause the rendition of an improper take nothing judgment. Nor did Borrower show that any such error probably prevented him from presenting his case on appeal. We thus reject subparts one, two, and four of his sole issue.

D. Borrower's Third Subpart: Was the trial court's May 5, 2015 order releasing the registry funds reversible error?

Borrower argues that the trial court's May 5, 2015 order authorizing the Collin County District Clerk to release the registry funds to Borrower was improper because the trial court signed that May 5, 2015 order one week before we released the mandate in this case. Assuming without deciding that in so doing the trial court erred, we conclude that Borrower has not shown any resulting harm for the same reasons stated in the preceding section and the fact that the mandate issued the following week.

E. Borrower's Fifth Subpart: Did the trial court err by awarding attorney's fees to Lender?

Borrower argues the trial court erred by awarding attorney's fees to Lender. There was, however, no attorney's fees amount awarded. Therefore, we reject this subpart of Borrower's sole issue.

III. Conclusion

For the above reasons, we affirm the trial court's judgment.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

LUIS A. SANTIAGO, Appellant

No. 05-16-00053-CV V.

THE BANK OF NEW YORK MELLON, AS SUCCESSOR TRUSTEE TO JPMORGAN CHASE BANK, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2004-2. NOVASTAR HOME EQUITY LOAN ASSET-BACKED CERTIFICATES, SERIES 2004-2, AND OCWEN LOAN SERVICING, LLC, Appellees

On Appeal from the 296th Judicial District Court, Collin County, Texas
Trial Court Cause No. 296-01232-2015.
Opinion delivered by Justice Whitehill.
Justices Lang and Brown participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees THE BANK OF NEW YORK MELLON, AS SUCCESSOR TRUSTEE TO JPMORGAN CHASE BANK, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2004-2. NOVASTAR HOME EQUITY LOAN ASSET-BACKED CERTIFICATES, SERIES 2004-2, AND OCWEN LOAN SERVICING, LLC recover their costs of this appeal from appellant LUIS A. SANTIAGO.

Judgment entered April 11, 2017.