Opinion issued October 2, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00787-CV

ISAAC S. ACHOBE, Appellant

V.

NORTH MISSION GLEN ESTATE HOMEOWNER ASSOCIATION, INC., Appellee

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On Appeal from the 240th District Court
Fort Bend County, Texas
Trial Court Case No. 16-DCV-236875

MEMORANDUM OPINION

Isaac S. Achobe owns a home in a deed-restricted community, which is governed by North Mission Glen Estate Homeowner Association, Inc. ("the HOA"). The HOA enforces various restrictive covenants, including a covenant that

requires lot owners to pay an annual maintenance assessment. The obligation to pay the annual maintenance assessment is secured by a lien on each lot.

The HOA sued Achobe to collect on past due assessments and related charges that had accrued over a several-year period and to foreclose on its lien on Achobe's home. After Achobe answered, the HOA filed a traditional motion for summary judgment. Achobe did not file a response, but he did appear at the hearing pro se. Achobe requested, and the trial court granted, a continuance so Achobe could retain counsel and file a response to the HOA's motion. Achobe did neither, and the trial court granted the HOA's motion at a subsequent hearing.

On appeal, Achobe contends that the trial court erred in granting the HOA's motion, raising arguments and seeking relief that he did not raise or seek in the trial court. We affirm.

Background

Achobe has a duty to pay the HOA annual assessments

In 1999, Achobe purchased a lot in Mission Glen Estates, a subdivision in Fort Bend County. The deed specified that the conveyance was "made subject to all and singular the restrictions, covenants, easements, exceptions, and reservations, if any, applicable to, and enforceable against, the property, as shown by the records of the County." In the early 1990s, before Achobe purchased the lot, a "Declaration of Covenants, Conditions and Restrictions" applicable to Mission

Glen Estates was filed with the Fort Bend County Clerk. Under the Declaration, all property located in the subdivision is subject to a covenant to pay annual assessments to the HOA. The obligation to pay is secured by a "continuing lien" on the property. Achobe admits that the HOA is "empowered" by the Declaration to collect the annual assessments and that payment is secured by a lien on his property.

In 2013, the HOA sues Achobe for past due assessments

In 2013, the HOA filed suit against Achobe to collect on past due assessments and related charges. The HOA obtained a judgment for money damages, which Achobe paid in full. Achobe mentions this payment throughout his appellate brief, though it is unrelated to the present suit.

In 2016, the HOA sues Achobe for additional past due assessments

After the 2013 judgment, additional assessments and related charges accrued on Achobe's account. These assessments and charges are the subject of this lawsuit.

Throughout 2016, the HOA wrote to Achobe on numerous occasions in an effort to collect on these assessments and charges. In the letters, the HOA informed Achobe of his past due balance, provided an itemized list of the accrued assessments and charges, and warned that it would file suit if Achobe failed to pay the charges.

At one point, Achobe tendered partial payment, which the HOA rejected and returned. The HOA explained in a letter to Achobe that "partial payments" would "not be accepted without a formal payment plan" and that if Achobe wanted to "enter into a payment plan" he should call the HOA to make the arrangements. There is no evidence that Achobe ever called the HOA or otherwise attempted to enter into a payment plan. The HOA received no other payments from Achobe for the assessments and charges that accrued after the 2013 judgment.

In November 2016, the HOA filed this suit to collect on the delinquent assessments and charges and to foreclose on its lien against Achobe's home to satisfy the debt. After Achobe filed an answer, the HOA served Achobe with requests for admissions. Achobe did not respond to the HOA's requests for admissions, and, as a result, the requests were deemed admitted. *See* TEX. R. CIV. P. 198.2(c).

The HOA moves for summary judgment, and Achobe fails to respond

In July 2017, the HOA filed a traditional motion for summary judgment. The HOA supported its motion with the affidavit of the HOA's managing agent and custodian of records, Shannon Nogradi. In the affidavit, Nogradi provided substantive testimony and authenticated four attached exhibits: (1) the Declaration, (2) the deed to Achobe's house, (3) the demand letters the HOA sent Achobe before filing suit, and (4) Achobe's deemed admissions.

The HOA set its motion for hearing on August 10, 2017. Achobe did not file a response. He did, however, appear at the hearing, where he requested additional time to file a response and retain counsel. The trial court granted Achobe's request and rescheduled the hearing for September 12, 2017.

Before the September 12 hearing, Achobe filed a request that the trial court continue the hearing for a second time, claiming that the initial continuance did not afford him enough time to prepare a response or retain counsel. The trial court did not rule on Achobe's request, and the hearing took place as scheduled.

Achobe did not appear. At the beginning of the hearing, the HOA advised the trial court that Achobe had arrived at the courthouse but left before the case was called. The bailiff called out for Achobe in the hallway three times, but Achobe did not respond or return to the courtroom.

The trial court granted the HOA's motion. The trial court entered a judgment for money damages and ordered that the lien on Achobe's property be foreclosed. Achobe did not file any subsequent motion explaining his absence from the hearing or asking the trial court to reconsider its summary-judgment ruling.

Achobe appeals.

Summary Judgment

We construe Achobe's brief as arguing that the trial court erred in granting summary judgment in the HOA's favor.

A. Standard of review

We review a trial court's ruling on a summary-judgment motion de novo. *Fondren Constr. Co. v. Briarcliff Hous. Dev. Assocs., Inc.*, 196 S.W.3d 210, 213 (Tex. App.—Houston [1st Dist.] 2006, no pet.). The movant for a traditional summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Fondren Constr. Co.*, 196 S.W.3d at 213. A plaintiff moving for a traditional summary judgment must conclusively establish all elements of its claims as a matter of law. *See* TEX. R. CIV. P. 166a(c); *MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986) (per curiam). If the movant can show it is entitled to judgment as a matter of law, the burden shifts to the non-movant to present evidence raising a fact issue to defeat the motion for summary judgment. *Fondren Constr. Co.*, 196 S.W.3d at 214. We view the evidence in the light most favorable to the non-movant, making all reasonable inferences and resolving all doubts in the non-movant's favor. *Id.* at 213.

B. Analysis

To prevail on its summary judgment motion, the HOA was required to prove as a matter of law: (1) the existence of a lien against Achobe's property securing payment of the assessments and related charges, (2) Achobe's failure to pay the debt secured by the lien, and (3) the HOA's entitlement to foreclosure on the lien

against Achobe's property to satisfy the debt. *Vill. Green Homeowners Ass'n, Inc. v. Leeder*, No. 04-10-00522-CV, 2011 WL 721260, at *2 (Tex. App.—San Antonio Mar. 2, 2011, no pet.) (mem. op.); *Sloan v. Owners Ass'n of Westfield, Inc.*, 167 S.W.3d 401, 403–04 (Tex. App.—San Antonio 2005, no pet.).

To meet its burden, the HOA supported its motion with Nogradi's affidavit. In it, Nogradi averred that Achobe's account with the HOA indicated that Achobe had "failed and refused . . . to pay annual maintenance assessments and related charges" that had accrued against his property. She further stated that the "total sum due and owing" on his account was $4,561, which represented all outstanding assessments and related charges, including penalties and interest, late fees, and collections costs.

Nogradi also authenticated four attached exhibits. The first was the Declaration, which showed that the lots in Mission Glen Estates were encumbered by various convents, including a covenant requiring the owners to pay annual HOA assessments, the payment of which was the personal obligation of each lot owner and was secured by a lien on the lot. The second was the deed to Achobe's property, which showed that his property was in Mission Glen Estates and purchased subject to the Declaration provisions. The third was the demand letters that the HOA had sent Achobe, which showed that the HOA attempted to settle Achobe's account without litigation and encouraged Achobe to enter into a

payment plan. And the fourth was the HOA's requests for admissions, which Achobe did not respond to and the trial court deemed admitted.

By failing to respond to the HOA's requests for admissions, Achobe was deemed to have admitted that: (1) he owns property governed by the Declaration, (2) the assessment account for the property reflected an unpaid balance of $4,382.69 when the HOA sued, (3) additional assessments and related charges accrued on the assessment account for the property after the HOA filed suit, (4) Achobe failed to make any payments on the assessment account for the property after the HOA filed suit, and (5) he was responsible for reimbursing the HOA for charges incurred through enforcement of the Declaration's restrictive covenants, including the HOA's efforts to collect unpaid assessments. *See* TEX. R. CIV. P. 198.2(c) (deemed admissions).

Nogradi's affidavit was "clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." TEX. R. CIV. P. 166a(c). The HOA's summary-judgment evidence conclusively established all the elements of its claim. *See Leeder*, 2011 WL 721260, at *2; *Sloan*, 167 S.W.3d at 403–04. Achobe did not respond to the HOA's summary-judgment motion and thus failed to present evidence controverting the HOA's evidence.

On appeal, Achobe does not explain why he did not respond to the HOA's motion. He argues that the HOA is a taxing entity subject to various provisions of the Tax Code and Property Code, and he asks that we award him $4,140 in damages. Because Achobe did not raise his taxing-entity argument in the trial court or seek any affirmative relief, these issues have been waived. *See Unifund CCR Partners v. Weaver*, 262 S.W.3d 796, 797–98 (Tex. 2008) (per curiam).

We hold that the trial court did not err in granting summary judgment. "We recognize the harshness of the remedy of foreclosure, particularly when such a small sum is compared with the immeasurable value of a homestead." *Inwood N. Homeowners' Ass'n, Inc. v. Harris*, 736 S.W.2d 632, 637 (Tex. 1987). But "we are bound to enforce the agreements into which [Achobe] entered concerning the payment of assessments." *Id.* We overrule Achobe's sole issue.

Conclusion

We affirm the trial court's judgment.

Harvey Brown
Justice

Panel consists of Chief Justice Radack and Justices Brown and Caughey.