Affirmed and Opinion filed November 21, 2023.

In The

Fourteenth Court of Appeals

NO. 14-22-00935-CV

ROCK CREEK CAPITAL, LLC, Appellant

V.

EVAN R. STEWART AND HERMAN R. STEWART, Appellees

On Appeal from the County Civil Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 1182469

O P I N I O N

Appellant Rock Creek Capital, LLC appeals a take-nothing judgment on its claims against appellees Evan R. Stewart and Herman R. Stewart for breach of two student loan promissory notes acquired by Rock Creek from Sallie Mae Bank. In two issues, Rock Creek contends it is the holder of the promissory notes, and for that reason, it is entitled to enforce them. For the reasons explained below, we affirm the trial court's judgment.

Background

In its original petition, Rock Creek alleged that the Stewarts failed to make installment payments on two student loan notes. The Stewarts asserted in verified denials that Rock Creek lacked the legal capacity to sue, that the indorsement or assignment of the notes was not genuine, and that proof of loss was not provided as Rock Creek alleged.

The case proceeded to a bench trial. The court admitted into evidence various Rock Creek business records, which included the following facts.

In August 2015 and July 2016, Evan Stewart applied for and received $15,000 and $13,850, respectively, in Sallie Mae student loans. Evan's father, Herman Stewart, co-signed both loan applications.[1] According to the most recent Sallie Mae loan statement included in the record, the outstanding collective loan balance was $44,735.63 as of October 20, 2020. Also included in the record are copies of two "Smart Option Student Loan" promissory notes by which Evan and Herman promised to repay the loans plus interest.

In November 11, 2020 letters addressed to Evan and Herman, Sallie Mae notified them that the balances of both loans had been "charged-off" and that any future payments that were scheduled prior to the charge-off had been canceled. Before the charge-offs occurred, Sallie Mae, Rock Creek, and others executed a "Charged-Off Educational Loan Portfolio Purchase and Sale Agreement" (the "Loan PSA") dated May 27, 2020, by which Sallie Mae sold certain loans to Rock Creek. Rock Creek contends that the acquired loans included Evan's two student loans. The

[1] The applications purport to bear the electronic signatures of Evan and Herman. At trial, Evan denied that he ever saw the loan applications, explaining that his father handled his finances. Given our disposition, we do not reach this contention but assume that Evan signed the applications. Herman did not testify and there is no evidence disputing that Herman electronically signed the applications as a parent co-signer.

Loan PSA became effective on May 13, 2021. Nine days later, on May 22, 2021, Sallie Mae mailed letters to Evan and Herman notifying them that both loans had been sold to Rock Creek and that it was important that they contact Rock Creek to make payment arrangements going forward. According to those letters, the collective loan balance as of April 30, 2021 was $46,908.54.

Included in the trial exhibits is a copy of a "Bill of Sale and Assignment" (the "Bill of Sale") documenting the existence of the Loan PSA and conveying to Rock Creek all interest in certain trusts and accounts identified in an attached account schedule.[2] The account schedule lists the balances of Sallie Mae and SMB Trust accounts together with a largely redacted spreadsheet, which purports to list outstanding loans by account number, loan number, loan balance, and borrower social security number. Only one line of the spreadsheet was not redacted, and the account number and other information referenced on that line does not match either of the Sallie Mae loans at issue.

Rock Creek also presented the oral testimony of Chad Welch, its managing member and president. Relying on the electronic signatures appearing on the loan applications, Welch testified that the Stewarts were borrowers on the two student loan notes. Welch did not testify about the process for obtaining electronic signatures. According to Welch, Rock Creek was the owner of the two notes based on the Bill of Sale. On cross-examination, however, Welch acknowledged that he could not identify which of the SMB Trusts listed on the Bill of Sale included the balance owed on the Stewarts' promissory notes. Referring to the redacted spreadsheet attached to the Bill of Sale, Welch stated, "I do not believe that the highlighted account number does connect to the client. . . . It would be in there. It

[2] The Bill of Sale lists fifteen "SMB Private Education Loan Grantor Trust" accounts (the "SMB Trusts").

is just redacted." On re-direct, Welch stated that Rock Creek buys defaulted student loans from Sallie Mae, which provides electronic copies of the original notes. He said that despite being in electronic format, the notes transferred to Rock Creek are the original notes to the "best of his knowledge." Further, he testified that "the account" was sold to Rock Creek and, to the best of his knowledge, Rock Creek is the holder of the note.

Rock Creek called one other witness, Evan. He testified that he did not recall receiving student loans from Sallie Mae, nor had he seen the promissory notes or applications before. He stated that he attended college on scholarship and relied on his father to handle his college finances. Evan did not identify his father by name.

After the parties rested and closed, the trial court orally ruled in favor of the Stewarts. The trial court later signed a take-nothing judgment in their favor and signed findings of fact and conclusions of law. In its findings and conclusions, the trial court found:

1. Rock Creek Capital, LLC's account schedule failed to prove that Sallie Mae Bank or any of the SMB Private Education Loan Grantor Trusts owned any debt of Defendants Evan R. Stewart and Herman R. Stewart.
2. Rock Creek Capital, LLC failed to prove that the promissory notes were acquired by Rock Creek Capital, LLC as a part of the Bill of Sale and Assignment.
3. Rock Creek Capital, LLC failed to prove that it owned any debt of Defendants Evan R. Stewart of Herman R. Stewart.

Based on these findings, the trial court concluded that Rock Creek "failed to meet its burden of proof on its claim for breach of contract/promissory note and account stated."

Rock Creek timely appealed.

Analysis

Rock Creek contends that trial court erred because Rock Creek conclusively proved that it is the holder of the promissory notes and may enforce them.

A. Standard of Review

In an appeal from a bench trial, the trial court's findings of fact have the same force and dignity as a jury verdict. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991). We review the trial court's findings using the same standards of review applicable to a jury verdict. *See MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 663 n.3 (Tex. 2009).

As the plaintiff, Rock Creek bore the burden of proof on its claim to enforce the promissory notes. *See Leavings v. Mills*, 175 S.W.3d 301, 309 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (identifying required elements). When a party challenges the legal sufficiency of the evidence to support an adverse finding on an issue for which it had the burden of proof, that party must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam). In reviewing such a matter-of-law challenge, we employ a two-part test. We first examine the record for evidence that supports the finding, while ignoring all evidence to the contrary. *Id*. If there is no evidence to support the finding, we then examine the entire record to determine if the contrary proposition is established as a matter of law. *Id*. The issue should be sustained only if the contrary proposition is conclusively established. *Id*.

We consider the evidence in the light most favorable to the challenged finding and indulge every reasonable inference that would support it. *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). We credit favorable evidence if a

reasonable factfinder could and disregard contrary evidence unless a reasonable factfinder could not. *See id.* at 827. Our task is to determine whether the evidence at trial would enable reasonable and fair-minded people to find the facts at issue. *See id.* As long as the evidence at trial "would enable reasonable and fair-minded people to differ in their conclusions," we will not substitute our judgment for that of the factfinder. *See id.* The factfinder is the only judge of witness credibility and the weight afforded to testimony. *See id.*

B. Application

A party seeking to enforce a note must prove (1) that a certain note is in question, (2) that the defendant signed the note, (3) that the plaintiff is the owner or holder of the note, and (4) that a certain balance is due and owing on the note. *Leavings*, 175 S.W.3d at 309; *see Jernigan v. Bank One, Tex., N.A.*, 803 S.W.2d 774, 775 (Tex. App.—Houston [14th Dist.] 1991, no writ) (proof of owner or holder status required). The dispositive issue is whether Rock Creek proved as a matter of law that it is the holder of the promissory notes. A holder is "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession."[3] Tex. Bus. & Com. Code § 1.201(21); *Leavings*, 175 S.W.3d at 309; *see Jernigan*, 803 S.W.2d at 776. When an instrument is payable to an identifiable person, the "holder" is the person in possession if he is the identified person. *Leavings*, 175 S.W.3d at 309. A holder of an instrument is a "[p]erson entitled to enforce" an instrument. *Id.*

The trial court implicitly determined that Rock Creek is not the holder of the promissory notes because it found that Rock Creek failed to prove that it acquired the notes as part of the Bill of Sale. Under the applicable standard of review, we

[3] In this appeal, we presume without deciding that the promissory notes are negotiable instruments.

examine the record for evidence that supports the finding, while ignoring all evidence to the contrary. *Dow Chem. Co.*, 46 S.W.3d at 241.

It is undisputed that the promissory notes, when issued, were payable to Sallie Mae. Therefore, considering the face of the notes, Rock Creek does not qualify as a holder because it is not a person or entity identified in the notes as a payee. Tex. Bus. & Com. Code § 1.201(21).

According to Rock Creek, it became the holder of the notes through negotiation. A person to whom an instrument is not payable can become a holder by negotiation. *Id.* § 3.201, cmt. 1; *Leavings*, 175 S.W.3d at 309. Negotiation is the "transfer of possession of an instrument . . . by a person other than the issuer to a person who thereby becomes its holder." Tex. Bus. & Com. Code § 3.201(a); *Leavings*, 175 S.W.3d at 309; *see Jernigan*, 803 S.W.2d at 776. "[I]f an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder." Tex. Bus. & Com. Code § 3.201(b); *Jernigan*, 803 S.W.2d at 776. The indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed to it as to become part of it. *Leavings*, 175 S.W.3d at 309; *Jernigan*, 803 S.W.2d at 776.

To prove that it acquired the notes by negotiation, Rock Creek had to prove possession of the notes and an indorsement by Sallie Mae. The notes in the record contain no indorsement written by or on behalf of Sallie Mae nor is there any paper or attachment so firmly affixed to them as to become a part of the instruments. *See Leavings*, 175 S.W.3d at 309; *Jernigan*, 803 S.W.2d at 776.

If an instrument not in the possession of the original holder lacks a written indorsement, a person in possession can still prove holder status and enforce the instrument if he proves the chain of title by which he acquired the instrument. *See Leavings*, 175 S.W.3d at 309; *Jernigan*, 803 S.W.2d at 776-77. The transfer may be

proven by documents or oral testimony. *Santos v. Yellowfin Servicing Corp.*, No. 14-21-00151-CV, 2022 WL 2678846, at *4 (Tex. App.—Houston [14th Dist.] July 12, 2022, pet. filed) (mem. op.); *Leavings*, 175 S.W.3d at 312.

Applying the standard of review, we conclude there is some evidence supporting the trial court's finding that Rock Creek is not a holder. The Bill of Sale and its attachments on which Rock Creek relies do not identify the two notes at issue as included in the transferred portfolios. The attached spreadsheet ostensibly listing the transferred loans by account number is entirely redacted except for one loan, which does not match any of the identifying information associated with either loan at issue. And although Welch testified that Rock Creek is currently the holder of the notes, his testimony was qualified to "the best of [his] knowledge." *See* Tex. R. Evid. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). Additionally, Evan—who Rock Creek called during its case-in-chief—testified that he had never seen any of the documents Rock Creek presented at trial. Affording the trial court the discretion due in weighing witness credibility, the above constitutes legally sufficient evidence that Rock Creek did not show that it currently possesses the promissory notes or that it acquired them by negotiation. Thus, Rock Creek has not demonstrated that the evidence establishes, as a matter of law, that it is the holder of the promissory notes at issue. *See Dow Chem. Co.*, 46 S.W.3d at 241.

Accordingly, we overrule Rock Creek's two issues.

Conclusion

We affirm the trial court's judgment.

/s/ Kevin Jewell
Justice

Panel consists of Justices Jewell, Spain, and Wilson.