Opinion issued July 14, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00990-CV

AMERICAN FIRST NATIONAL BANK, Appellant

V.

JORDAN-LEWIS DEVELOPMENT, L.P., WESTBOUND BANK, AND BOB KARIM & ASSOCIATES, L.P., Appellees

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On Appeal from the 157th District Court
Harris County, Texas
Trial Court Case No. 2008-46432

MEMORANDUM OPINION

American First National Bank appeals the trial court's judgment declaring that its second lien on commercial property, which had been purchased by Jordan-Lewis Development, L.P. and secured by a deed of trust in favor of Westbound

Bank, had been satisfied. The trial court ordered AFNB to file a release of the lien and awarded attorney's fees to Jordan-Lewis Development. Bob Karim & Associates, L.P. reached a settlement with AFNB on appeal, and we grant those parties' joint motion to modify the judgment in accordance with their settlement agreement. Because we conclude as a matter of law that the second lien was extinguished by the substitution of collateral, we affirm the trial court's declaratory judgment. Because AFNB waived its right to challenge the failure to segregate attorney's fees, we also affirm the trial court's award of attorney's fees to Jordan-Lewis Development and Westbound Bank.

I. Background

Bob Karim & Associates, L.P. ("BKA") purchased commercial property located on Luzon Street in Houston, Texas. American First National Bank ("AFNB") loaned BKA $210,000 to finance the purchase. This loan was evidenced by a promissory note and secured by a deed of trust. AFNB recorded its first lien on this property by filing the deed of trust in the real property records of Harris County.

Approximately eight months later, Bob Karim introduced Jason and Jared Huckabee, principals of The Sound Block Inc., to his contacts at AFNB. AFNB loaned Sound Block $180,000 to open a music rehearsal studio. Karim personally guaranteed the loan, and BKA executed a second deed of trust on BKA's Luzon

Street property in favor of AFNB as collateral for the Sound Block loan. In connection with this transaction, BKA executed a third party pledge agreement in favor of AFNB as the secured party. AFNB recorded its second lien on the Luzon Street property by filing the deed of trust in the real property records of Harris County.

BKA later decided to sell the Luzon Street property. David Lewis, acting on behalf of Jordan-Lewis Development, executed an earnest money contract to purchase the Luzon Street property for $215,000. The contract required BKA to convey the property to Jordan-Lewis Development at closing with no liens or security interests that would not be satisfied out of the sales price.

Before the sale to Jordan-Lewis Development closed and at Karim's request, the executive committee of AFNB approved a modification to the Sound Block loan. This approval was memorialized in a memorandum, signed by AFNB's president, who was also the chairman of the loan committee. The memorandum showed that the second lien on the Luzon Street property would be released and a certificate of deposit to be held at AFNB in the amount of $55,000 would be added as collateral for the Sound Block loan. The memorandum did not expressly require Karim or BKA to sign an additional assignment or pledge. An email from Karim to AFNB and Alamo Title confirmed that Karim would "deposit" a $55,000 CD after receiving funds from closing the sale of the Luzon Street property and that

Karim expected that to "clear" the lien. Karim testified that in his conversation with AFNB about substituting collateral, there was no mention of a need for him to sign a pledge. Karim understood that the CD would be collateral for the Sound Block loan. Moreover, Karim had previously both personally guaranteed the Sound Block loan and signed a third party pledge agreement on behalf of BKA.

The parties to the sale of the Luzon Street property engaged Alamo Title as the escrow and closing agent. Alamo Title asked AFNB for a statement of the amounts required to extinguish the liens on the property. In response, AFNB sent a payoff statement, which indicated that the first lien could be satisfied by payment of $45,992.77 plus a per diem cost of approximately nine dollars. The payoff statement also noted, "Per officer instruction, the customer need provide a CD I/A/O $55,000.00 in order to release the second lien."

Westbound Bank loaned Jordan-Lewis Development $188,000 toward the purchase. In connection with closing, Westbound Bank sent Alamo Title Company a letter with specific instructions for handling escrow and closing the sale. This letter stated, "You are instructed to close this loan transaction Loan, at Borrower's expense, insuring WESTBOUND BANK a valid FIRST lien . . . ." The parties closed the transaction. Three days later, Jordan-Lewis Development and Westbound Bank funded the purchase price, and the sale proceeds were then disbursed. The final seller's statement showed a charge to seller at closing of

$55,000 for "American First National Bank Certificate of Deposit." Documents from Alamo Title show wire transfers to AFNB to pay off the first lien and to fund a certificate of deposit in the amount of $55,000.

The certificate of deposit was opened in Karim's name, individually. A stamp and notation on the front of the certificate indicate that it was pledged as collateral. The terms of the CD included the following express right of setoff granted in favor of AFNB:

> SETOFF. We may (without prior notice and when permitted by law) set off the funds in this account against any due and payable debt you owe us now or in the future, by any of you having the right of withdrawal, to the extent of such persons' or legal entity's right to withdraw. If the debt arises from a note, "any due and payable debt" includes the total amount of which we are entitled to demand payment under the terms of the note at the time we set off, including any balance the due date for which we properly accelerate [illegible] the note. We will not be liable for the dishonor of any check [illegible] the dishonor occurs because we set off a debt against this amount. You agree to hold us harmless from any claim arising as a result of our exercise of our right of setoff.

AFNB's general ledger shows the transaction opening a CD in the amount of $55,000 "to pledge LN #11372, The Sound Block."

While BKA's sale of the Luzon Street property was pending, an AFNB loan assistant sent an email asking Karim to sign certain attached documents. The subject-line of the email read: "the documents need to be sign." At trial, the loan assistant testified that she asked Karim to sign a pledge agreement per the instructions she received from the loan officer. She testified that when Karim

came to the bank after the sale proceeds had been disbursed, she personally escorted him to the new account department and then told him to contact her after the CD was opened so that she could prepare a pledge agreement for his signature in order to release the lien.

Karim's testimony contradicted the loan assistant's testimony. Karim testified that when he went to the bank, the new accounts department contacted the loan department. Although Karim recalled the loan assistant meeting him, he testified unequivocally that no AFNB representative told him he needed to sign a pledge agreement or do anything other than open the CD. He testified that he did everything required by AFNB:

> [W]hatever the bank instructed, I just followed it; and whatever paper I had to sign, I signed it. . . . I went only one time to open an account, and the only time I could do it is when the fund was transferred from Alamo—the money was—I did not take cash to the bank. The fund was already there, and it was sitting in their deposit. I had no other instruction. Whatever the bank asked me to do, that's what I did. I had no—I went there. I was like a puppet. They told me, "Okay. You need to come." And this lady took me to this department, and I was just like their puppet. They told me to sign it, and I signed it.

Sometime after the closing, Sound Block failed to make its payments to AFNB and defaulted on its lease. After AFNB learned that Sound Block lost its lease, it accelerated the loan.

AFNB notified Alamo Title that it was releasing AFNB's first lien on the Luzon Street property, but it did not release the second lien. Shortly thereafter,

AFNB notified all the potentially interested parties that it intended to foreclose on the Luzon Street property.

Jordan-Lewis Development and Westbound Bank sought a temporary injunction to prevent the foreclosure. Their suit against AFNB, BKA, and Karim also pleaded claims for a declaratory judgment regarding the second lien, breach of contract, promissory estoppel, breach of warranty, and conversion. Finding a probable right to recovery, the trial court granted the temporary injunction. AFNB asserted cross-claims against BKA and Karim, and those parties countersued for various claims including breach of contract and a declaratory judgment that the second lien had been fully satisfied. The case was tried to a jury on all claims except those seeking declaratory judgments. The jury rendered a verdict in favor of Jordan-Lewis Development and Westbound Bank on their breach of contract action, awarding damages and attorney's fees. The trial court entered a declaratory judgment invalidating the second lien, awarding attorney's fees to Jordan-Lewis Development from AFNB and BKA, and awarding attorney's fees to BKA from AFNB. The trial court filed findings of fact and conclusions of law.

II. Standards of review

A. Declaratory judgment

The purpose of the Declaratory Judgments Act is "to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal

relations." TEX. CIV. PRAC. & REM. CODE ANN. § 37.002(b) (West 2008); *see Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995); *Indian Beach Prop. Owner's Ass'n v. Linden*, 222 S.W.3d 682, 699 (Tex. App.—Houston [1st Dist] 2007, no pet.). The statute is "remedial" and "to be liberally construed." *Id.* A declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties, and a declaration will resolve the controversy. *Bonham State Bank*, 907 S.W.2d at 467; *Fort Bend Cnty. v. Martin-Simon*, 177 S.W.3d 479, 482–83 (Tex. App.—Houston [1st Dist.] 2005, no pet.). A trial court has discretion to enter a declaratory judgment so long as it will serve a useful purpose or will terminate the controversy between the parties. *Bonham State Bank*, 907 S.W.2d at 467 (citing *James v. Hitchcock Indep. Sch. Dist.*, 742 S.W.2d 701, 704 (Tex. App.—Houston [1st Dist.] 1987, writ denied)).

We review declaratory judgments under the same standards as other judgments. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.010 (West 2008). We look to the procedure used to resolve the issue below to determine the standard of review on appeal. *City of Galveston v. Tex. Gen. Land Office*, 196 S.W.3d 218, 221 (Tex. App—Houston [1st Dist.] 2006, pet. denied). A trial court has no discretion when evaluating a question of law. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). When the trial court enters a declaratory judgment after a bench trial, an appellate court applies a sufficiency of the evidence review to the

trial court's factual findings and reviews its conclusions of law de novo. *See Black v. City of Killeen*, 78 S.W.3d 686, 691 (Tex. App.—Austin 2002, pet. denied). We must uphold the trial court's determination in a declaratory judgment action if it can be sustained upon any legal theory supported by the evidence. *Bell v. Katy Indep. Sch. Dist.*, 994 S.W.2d 862, 864 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

B. Legal and factual sufficiency

In an appeal of a judgment rendered after a bench trial, the trial court's findings of fact have the same weight as a jury's verdict, and we review the legal and factual sufficiency of the evidence to support them as we would review a jury's findings. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994); *In re K.R.P.*, 80 S.W.3d 669, 673 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). To determine whether legally sufficient evidence supports a challenged finding, we must consider evidence that favors the finding if a reasonable fact-finder could consider it, and we must disregard evidence contrary to the challenged finding unless a reasonable fact-finder could not disregard it. *See City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). This Court may not sustain a legal insufficiency, or "no evidence," point unless the record demonstrates (1) a complete absence of evidence of a vital fact; (2) that the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital

fact; (3) that the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) that the evidence conclusively establishes the opposite of the vital fact. *Id.* at 810.

We review conclusions of law by the trial court de novo and will uphold them if the judgment can be sustained on any legal theory supported by the evidence. *Noble Mortg. & Invs., LLC v. D & M Vision Invs., LLC*, No. 01-09-00987-CV, 2011 WL 940756, at *7 (Tex. App.—Houston [1st Dist.] Mar. 17, 2011, no pet.); *In re Moers*, 104 S.W.3d 609, 611 (Tex. App.—Houston [1st Dist.] 2003, no pet.). The trial court's conclusions of law are not subject to challenge for lack of factual sufficiency, but we may review the legal conclusions drawn from the facts to determine their correctness. *Brown v. Brown*, 236 S.W.3d 343, 348 (Tex. App.— Houston [1st Dist.] 2007, no pet.).

III. Analysis

AFNB brings nine issues on appeal. Eight issues challenge the propriety of the trial court's declaratory judgment invalidating the second lien. The remaining issue argues that the trial court abused its discretion by awarding attorney's fees.

A. Satisfaction of lien

AFNB argues that the payoff statement, which stated that the deposit of a $55,000 CD would extinguish the second lien, does not affect the legal rights of the parties. Most of AFNB's briefing is focused on whether the payoff statement

was an enforceable contract, whether the parties could be bound to it by the actions of the escrow agent, and whether Jordan-Lewis Development and Westbound Bank had standing to bring a breach of contract case against AFNB. We begin by considering the legal effect of the payoff statement.

AFNB argues that "a payoff statement is not anything close to a binding agreement. Rather, it is merely a communication of mathematical fact: the outstanding principal balance and accrued interests owing on a loan as of a certain date." But in this case mathematical facts can have legal consequence because "[a] lien is usually extinguished upon payment of the indebtedness that it was created to secure." *Caress v. Lira*, 330 S.W.3d 363, 366 (Tex. App.—San Antonio 2010, pet. denied) (citing *Spencer–Sauer Lumber Co. v. Ballard*, 98 S.W.2d 1054, 1055 (Tex. Civ. App.—San Antonio 1936, no writ)). When a lien is extinguished by the payment of the indebtedness, the "extinguishment is complete even without a written release." *Id.* The Texas Property Code defines a "payoff statement" as "a statement of the amount of: (A) the unpaid balance of a loan secured by a mortgage, including principal, interest, and other charges properly assessed under the loan documentation of the mortgage; and (B) interest on a per diem basis for the unpaid balance." TEX. PROP. CODE ANN. § 12.017(a)(5) (West Supp. 2010). The Property Code also provides for release of a lien based on satisfaction of the terms of the payoff statement. It provides:

> An authorized officer of a title insurance company or an authorized title insurance agent may, on behalf of the mortgagor or a transferee of the mortgagor who acquired title to the property described in the mortgage, execute an affidavit that complies with the requirements of this section and record the affidavit in the real property records of each county in which the mortgage was recorded.

Id. § 12.017(c). The statute prescribes the form for the "Affidavit as Release of Lien" referenced in Section 12.017(c). That affidavit must provide, among other things, that the "[a]ffiant has ascertained that Title Company delivered to Mortgagee payment of the loan secured by the mortgage in the amount and time and to the location required by the payoff statement." *Id.* § 12.017(d). It must also state that "Pursuant to Section 12.017, Texas Property Code, this affidavit constitutes a full and final release of the mortgage from the property." *Id.* Considering the plain language of these statutory provisions, we reject AFNB's argument that a payoff statement is not "anything close to . . . binding." Rather, we conclude that satisfaction of the debt underlying the lien, in an amount and manner as reflected in the payoff statement, extinguishes the lien. To conclude otherwise would contradict the Legislature's plainly expressed intention, as reflected in the statute providing that release of the lien may be established by a title company's affidavit demonstrating that payment had been made according to the terms of the payoff statement.

Upon request, AFNB sent Alamo Title a payoff statement indicating that the first lien could be satisfied by payment of $45,992.77 plus a per diem cost of

$8.9291. The basis for this was the loan agreement and deed of trust underlying the first lien. The payoff statement further provided a payoff amount for the second lien of $55,000.00 with a note that stated, "Per officer instruction, the customer need provide a CD I/A/O $55,000.00 in order to release the second lien." The basis for this was the memorandum approved by AFNB's executive committee. The subject of this memorandum was "Total release the lien on R/E located at 1813 Luzon Street, Houston, TX 77009 being collateral of the subject note [the Sound Block loan]." The memorandum stated that the original terms of the loan would be modified and the second lien would be released in exchange for an AFNB CD in the amount of $55,000.

The parties agree that after Westbound Bank funded Jordan-Lewis Development's purchase of the Luzon Street property, Karim went to AFNB and opened a CD with the $55,000 that was transferred to AFNB as part of the real estate transaction. The parties also agree that Karim never executed an additional third-party pledge agreement. Even so, execution of a pledge agreement was not required by either the payoff statement or AFNB's memorandum memorializing the agreement it reached with Karim as to substituting collateral. In addition, the CD itself was stamped "pledged" with a notation that it was collateral for the Sound Block loan, and it included an express right of setoff. As to the second lien, Karim satisfied the terms of the payoff statement and the agreement underlying it.

We conclude, as a matter of law, that his purchase of a $55,000 CD with AFNB extinguished the second lien. *See Caress*, 330 S.W.3d at 366.

AFNB devotes much of its briefing to arguing that Jordan-Lewis Development and Westbound Bank lacked standing to pursue a breach of contract claim because they lacked privity with respect to the payoff statement. Our decision, like the trial court's judgment, does not depend on a breach of contract theory. Because we decide only that satisfaction of the requirements to release the second lien extinguished it, we need not address any of the arguments relating to the standing of Jordan-Lewis Development and Westbound Bank to pursue a contract action. Rather, we conclude that Jordan-Lewis Development and Westbound Bank properly sought a declaration of their rights in light of the extinguishment of the second lien. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.001, .003, .004 (West 2008).

We overrule issues one through seven and issue nine.

B. Attorney's fees

AFNB argues that the trial court abused its discretion in awarding attorney's fees because they are not available when the declaratory relief sought is to clear or remove a cloud on title. AFNB further argues that there is no evidence that the fees awarded were reasonable and necessary because Jordan-Lewis Development and Westbound Bank failed to segregate their fees.

AFNB first argues that the underlying suit in this case was one to quiet title, for which attorney's fees are not recoverable. But each of the cases relied upon by AFNB involved suits to quiet title that were equivalent to trespass-to-try title actions, for which attorney's fees may not be recovered. *See Florey v. Estate of McConnell*, 212 S.W.3d 439, 448–49 (Tex. App.—Austin 2006, pet. denied). A declaratory judgment action to determine the validity of a real property lien, such as was asserted in this case, is not akin to a trespass to try title suit because it does not seek title and possession. Instead, it seeks to determine the validity of a lien and entitlement to proceeds from the sale of the real property. *Id.* at 449.

In this case, the underlying suit did not seek both title and possession. Instead it sought a judicial determination that the second AFNB lien had been extinguished by Karim's purchase of the $55,000 CD, in accordance with Karim's and AFNB's agreement, which was memorialized in AFNB's executive committee memorandum and communicated to all parties to the sale through the payoff statement. We conclude that this was not a trespass to try title suit for which fees could not be recovered, so we must next consider whether the trial court abused its discretion in awarding attorney's fees to Jordan-Lewis Development and Westbound Bank.

AFNB argues that the evidence was factually insufficient to support the award because segregation of fees is required to show they were reasonable and

necessary, yet Jordan-Lewis Development and Westbound Bank failed to provide such proof so as to segregate fees for they which had no right of recovery from AFNB (i.e. their claims against other parties, and the declaratory judgment claim).

The Declaratory Judgments Act provides that the trial court may award costs and reasonable attorney's fees when doing so is equitable and just. TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (West 2006). Because the Act does not require an award of attorney's fees, we review the trial court's judgment awarding attorney's fees for an abuse of discretion. *See Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998); *see, e.g., Mitchell v. Fort Davis State Bank*, 243 S.W.3d 117, 126 (Tex. App.—El Paso 2007, no pet.). Attorney's fees awarded under the Act must be reasonable, necessary, equitable, and just. *See Bocquet*, 972 S.W.2d at 21.

Texas law does not allow for recovery of attorney's fees unless authorized by statute or contract. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310 (Tex. 2006). "As a result, [attorney's] fee claimants have always been required to segregate fees between claims for which they are recoverable and claims for which they are not." *Id.* at 311. However, the party opposing an award of attorney's fees must make a timely objection. *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997); *Hruska v. First State Bank of Deanville*, 747 S.W.2d 783, 785 (Tex. 1988). Such an objection must be made before the trial court renders judgment. *See* TEX. R. APP. P. 33.1(a)(1); *cf. Donihoo v. Lewis*, No. 01-08-00277-CV, 2010

WL 1240970, at *14 (Tex. App.—Houston [1st Dist.] Mar. 25, 2010, pet. denied) (mem. op.) (holding that segregation of attorney's fees must be raised before trial court renders judgment).

At the charge conference, AFNB did not object to the failure to segregate attorney's fees or request an instruction thereon. AFNB first raised this issue in its motion for new trial. However, this motion was filed nearly a full month after the trial court rendered judgment. Because AFNB's objection to the failure to segregate attorney's fees was not raised before the trial court rendered judgment, AFNB has waived this objection on appeal. *See* TEX. R. APP. P. 33.1(a).

We overrule issue number eight.

C. BKA and AFNB's settlement

AFNB and BKA filed a joint motion informing the Court that they have settled the controversies between them that relate to this appeal. They ask this Court to render judgment in accordance with their settlement. We grant the parties' motion, vacate the portion of the trial court's judgment rendering declaratory judgment in favor of BKA, render judgment that BKA take nothing by its claims against AFNB, and order that BKA and AFNB each bear its own costs of court. *See Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. and Research Corp.*, 313 S.W.3d 467, 468 (Tex. App.—Dallas 2010, no pet.) (rendering take-

nothing judgment in accordance with parties' agreement); *see also* TEX. R. APP. P. 42.1(a)(2).

Conclusion

Pursuant to the parties' agreement, we vacate the portion of the trial court's judgment rendering declaratory judgment in favor of Bob Karim & Associates, L.P., and we and render judgment that it take nothing. We overrule all remaining issues brought by appellant American First National Bank, and accordingly we affirm the remainder of the judgment.

Michael Massengale
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.

Justice Sharp, concurring without opinion.