

Reversed and Rendered and Memorandum Opinion filed November 9, 2010



In The

Fourteenth Court of Appeals

NO. 14-09-00503-CV

GONZALEZ FINANCIAL HOLDINGS, INC., Appellant

V.

**WILLIE MOORE, THELMA MOORE, AND UNITY NATIONAL BANK,
Appellees**

**On Appeal from the County Civil Court at Law No. 1
Harris County, Texas
Trial Court Cause No. 917,152**

MEMORANDUM OPINION

This is an appeal from a judgment following a bench trial in a breach-of-contract case. The main issue is the lender's obligations under a contract between the lender and homeowners whose home was subject to imminent foreclosure for non-payment of taxes. Shortly before the scheduled foreclosure, the lender agreed to pay off the homeowners' delinquent taxes in exchange for a tax lien on the homeowners' property. The trial court determined that the lender breached its obligation under this contract to prevent the foreclosure by waiting to deliver the funds until the morning of the foreclosure sale. Concluding that this contract did not impose such an obligation on the lender, we reverse

the trial court's judgment in favor of the homeowners and render a take-nothing judgment in favor of the lender.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant/third-party defendant Gonzalez Financial Holdings, Inc. contacted appellees/third-party plaintiffs Willie Moore and Thelma Moore about the delinquent taxes they owed on their home. Clear Creek Independent School District ("Clear Creek ISD"), one of the taxing authorities, had scheduled the Moores' home for a sheriff's sale the following month. Gonzalez Financial, along with other lenders, offered to contract with the Moores to pay off the delinquent taxes to stop the foreclosure. The Moores selected Gonzalez Financial because it offered a lower interest rate than the other lenders. Over the next few days, the Moores provided Gonzalez Financial with the information and documentation Gonzalez Financial needed to proceed with the transaction.

At the September 26, 2006 closing, the Moores signed a promissory note to Gonzalez Financial for \$24,618.06 to be repaid in monthly installments and bearing a fourteen percent interest rate. The Moores also signed a "Deed of Trust-Tax Lien" to secure repayment of the note. This instrument provides that Gonzalez Financial agrees "to pay all delinquent taxes and other amounts owed related to the ad valorem taxes" on the Moores' home. No date by which these taxes are to be paid is included in the contract, nor is there any language indicating that time is of the essence in performing the contract. The Moores also signed a "Notice of Right to Cancel," which provides federally mandated notification that the Moores had three days to cancel the transaction. The Moores could have waived the right of rescission, but did not do so. The parties agree that federal law prevented Gonzalez Financial from delivering the required funds to the tax collection agencies until after midnight on Friday, September 29, 2006, the Friday before the foreclosure scheduled for Tuesday, October 3, 2006.

Gonzalez Financial was instructed to deliver the funds to Perdue Brandon Fielder & Mott, the law firm representing Clear Creek ISD. On Monday, October 2, 2006,

Gonzalez Financial sent the funds via overnight delivery; the funds arrived at Perdue Brandon Fielder & Mott's office on Tuesday, October 3, at 7:00 a.m, three hours before the scheduled foreclosure. Nonetheless, the foreclosure sale proceeded at 10:00 a.m., and the Moores' home was sold.

The Moores asserted claims against Gonzalez Financial for negligent breach of contract and negligent infliction of emotional distress.¹ Gonzalez Financial responded with a summary-judgment motion, asserting that these claims do not exist under Texas law. The trial court granted Gonzalez Financial's motion, but gave the Moores seven days in which to re-plead their claim as a breach of contract. The Moores filed an amended petition, in which they alleged that Gonzalez Financial had a contractual obligation to pay the delinquent taxes on the Moores' homestead in a timely manner to stop the tax foreclosure sale. The Moores alleged that Gonzalez Financial was given specific directions on how the foreclosure was to be stopped. The Moores claimed that Gonzalez Financial breached its contract by waiting "for the day of foreclosure to pay the delinquent taxes."

According to his testimony at trial, Willie Moore thinks that Gonzalez Financial breached its contract by not timely paying the taxes so as to prevent the foreclosure sale. Moore testified that he realized that the sale was scheduled for October 3, 2006, and that Gonzalez Financial could not have paid the taxes until Saturday, September 30, 2006, at

¹ This suit began in the trial court when appellee/plaintiff Unity National Bank sued the Moores. The Moores counterclaimed against Unity and filed third-party claims against Gonzalez Financial. The trial court granted Unity's motion for summary judgment in an order that was not a final judgment because the trial court failed to (1) actually dispose of all claims and parties before the court or (2) state with unmistakable clarity that the judgment was a final judgment. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 192, 200 (Tex. 2001). There is no indication in our record that the partial summary judgment in favor of Unity was ever severed. The trial court proceeded to conduct a bench trial in this case and rendered a judgment on March 2, 2009. In this judgment following a trial on the merits, the trial court granted judgment in the Moores' favor on their third-party claims and stated that all relief not expressly granted in the judgment was denied. Therefore, this judgment was a final judgment, and this court has appellate jurisdiction over Gonzalez Financial's appeal. *See id.* at 204; *Memphis, Inc. v. Cogswell*, No. 05-02-01876-CV, 2005 WL 1774973, at *2 (Tex. App.—Dallas July 28, 2005, pet. denied) (mem. op.).

the earliest. But, Moore testified that Gonzalez Financial breached its contract by not tendering the funds to pay the taxes on Monday, October 2, 2006.

The parties stipulated to attorney's fees, and the trial court signed a final judgment in favor of the Moores, awarding them \$16,000 in damages and \$5,500 in attorney's fees and all costs of court. Gonzalez Financial filed a motion for new trial, which was overruled. The trial court also issued findings of fact and conclusions of law.

II. ISSUES AND ANALYSIS

Gonzalez Financial raises five issues on appeal. We address only its second and fifth issues, as these issues are dispositive of this appeal.

A. Did the trial court err in finding that the lender breached the contract?

In its second issue, Gonzalez Financial asserts that the trial court erred in finding that Gonzalez Financial breached its contract with the Moores (hereinafter "Contract") because the evidence establishes that it tendered full performance of its obligations under the Contract. We agree.

In construing the language of the parties' agreement, our primary concern is to ascertain and give effect to the intentions of the parties as expressed in their written contract. *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 464 (Tex. 1998). Terms in a contract are given their plain, ordinary, and generally accepted meanings unless the contract itself shows the terms are to be used in a technical or different sense. *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). When a written contract is worded so that it can be given a certain or definite legal meaning or interpretation, it is unambiguous, and the court construes it as a matter of law. *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003). Neither side contends that the agreement is ambiguous, and we conclude it is unambiguous. The interpretation of an unambiguous contract is a question of law that we review de novo. *See MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 650–51 (Tex. 1999).

As is relevant to this issue, the trial court made the following findings of fact:

6. [Gonzalez Financial] initially contacted the [Moore]s on September 8, 2006, explaining to them that [Gonzalez Financial] could pay their delinquent taxes and stop their foreclosure.
7. [The Moore]s provided all necessary information and documents in the next couple of days. [Gonzalez Financial] set the closing date for September 26, 2006.
- ...
10. This late closing date was questioned by [the Moore]s, but they were assured by [Gonzalez Financial] that they could close the loan and pay all fees before the actual foreclosure.
11. The loan was closed on September 26, 2006, at [Gonzalez Financial's] Houston office . . .
- ...
16. Pursuant to 12 C.F.R. 226.15(c), [Gonzalez Financial] was prohibited by Federal law from disbursing any funds from the loan until the expiration of [a] three day right to rescind [which the trial court found expired at midnight on Friday, September 29, 2006.].
17. [Gonzalez Financial's] offices are located in San Antonio and [Gonzalez Financial] had to mail the funds to Perdue Brandon Fielder & Mott, the attorneys representing Clear Creek [I]ndependent School District.
18. [Gonzalez Financial] could have sent the funds by overnight express on Saturday for delivery on Monday, so that the funds would arrive the day before foreclosure.
19. [Gonzalez Financial] waited until Monday before the Tuesday foreclosure to overnight the funds.
20. The [Contract] did not give a specific date that the money was supposed to be tendered to Clear Creek Independent School District.

21. Gonzalez Financial was instructed to send the funds under the contract to Purdue Brandon Fielder & Mott, the attorneys representing Clear Creek Independent School District.
22. Gonzalez Financial tendered the funds required under the [Contract].
23. The funds tendered by Gonzalez Financial arrived at the offices of Perdue Brand [sic] at approximately 7:00 a.m. on Tuesday October 3, 2006[,] three hours before the foreclosure sale was to begin.

The trial court made the following legal conclusions:

1. [Gonzalez Financial] breached the [Contract].
2. When [Gonzalez Financial] agreed to disburse funds to the taxing entities, [it] had an obligation to make sure that the foreclosure was prevented and that all entities received their funds in a timely manner.
3. Gonzalez Financial breached its duty by mailing overnight the funds the day before the foreclosure.

We review a trial court's conclusions of law de novo. *See BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). The trial court found that Gonzalez Financial breached an alleged contractual obligation to make sure that the foreclosure was prevented and that all entities received their funds in a timely manner. We conclude that, under the unambiguous language of the Contract, Gonzalez Financial had no such contractual obligation.

Under the Contract, Gonzalez Financial was required to pay all delinquent taxes; however, the Contract contains no obligation to "make sure that the foreclosure was prevented." The trial court correctly found that Gonzalez Financial tendered payment of all delinquent taxes; however, the trial court concluded that this tender was untimely and could have been made one day earlier. Under the Contract, Gonzalez Financial was required to pay the delinquent taxes before the foreclosure sale took place; however, the

parties did not state any time or date by which Gonzalez Financial was required to tender the funds, nor did the parties agree that time was of the essence. Therefore, we conclude that, under the unambiguous language of the Contract, Gonzalez Financial did not agree to “make sure that the foreclosure was prevented” or to pay the taxes in a way that would avoid the foreclosure sale. Although the funds arrived only three hours before the foreclosure, the funds were received by the party to whom they were required to be delivered three hours before the scheduled sale. We conclude that, as a matter of law, Gonzalez Financial did not breach the Contract, and we sustain Gonzalez Financial’s second issue.

Having concluded that Gonzalez Financial did not breach the Contract, we need not consider the other issues related to the Contract. We thus turn to Gonzalez Financial’s claim that it is entitled to attorney’s fees because it filed a counterclaim under the Texas Declaratory Judgments Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.001, *et seq.* (West 2008).

B. Does the lender’s counterclaim for a declaratory judgment require the trial court to award it attorney’s fees?

Under its fifth issue, Gonzalez Financial argues that its counterclaim for a declaratory judgment mandated an award of attorney’s fees. Gonzalez Financial states in its appellate brief that it “is not seeking damages under the contract. Gonzalez Financial is seeking a declaration that it fully performed under the contract, and that no breach of the contract between Gonzalez Financial and the Moores occurred.” Gonzalez Financial asserts that the trial court erred by failing to grant declaratory relief in its favor and award Gonzalez Financial its attorney’s fees under the Declaratory Judgments Act. But, as discussed above, the Moores sued Gonzalez Financial for breach of contract. Thus, Gonzalez Financial’s counterclaim for declaratory relief sought a declaration that Gonzalez Financial did not breach the Contract, as alleged in the Moores’ claims against Gonzalez Financial. No applicable statute allows Gonzalez Financial to recover its

attorney's fees for successfully defending against the Moores' contract claims, and in this circumstance, the Declaratory Judgments Act cannot be used as a basis for Gonzalez Financial to recover attorney's fees. *See MBM Fin. Corp. v. The Woodlands Operating Co.*, 292 S.W.3d 660, 667–71 (Tex. 2009). Thus, Gonzalez Financial is not entitled to attorney's fees under the Declaratory Judgment Act. Accordingly, we overrule Gonzalez Financial's fifth issue.

III. CONCLUSION

The evidence establishes as a matter of law that Gonzalez Financial did not breach its contract with the Moores. But Gonzalez Financial is not entitled to attorney's fees under the Declaratory Judgment Act. Having reached all the issues necessary to the disposition of this appeal, we reverse the trial court's judgment in favor of the Moores, and we render a take-nothing judgment against the Moores.

/s/ Kem Thompson Frost
 Justice

Panel consists of Justices Anderson, Frost, and Seymore.