

Opinion issued August 31, 2010



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-09-00278 CV

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**PHILLIP HEAD and RENA HEAD, Appellants**

**V.**

**DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR  
LONG BEACH MORTGAGE LOAN TRUST 2003-2, Appellee**

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**On Appeal from the 212th District Court  
Galveston County, Texas  
Trial Court Case No. 05-CV-0610**

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**MEMORANDUM OPINION**

The trial court rendered summary judgment awarding foreclosure on a home equity loan. The homeowners claim the lien was not properly perfected, but these

claims were previously brought and finally resolved in bankruptcy court. We affirm.

### **Procedural Background**

Appellee Deutsche National Bank Trust, as Trustee for Long Beach Mortgage Loan Trust 2003-2, sued appellants Phillip Head and Rena Head to foreclose a lien for a home equity loan. *See* TEX. R. CIV. P. 735(2); *see also* TEX. CONST. art. XVI, § 50(a)(6) (authorizing home equity loans). The Bank subsequently filed a motion for summary judgment seeking foreclosure. *See* TEX. R. CIV. P. 166a(a), (c). The Bank's summary judgment evidence included a February 4, 2003 note, security instrument, assignment of lien from the original holder to the Bank, and an affidavit that the total amount due as of December 18, 2008 was \$834,372.75.

The Heads filed a response to the motion for summary judgment in which they claimed: (1) the lien was invalid because it was not perfected as required by Texas Constitution article XVI, section 50(a)(6); (2) the defects in perfecting the lien were not cured; (3) no notice was given to the Heads that they could rescind the home equity loan; and (4) the Bank had not produced the original note to show it was the holder in due course. The Heads' summary judgment evidence included a February 3, 2003 notice concerning extensions of credit, a February 4, 2003

settlement statement, and the affidavit of Rena Head, in which she stated that the closing statement was materially changed after she signed it.

The Bank filed a reply and claimed that res judicata barred the Heads from relitigating the invalidity of the lien because of a February 23, 2007 order dismissing with prejudice an adversary proceeding in bankruptcy court. The Bank provided summary judgment evidence that included (1) the Heads' complaint in bankruptcy court against the Bank seeking to invalidate the lien and (2) the bankruptcy court's order dismissing with prejudice "any claims or causes of action that could or should have been brought." *See Casciato-Northrup, Tr. v. Deutsche Nat'l Bank Trust Co.*, Adversary No. 05-3799 (*In re Head*, No. 05-42027-H4-7) (Bankr. S.D. Tex., Feb. 23, 2007). The appellate record does not contain any response by the Heads to the Bank's assertion of res judicata.

The trial court granted the Bank's motion and rendered a final summary judgment for \$834,372.75 and awarded foreclosure. The Heads bring three issues on appeal: (1) the procedure for a home equity loan was not properly followed and the lien against the homestead was invalid and unconstitutional; (2) the Bank did not attempt to cure the defect in the execution of the home equity loan when it was notified of the defect; and (3) the bankruptcy court did not have jurisdiction to determine the validity of a lien against a Texas homestead.

## Analysis

### *Standard of review*

The standard of review for a traditional summary judgment is well established: (1) the movant for summary judgment has the burden of showing that no genuine issue of material fact exists and that it is therefore entitled to summary judgment as a matter of law; (2) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true; and (3) every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in the nonmovant's favor. *See, e.g., Nixon v. Mr. Property Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985). Issues not expressly presented to the trial court by written motion, answer, or other response shall not be considered as grounds for reversal. TEX. R. CIV. P. 166a(c); *see Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 313 (Tex. 2006).

### *Jurisdiction of the bankruptcy court*

In their third issue, the Heads claim the United States Bankruptcy Court had no subject-matter jurisdiction to determine the validity of the lien on what they claim is their homestead. As authority, the Heads rely upon a single case, *First State Bank of Grapeland v. Brown*, 490 S.W.2d 248 (Tex. Civ. App.—Tyler 1973,

no writ). We interpret this issue as a collateral attack on the federal bankruptcy court's order because the Heads claim that order is void.<sup>1</sup>

The Heads did not expressly present this issue to the trial court by written motion, answer, or other response, so it has been waived. *See* TEX. R. CIV. P. 166a(c). We also note that the only rationale given by the Heads in their brief on the issue of voidness was that the Tyler Court of Civil Appeals in *First State Bank* discussed a bankruptcy court's jurisdiction over exempt property. *See* 490 S.W.2d at 249. Nothing in *First State Bank*, however, purports to authorize a collateral attack upon an order of a bankruptcy court. The discussion concerned how exempt property at that time—1973—did not constitute part of the bankruptcy estate. *See id.*

We overrule issue three.

### *Res judicata*

In issues one and two, the Heads claim (1) the procedure for a home equity loan was not properly followed and the lien against the homestead was invalid and unconstitutional and (2) the Bank did not attempt to cure the defect in the execution of the home equity loan when it was notified of the defect. The Bank

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<sup>1</sup> The United States Supreme Court has held that judgments and decrees of the federal courts of a state have the same dignity in the courts of that state as those of its own courts. *See Stoll v. Gottlieb*, 305 U.S. 165, 170, 59 S. Ct. 134, 136–37 (1938) (citing *Dupassey v. Rochereau*, 88 U.S. 130, 135 (1874)), *cited with approval in Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 507, 121 S. Ct. 1021, 1027 (2001).

raised res judicata as a defense in its written reply, based on the federal bankruptcy court order, and the trial court granted the motion for summary judgment.

The Heads do not challenge the res judicata issue on appeal, other than to argue that the bankruptcy court had no subject-matter jurisdiction to determine the validity of the lien. Nonetheless, we note the trial court could have properly based its summary judgment on the preclusive effect of the federal bankruptcy court order. Federal law controls the determination of whether res judicata will bar a later state-court proceeding. *Eagle Props., Ltd. v. Scharbauer*, 807 S.W.2d 714, 718 (Tex. 1990); *see* RESTATEMENT (SECOND) OF JUDGMENTS § 87 (1982) (“Federal law determines the effects under the rules of res judicata of a judgment of a federal court.”). Under federal law, the doctrine of res judicata will apply if: (1) the parties are identical in both suits; (2) the prior judgment is rendered by a court of competent jurisdiction; (3) there is a final judgment on the merits; and (4) the same cause of action is involved in both cases. *See Eagle Props.*, 807 S.W.2d 718.

An examination of the federal bankruptcy court’s order reveals that the four elements have been met. Rena Head and Phillip Head filed a complaint against Deutsche National Bank Trust in bankruptcy court, thus satisfying elements one and two. The Heads sued to invalidate the lien, claiming that the procedure for a home equity loan was not properly followed and the lien against the homestead

was invalid and unconstitutional, which satisfies element four. The bankruptcy court dismissed the case with prejudice, satisfying element three, a final judgment on the merits. *See Lentworth v. Trahan*, 981 S.W.2d 720 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (dismissal with prejudice constitutes adjudication on merits and operates as if case had been fully tried and decided, citing *Mossler v. Shields*, 818 S.W.2d 752, 754 (Tex. 1991) and *Lelsz v. Kavanagh*, 903 F. Supp. 1037, 1040 (N.D. Tex. 1995)).

We overrule issues one and two.

### **Conclusion**

We affirm the trial court's judgment.

Michael Massengale  
Justice

Panel consists of Justices Alcala, Massengale, and Wilson.<sup>2</sup>

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<sup>2</sup> The Honorable Davie L. Wilson, retired justice, Court of Appeals for the First District of Texas, sitting by assignment.