Opinion issued February 24, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00873-CV

COMUNIDAD FONDREN COURT, LLC, Appellant

V.

FEDERAL NATIONAL MORTGAGE ASSOCIATION, Appellee

On Appeal from the 281st District Court
Harris County, Texas
Trial Court Case No. 2008-28047

MEMORANDUM OPINION

Comunidad Fondren Court, LLC appeals a judgment in favor of the Federal National Mortgage Association ("Fannie Mae"). Harris County interpleaded funds with the trial court from a refund of *ad valorem* taxes on real property because

Comunidad and Fannie Mae both asserted a right to the funds. On cross-motions for summary judgment, the trial court determined that Fannie Mae was entitled to the funds. On appeal, Comunidad asserts that the trial court erred because Comunidad is the owner of the refunded funds, Fannie Mae's security interest did not attach to the funds, and Comunidad is not the successor or assign of the original debtor. Fannie Mae also appealed, raising a single issue—that the trial court erred by refusing to award its attorneys' fees. We conclude that Comunidad took the real property subject to Fannie Mae's outstanding security interests, which covered the tax refund at issue here. We also conclude that the record does not show that the trial court abused its discretion by ordering Fannie Mae and Comunidad to each pay their own attorneys' fees. We affirm.

Background

In 1998, F. Court Partners, Ltd. was formed for the purpose of owning and operating an apartment complex on Fondren Road in Houston, Texas ("the Property"). The Property is composed of two contiguous tracts. Over a period of several years, F. Court obtained financing for the Property by executing a series of three promissory notes (collectively "Notes"), each secured by a deed of trust (collectively "Deeds of Trust").[1] The monthly mortgage payments from the borrower included a tax escrow component that was deposited into a tax escrow

[1] The Deeds of Trust contain identical provisions concerning the material issues in this appeal.

account. The Notes and Deeds of Trust were subsequently transferred to Fannie Mae, and Fannie Mae is the owner and holder of the Notes and related loan documents.

In December 2003, F. Court conveyed the Property to Comunidad. The Property remained subject to the Deeds of Trust executed by F. Court. As part of the transfer, Comunidad did not assume F. Court's debt. Fannie Mae was not asked to, and did not, consent to the transfer, even though the transfer constituted an event of default under the Deeds of Trust. F. Court also defaulted by failing to pay the amounts due under the Notes beginning in September 2006.

Comunidad is a tax exempt community housing development organization. During the years 2004 to 2006, while Comunidad owned the apartment complex, it qualified for a tax exemption on the property. Harris County, however, made a mistake on its tax rolls by exempting only one of the two tracts, which was approximately one-half of the Property, and therefore assessed taxes on a tract when it should not have. This mistake was not corrected until August 2007, after Fannie Mae had foreclosed on the property. Between the closing in December 2003 and the default by non-payment in September 2006, F. Court, through the property manager, timely paid the Notes to Fannie Mae from the rents earned by

the property. During the same time, Fannie Mae, through its loan servicer,[2] paid the mistakenly assessed property taxes from a tax escrow account into which F. Court's note payments, including the amount that was to be escrowed for taxes, were deposited. Comunidad, which was tax exempt, did not pay any of the tax payments in question.

After F. Court defaulted on its monthly mortgage obligations, Fannie Mae sought foreclosure on the Property. Fannie Mae was the high bidder and purchased the Property in February 2007. The deficiency remaining after the foreclosure sale was approximately $1.2 million.

In September 2007, after the foreclosure, Comunidad applied for a refund of the taxes paid on the Property from 2004 to 2006 with the Harris County Appraisal Review Board, based upon Comunidad's tax-exempt status. Fannie Mae also requested a refund. The review board subsequently granted the refund request. At the time the refund was granted, Comunidad had no ownership interest in the Property. Harris County filed an action in interpleader based on the competing claims to the tax refund. The interpleaded funds totaled $381,538.78.

[2] Fannie Mae relies on third-party servicers to service the mortgages that Fannie Mae acquires.

Both Comunidad and Fannie Mae sought summary judgment on their respective claims to the tax refund.[3] The trial court denied Comunidad's motion and granted Fannie Mae's, rendering judgment for Fannie Mae for the tax refund.

Standard of Review

We review summary judgments de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). Summary judgment is proper only when a movant establishes that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). On review, we indulge every reasonable inference in favor of the nonmovant, take all evidence favorable to the nonmovant as true, and resolve any doubts in favor of the nonmovant. *Valence Operating Co.*, 164 S.W.3d at 661. When there are multiple grounds for summary judgment and the order does not specify the ground on which the summary judgment was rendered, the appealing party must negate all grounds on appeal. *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 381 (Tex. 1993); *Ellis v. Precision Engine Rebuilders, Inc.*, 68 S.W.3d 894, 898 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

When both sides move for summary judgment and the trial court grants one motion and denies the other, we review the summary judgment evidence presented

[3] Other parties joined the interpleader action, but in its final judgment, the trial court declared that no other party was entitled to any portion of the tax refund and dismissed those claims with prejudice. Only Comunidad and Fannie Mae have appealed.

by both sides and determine all legal questions presented. *Comm'rs Court v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997). We render such judgment as the trial court should have rendered. *Id.*

Entitlement to the Tax Refund

Comunidad asserts the trial court erred in awarding the refund to Fannie Mae because Comunidad is the owner of the refunds and Fannie Mae's security interest did not attach to the refund. Fannie Mae responds that its security interest plainly states that it covers tax refunds and that Comunidad took the property subject to the security interests. Comunidad concedes in its brief that if Fannie Mae's security interest did attach to the funds, then the trial court's judgment is correct. Thus, the first legal issue is whether Fannie Mae's security interest created in its Deeds of Trust reaches the tax refund. The parties agree that the construction and interpretation of the Deeds of Trusts is a legal question for the court.

"When the owner of real estate executes a valid deed of trust, and then conveys an interest in the mortgaged property to a third party, the rights of the mortgagor's vendee are subject to the rights held by the beneficiary of the deed of trust." *Lavigne v. Holder*, 186 S.W.3d 625, 628 (Tex. App.—Fort Worth 2006, no pet.) (quoting *Motel Enters., Inc. v. Nobani*, 784 S.W.2d 545, 547 (Tex. App.—Houston [1st Dist.] 1990, no writ)). Thus, Comunidad took the Property subject to the existing Deeds of Trust and is bound by their terms.

Our primary concern in interpreting a contract is to ascertain and give effect to the parties' objective intent as it is expressed in the contract. *Seagull Energy E & P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 345 (Tex. 2006). The intent of the parties must be taken from the agreement itself, not from the parties' present interpretations, and the agreement must be enforced as it is written. *See Sun Oil Co. v. Madeley*, 626 S.W.2d 726, 731–32 (Tex. 1981). We also review the entire contract as a whole in an attempt to harmonize its provisions and do not give any single provision controlling effect without reference to the whole. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983).

A deed of trust is interpreted according to the ordinary rules of contract interpretation. *Fin. Freedom Sr. Funding Corp. v. Horrocks*, 294 S.W.3d 749, 753 (Tex. App.—Houston [14th Dist.] 2009, no pet.). One of those rules is that deeds of trust are generally strictly construed against the lender, which is the party normally responsible for the drafting of the document. *See Dodd v. Harper*, 670 S.W.2d 646, 649 (Tex. App.—Houston [1st Dist.] 1983, no writ). That rule only applies, however, if the agreement, after applying the ordinary rules of contract interpretation, is susceptible to more than one reasonable interpretation, i.e., when it is ambiguous. *Universal C.I.T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 157 (Tex. 1951); *Ramsay v. Tex. Trading Co., Inc.*, 254 S.W.3d 620, 630 (Tex. App.—

Texarkana 2008, pet. denied). Because neither party contends that the Deeds of Trust are ambiguous, that rule has no application to this case.

The Deeds of Trust clearly provide that all property tax refunds are Fannie Mae's collateral. The Deeds of Trust define the property that secures the Notes to include the following:

> (1) the Land;
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> . . .
>
> (7) all awards, payments and other compensation made or to be made by any municipal, state or federal authority with respect to the Land . . ., or any other part of the Mortgaged Property, including any awards or settlements resulting from condemnation proceedings or the total or partial taking of the Land . . . or any other part of the Mortgaged Property under the power of eminent domain or otherwise and including any conveyance in lieu thereof;
>
> . . .
>
> (10) all Rents and Leases;
>
> . . .
>
> (12) all Imposition Deposits;
>
> (13) all refunds or rebates of Impositions by any municipal, state or federal authority or insurance company (other than refunds applicable to periods before the real property tax year in which this Instrument is dated) . . . .

Impositions, the refunds of which are secured by the Deeds of Trust, are defined in section 7(a) of the Deeds of Trust:

> Borrower shall deposit with Lender on the day monthly installments of principal or interest, or both, are due under the Note . . ., until the indebtedness is paid in full, an additional amount sufficient to accumulate with Lender the entire sum required to pay, when due . . . Taxes . . . . The amounts deposited under the preceding sentence are collectively referred to in this Instrument as the "Imposition Deposits". The obligations of Borrower for which the Imposition Deposits are required are collectively referred to in this Instrument as "Impositions". . . .

Section 7(b) further grants Fannie Mae, as the lender, a security interest in Imposition Deposits:

> . . . . Lender shall apply the Impositions Deposits to pay Impositions so long as no event of Default has occurred and is continuing. . . . Borrower hereby pledges and grants to Lender a security interest in the Impositions deposits as additional security for all of Borrower's obligations under this Instrument and the other Loan Documents. Any amounts deposited with Lender under this Section 7 shall not be trust funds, nor shall they operate to reduce the Indebtedness, unless applied by Lender for that purpose under Section 7(e).

Finally, section 7(e) grants Fannie Mae the right to apply the Impositions as payment on the Notes:

> If an Event of Default has occurred and is continuing Lender may apply any Imposition Deposits, in any amount and in any order as Lender determines, in Lender's discretion, to pay any Impositions or as a credit against the indebtedness. . . .

The Deeds of Trust expressly granted Fannie Mae a security interest on the payments made by F. Court to the loan servicer to be held in escrow for taxes. Not only were the deposits themselves subject to the security interest, the rents which were the source of the payments to the loan servicer were also subject to a security

interest by the terms of the Deeds of Trust. If a borrower had defaulted in the middle of a tax year after paying the first several monthly mortgage payments with escrowed amounts for taxes, the Deeds of Trust granted a security interest in the escrowed monies. And if property values were re-assessed causing a tax refund, the Deed of Trust granted a security interest in that refund. Based on the plain language of the Deeds of Trust, we conclude that Fannie Mae had a security interest first on the tax escrow account and then later on the tax refund. When Fannie Mae purchased the property at foreclosure, any interest of the borrower in the refunds was extinguished under section 43 of the Deeds of Trust.

Because Comunidad took the Property subject to the existing Deeds of Trust, and those Deeds of Trust granted a security interest in the rents, tax escrow accounts, and tax refunds, the trial court did not err by interpreting the Deeds of Trust as granting Fannie Mae a security interest on the tax refunds that were paid from the rents and Imposition Deposits. *See Lavigne*, 186 S.W.3d at 628 (rights of mortgagor's vendee subject to rights of beneficiary of deed of trust).

We next examine the legal effect of the Deeds of Trust. Comunidad raises two arguments to defeat the language of the Deeds of Trust. First, Comunidad, citing *Winters v. Slover*, asserts that under the basic law of real property, a party cannot transfer or mortgage more than it owns. 251 S.W.2d 726, 729 (Tex. 1952). Comunidad asserts that, because F. Court was not a tax-exempt business entity, it

did not have tax-exempt status or own entitlement to a refund. Thus, Comunidad concludes, Fannie Mae could not have acquired a security interest in a tax-exempt status or refund that F. Court did not own. As summarized by Comunidad, "but for Comunidad's ownership of the real property and Comunidad's tax exempt status, there would be no refund for the parties to fight over." Thus, Comunidad is implicitly arguing that when a refund is due to the status of the property owner, rather than a re-assessment of the value of the property, the refund is no longer collateral subject to the lender's security interest.

Comunidad, however, cites no authority that its tax-exempt status is an ownership interest in real property or somehow alters the ordinary interpretation of the Deeds of Trust in which a tax refund is collateral subject to the lender's security interest. The Deeds of Trust on their face do not recognize this distinction. Rather, as noted above, the rents, tax escrow accounts, and tax refunds were expressly subject to Fannie Mae's security interest. There is no ownership in a party's tax-exempt status; the ownership dispute is between the parties who paid the monies into the tax escrow account and the party that paid the taxes from that account, Fannie Mae. But that dispute is legally irrelevant because Fannie Mae had a security interest in all the collateral, including the tax escrow monies ("Imposition Deposits"), under the terms of the Deeds of Trust. It also had a security interest in all tax refunds ("all refunds or rebates of Impositions").

And the reason for the refund—Comunidad's tax-exempt status—is not determinative of ownership; it is the ownership of the refund itself that is in issue. Fannie Mae's security interest attached to the escrow account itself, not Comunidad's tax-exempt status or the cause of the tax refund.

Comunidad further argues that it did not acquire the tax refund from F. Court and it could not have done so because F. Court was not itself tax exempt. But Comunidad acquired its interest in the property in December 2003, and therefore the taxes had not been paid into escrow at that time. The tax refund in dispute arises out of taxes paid after Comunidad purchased its interest.

Comunidad also asserts that Fannie Mae lost its security interest on the monies in the tax escrow account when it paid the taxes out of the Imposition Deposit account. Fannie Mae, however, still has a security interest on refunds under the express terms of the Deeds of Trust. Comunidad relies on section 9.332 of the Texas Business and Commerce Code to support its contention that Harris County took the tax payments free of any security interest. *See* TEX. BUS. & COM. CODE ANN. § 9.332 (West 2002). However, Comunidad raises this issue for the first time in its reply brief. This issue was not mentioned in Comunidad's motion for summary judgment, responses to Fannie Mae's motion for summary judgment, or opening brief. This issue, therefore, is not preserved for review. *See* TEX. R. CIV. P. 166a(c) ("Issues not expressly presented to the trial court by written

motion, answer or other response shall not be considered on appeal as grounds for reversal."); *Rayl v. Borger Econ. Dev. Corp.*, 963 S.W.2d 109, 114 (Tex. App.—Amarillo 1998, no pet.) (holding that party may not appeal summary judgment in favor of opponent when grounds opposing summary judgment asserted on appeal were not raised before trial court); *see also Malcomson Rd. Util. Dist. v. Newsom*, 171 S.W.3d 257, 279 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (declining to reach challenge that was not raised in appellant's opening brief).

We overrule Comunidad's first two issues. Because the trial court's judgment may be sustained on the basis discussed above, we do not address Comunidad's third issue, which presents an argument concerning an alternative basis for the trial court's judgment. *See Ellis*, 68 S.W.3d at 898.

Fannie Mae's Appeal

In a single issue, Fannie Mae asserts that the trial court erred by refusing to award its attorneys' fees in this case.

Under the Declaratory Judgments Act, a trial court "may award costs and reasonable and necessary attorney's fees as are equitable and just." TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (West 2008). The decision to grant or deny attorneys' fees under the Act is solely within the discretion of the trial court. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 799 (Tex. 2005). Because the grant or denial of attorneys' fees is within the sound discretion

of the trial court, its judgment will not be disturbed on appeal in the absence of a clear showing that it abused its discretion. *Oake v. Collin County*, 692 S.W.2d 454, 455 (Tex. 1985).

The trial court's decision to award attorneys' fees is based on four factors: the fees awarded must be reasonable and necessary, which are matters of fact, and they must be equitable and just, which are matters of law. TEX. CIV. PRAC. & REM. CODE ANN. § 37.009; *see Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). The trial court is not required to award attorneys' fees to the prevailing party. *Moosavideen v. Garrett*, 300 S.W.3d 791, 802 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). In exercising its discretion, the trial court may, as it did here, decline to award attorneys' fees to either party. *See Univ. of Tex. Health Sci. Ctr. v. Mata & Bordini, Inc.*, 2 S.W.3d 312, 319 (Tex. App.—San Antonio 1999, pet. denied); *United Interests, Inc. v. Brewington, Inc.*, 729 S.W.2d 897, 906 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

Within this issue, Fannie Mae asserts several arguments. First, Fannie Mae contends, "As a general rule, it is proper to make a fee award to a party who obtains a declaratory judgment and the court is given broad discretion to make such an award." As noted above, it is true that the trial court has broad discretion in making an award and that it may be "proper" to do so, if the award is equitable and just. But just because it is "proper" to award fees does not make it mandatory.

There is no "general rule" that a court should award attorneys' fees. As explained above, the statute makes no mention of a prevailing party; an award of reasonable and necessary fees may be made if such an award is "equitable and just." *See Moosavideen*, 300 S.W.3d at 802.

Second, Fannie Mae contends that the trial court abused its discretion in failing to award Fannie Mae its attorneys' fees because "Comunidad asserted a competing, albeit meritless, claim to the tax refund." This is essentially a variation on the "prevailing party" argument. Fannie Mae contends that because the trial court denied Comunidad's summary judgment and granted Fannie Mae's it should be entitled to an award of attorneys' fees. As noted above, the fact that Fannie Mae prevailed does not mean that it is entitled to attorneys' fees. *See id.*

Finally, Fannie Mae contends that it "presented uncontroverted testimony of the reasonableness and necessity of attorneys' fees, both at the trial court level and the estimated fees in the event of appeal. This evidence is sufficient to support an award of attorney's fees." Once again, the reasonableness and necessity of attorneys' fees is only part of the inquiry in the trial court's decision under the Declaratory Judgments Act. An award of reasonable and necessary fees is only proper if the award is "equitable and just." *See id.*

Fannie Mae presents no argument and discusses no evidence concerning whether the trial court's decision to have each party pay their own attorneys' fees

is equitable and just.[4] Fannie Mae has failed to show that it established as a matter of law that an award of fees was equitable and just. Based on the record before us, we cannot conclude that Fannie Mae has shown that the trial court committed an abuse of discretion. *See Abraxas Petroleum Corp. v. Hornburg*, 20 S.W.3d 741, 762 (Tex. App.—El Paso 2000, no pet.) ("[I]in reviewing a trial court's decision to not award fees, we must examine whether the complaining party established not only that the fees sought are reasonable and necessary, but also that the award is equitable and just.").

We overrule Fannie Mae's sole issue.

Conclusion

We affirm the judgment of the trial court.

Harvey Brown
Justice

Panel consists of Justices Jennings, Higley, and Brown.

[4] Fannie Mae does assert that prior to Comunidad filing its claim for the interpleaded tax refund, Fannie Mae's counsel sent a letter explaining the legal basis for its claim to the tax refund. Fannie Mae does not expressly argue that setting out its claim prior to Comunidad filing suit makes the subsequent attorneys' fees incurred in this suit "equitable and just." Furthermore, correspondence between opposing parties before litigation occurs is common. We decline to hold that such correspondence requires a court to find subsequent fees are equitable and just.