Reversed and Remanded and Memorandum Opinion filed December 20, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-01076-CV

BARNEY A. GONZALEZ, Appellant

V.

GREEN TREE SERVICING, LLC, Appellee

On Appeal from the 11th District Court
Harris County, Texas
Trial Court Cause No. 2014-39847

M E M O R A N D U M   O P I N I O N

Appellant Barney Gonzalez appeals a summary judgment of judicial foreclosure on a lien created by a deed of trust securing a home equity note. We hold that the Texas Supreme Court's post-summary-judgment decision in *Wood v. HSBC Bank USA, N.A.*, No. 14-0714, 2016 WL 2993923 (Tex. May 20, 2016), governs, and Gonzalez raised a genuine issue of material fact regarding his defense that certain closing fees exceeded the cap permitted by the Texas Constitution, therefore preventing foreclosure on his homestead. We reverse and remand.

I. BACKGROUND

Green Tree Servicing, LLC, filed suit against Gonzalez, seeking judicial foreclosure. Green Tree alleged that it was the mortgagee of a 2007 loan agreement evidenced by a note and deed of trust executed by Gonzalez for the subject property. Green Tree alleged Gonzalez's default. Gonzalez generally denied the allegations and alleged, without elaboration, "affirmative defenses plead under Tex. Const. Art. XVI § 50(a)(6)." Green Tree moved for a traditional summary judgment supported by, among other things, (1) the home equity note, (2) the deed of trust, (3) assignment documents, and (4) an affidavit from Green Tree's foreclosure supervisor.

Gonzalez responded to the motion. Gonzalez did not offer evidence to contest the loan default. Instead, he defensively urged that Green Tree "failed to satisfy conditions precedent to foreclosure—it failed to cure its violation of § 50(a)(6)(E) of the Texas Constitution and as required by the security agreement." Specifically, relying upon the HUD Settlement Statement, Gonzalez alleged that the lender's charge of closing fees on the 2007 transaction exceeded the 3% cap permitted by Article XVI, Section 50(a)(6)(E), of the Texas Constitution. *See* Tex. Const. art. XVI § 50(a)(6)(E).[1] He also attached a "notice of request to cure" letter

[1] In relevant part, the Texas Constitution provides:

> (a) The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for:
>
> . . . .
>
> (6) an extension of credit that:
>
> . . . .
>
> (E) does not require the owner or the owner's spouse to pay, in addition to any interest, fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, three percent of the original principal amount of the extension of credit; . . . .

from Gonzalez's attorney to the lender detailing the violation: "Fees and charges to make the loan may not exceed 3 percent of the loan amount. Tex. Const. art. XVI, § 50(a)(6)(E). Fees on the loan should not have exceeded $2,136.00 but fees actually charged equaled or exceed $4,932.69."[2] The letter was dated more than four years after the extension of credit, but Gonzalez argued that no statute of limitations applied to his defense.

Green Tree filed a reply, arguing that Gonzalez was barred from asserting a § 50(a)(6)(E) defense. Specifically, Green Tree argued that to be successful in proving his defense, Gonzalez "would necessarily have to show that Plaintiff's lien was invalid," but that Gonzalez could not prove his affirmative defense because a defective home equity loan becomes "valid as a matter of law when the four year statute of limitations expire[s]." Green Tree argued that this court's decision in *Wood v. HSBC Bank, USA*, 439 S.W.3d 585 (Tex. App.—Houston [14th Dist.] 2014, pet. granted), was controlling precedent, which the trial court was required to follow. Green Tree summarized the *Wood* holding: "In that case the Court found

---

> (c) No mortgage, trust deed, or other lien on the homestead shall ever be valid unless it secures a debt described by this section . . . .

Tex. Const. art. XVI, § 50(a)(6)(E).

[2] The Texas Constitution also requires, for homestead liens to be valid, that the extension of credit be made on the condition that the lender forfeit principal and interest unless the lender cures a default under the contract:

> (x) . . . the lender or any holder of the note for the extension of credit shall forfeit all principal and interest of the extension of credit if the lender or holder fails to comply with the lender's or holder's obligations under the extension of credit and fails to correct the failure to comply not later than the 60th day after the date the lender or holder is notified by the borrower of the lender's failure to comply by:
>
> > (a) paying to the owner an amount equal to any overcharge paid by the owner under or related to the extension of credit if the owner has paid an amount that exceeds an amount stated in the applicable Paragraph (E), (G), or (O) of this subdivision[.]

Tex. Const. art. XVI, § 50(a)(6)(Q).

that Texas home equity loans that are found to be non-compliant, as Defendant herein asserts, are voidable, not void from the inception."

The trial court granted the summary judgment and signed a judicial foreclosure judgment. After Gonzalez appealed, the Supreme Court of Texas reversed *Wood* and held that "liens securing constitutionally noncompliant home-equity loans are invalid until cured and thus not subject to any statute of limitations." *Wood v. HSBC Bank USA, N.A.*, No. 14-0714, 2016 WL 2993923, at *1 (Tex. May 20, 2016).

II. Analysis

In his first issue, Gonzalez contends his defense against the foreclosure is not barred by the statute of limitations. In his second issue, Gonzalez contends the trial court erred by granting summary judgment because Green Tree failed to show compliance with § 50(a)(6)(E).

Green Tree responds that (1) "due to the prevailing law at the time the trial court did not err" because Gonzalez "was absolutely barred from raising any issues regarding the constitutional validity of his loan" based on a four-year statute of limitations; (2) Gonzalez "was absolutely barred from raising any issues regarding the constitutional validity of his loan with the trial court on the basis his claim was barred by res judicata"; (3) Gonzalez failed to plead his affirmative defense; (4) the appeal is moot because Green Tree has cured the alleged violation by tendering a check to Gonzalez "in the amount of $778.69, which is the amount of the alleged overcharges, plus interest"; and (5) Gonzalez failed to prove that the lien exceeded the 3% limit.

Initially, we address Gonzalez's first issue and Green Tree's first responsive argument and determine that our decision in *Wood*, reversed by the Texas Supreme

Court, no longer provides an authoritative obstacle to Gonzalez's defense. Then, we address Green Tree's alternative reasons Gonzalez's defense is barred as presented in its second through fourth responsive arguments. Finally, we address Gonzalez's second issue and Green Tree's fifth argument.

A. Statute of Limitations and Change in the Law

"When the applicable law changes during the pendency of the appeal, the court of appeals must render its decision in light of the change in the law." *Blair v. Fletcher*, 849 S.W.2d 344, 345 (Tex. 1993).[3] Green Tree relied on this court's opinion in *Wood* and the authorities cited therein when arguing to the trial court that a statute of limitations applied to Gonzalez's defense. The Texas Supreme Court reversed *Wood* on the germane issue, holding that no statute of limitations applies to an invalid, noncompliant home equity lien—in particular, a lien that violates the cap on closing fees. *See* 2016 WL 2993923, at *1.

Thus, to the extent the trial court rejected Gonzalez's defense based on Green Tree's statute of limitations argument, we may not affirm the summary judgment on this basis. Gonzalez's first issue is sustained.

B. Res Judicata

An appellee's brief must contain "a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." Tex. R. App. P. 38.1(i); *see also* Tex. R. App. P. 38.2(a)(1). Other than a bare assertion of res judicata, Green Tree's brief does not comply with the briefing rule for this

[3] This rule does not override a party's obligation to expressly raise issues on summary judgment. *See Baty v. ProTech Ins. Agency*, 63 S.W.3d 841, 863 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). Green Tree does not contend that Gonzalez failed to raise this issue in response to the summary judgment motion. Indeed, Gonzalez argued that the statute of limitations did not apply to his defensive issue, and citing this court's *Wood* opinion, Gonzalez noted that the "Texas Supreme Court granted a similarly-situated homeowner's petition of review on this issue." Thus, Gonzalez sufficiently raised this issue in the trial court.

issue. Green Tree cites no authorities relevant to res judicata and does not make a clear and concise argument for the contention. Because Green Tree has inadequately briefed this issue, we need not consider it. *See Bruce v. Cauthen,* No. 14-15-00693-CV, — S.W.3d —, 2016 WL 6238403, at *7 (Tex. App.—Houston [14th Dist.] Oct. 25, 2016, no pet. h.) (refusing to consider issue because "appellate briefing requirements are not satisfied by merely uttering brief, conclusory statements unsupported by legal citations or substantive analysis).

C. Pleading Affirmative Defense

Green Tree's argument concerning Gonzalez's failure to plead an affirmative defense is: "Appellant failed to plead much less prove that the lien exceeded the 3% limit." Green Tree cites no authority. Because Green Tree has inadequately briefed this issue, we need not consider it. *See Bruce*, 2016 WL 6238403, at *7; *see also* Tex. R. App. P. 38.1(i); Tex. R. App. P. 38.2(a)(1).

D. Mootness by Cure

Green Tree contends this appeal is moot because Green Tree has cured the alleged violation by tendering a check to Gonzalez in the amount of the alleged overcharge, plus interest.[4] Green Tree cites no authority for this argument. Because Green has inadequately briefed this issue, we need not consider it. *See Bruce*, 2016 WL 6238403, at *7; *see also* Tex. R. App. P. 38.1(i); Tex. R. App. P. 38.2(a)(1).

Furthermore, the appeal is not moot. "If a controversy ceases to exist—the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome—the case becomes moot." *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001) (quotation omitted). Gonzalez contends that Green Tree may not

[4] In support of this argument, Green Tree has provided this court with documents that do not appear in the Clerk's Record.

foreclose because the lender failed to cure within 60 days, as required by the Texas Constitution. *See Wood*, 2016 WL 2993923, at *5 (describing the cure provisions as "the sole mechanism to bring a loan into constitutional compliance . . . thereby validating the accompanying lien," reasoning that a "lien that was invalid from origination remains invalid until it is cured," and noting that "a lender has 60 days to cure after notice"). Gonzalez has never conceded that Green Tree's curing after 60 days would enable Green Tree to foreclose.

So, assuming without deciding that we may consider Green Tree's documents not contained in the Clerk's Record for an issue that Green Tree did not raise in the trial court in the motion for summary judgment or reply, we hold that the controversy is still live.

E. Genuine Issue of Material Fact on § 50(a)(6)(E) Defense

We assume without deciding that Gonzalez bears the burden to raise a genuine issue of material fact on whether the loan complied with § 50(a)(6)(E). *See Sturm v. Muens*, 224 S.W.3d 758, 761 (Tex. App.—Houston [14th Dist.] 2007, no pet.) ("To avoid summary judgment by asserting an affirmative defense to the claim for which summary judgment is sought, a nonmovant must adduce evidence raising a fact issue on each element of the defense."). We review the evidence in the light most favorable to Gonzalez, as the nonmovant, crediting evidence favorable to Gonzalez if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *See Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009).

It is undisputed that the loan amount was $72,200 and that 3% of the loan amount is $2,136. Gonzalez's "notice of request to cure" letter states that the relevant closing fees exceeded $2,136 because the fees equaled or exceeded $4,932.69. On appeal, Green Tree attacks the $4,932.69 number, claiming that

$2,259.66 of the $4,932.69 alleged overcharge should not be included because it is a tax payable to Harris County. *See* 7 Tex. Admin. Code § 153.5(14) (Tex. Dep't of Banking, Three Percent Fee Limitation) (excluding items paid in escrow such as taxes). The remainder of $2,637.03, however, would still exceed 3% of the loan amount. Thus, Gonzalez adduced some evidence that the applicable closing fees for the loan exceeded 3% of the loan amount in violation of § 50(a)(6)(E) and that Gonzalez notified the lender of this deficiency.[5]

Gonzalez's second issue is sustained.

III. Conclusion

We sustain Gonzalez's issues, reverse the trial court's judgment, and remand for proceedings consistent with this opinion.

/s/ Sharon McCally
Justice

Panel consists of Justices Jamison, McCally, and Wise.

[5] Green Tree has never argued that Gonzalez failed to raise a fact issue on whether Green Tree cured within 60 days, and there is no evidence that Green Tree cured. *See* 7 Tex. Admin. Code § 153.94 (Tex. Dep't of Banking, Methods of Curing a Violation Under Section 50(a)(6)(Q)(x)(a)-(e)) (describing how a lender or holder may correct a failure to comply by paying funds; "The lender or holder has the burden of proving compliance with this section."); *see also Wells Fargo Bank, N.A. v. Leath*, 425 S.W.3d 525, 533 n.3 (Tex. App.—Dallas 2014, pet. denied) (expressing "no opinion on whether the borrower or lender has the burden of proof to show the lender failed to cure the violation upon being notified").