Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00788-CV

Danny **ALEXANDER** & Sarah Alexander,
Appellants

v.

AMERICAN HOME MORTGAGE SERVICING, INC. as Servicer for
Deutsche Bank National Trust Co., Trustee for
Soundview Home Loan Trust 2006-OPT5, Asset-Backed Certificates Series 2006-OPT5,
Appellee

From the 198th Judicial District Court, Bandera County, Texas
Trial Court No. CV-12-0000281
Honorable M. Rex Emerson, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: September 13, 2017

AFFIRMED

Danny Alexander and Sarah Alexander appeal a summary judgment granted in favor of appellee American Home Mortgage Servicing, Inc. as Servicer for Deutsche Bank National Trust Co., Trustee for Soundview Home Loan Trust 2006-OPT5, Asset-Backed Certificates Series 2006-OPT5, which allowed the appellee to judicially foreclose on property owned by the Alexanders. In the underlying cause, the parties filed competing motions for summary judgment. The trial court granted the appellee's motion and denied the Alexanders' motion. The Alexanders contend

the trial court erred in denying their motion because the evidence conclusively established that the home equity loan underlying the foreclosure violated the Texas Constitutional requirements prohibiting a home equity loan from: (1) being secured by non-homestead assets; and (2) exceeding 80% of the market value of the homestead property securing the loan. The Alexanders also contend the trial court erred in sustaining the appellee's objections to the Alexanders' summary judgment evidence. We affirm the trial court's judgment.

BACKGROUND

In 2006, the Alexanders executed a home equity note in the principal amount of $280,000 which was secured by a deed of trust. In the loan documents, the Alexanders represented that the property pledged to secure the lien was homestead property.

After the Alexanders defaulted on the note in 2011, the appellee accelerated the debt. In 2012, the Alexanders filed the underlying lawsuit seeking a declaration that the appellee lacked standing to foreclose on the note and an injunction to stop any foreclosure. The appellee answered and filed a counterclaim seeking a judicial foreclosure. The appellee subsequently filed its first motion for summary judgment. By order dated November 18, 2014, the trial court granted summary judgment in favor of the appellee concluding the appellee had standing to foreclose. The trial court's order also dismissed the Alexanders' claims with prejudice, but did not grant summary judgment on the appellee's counterclaim for judicial foreclosure.

On May 31, 2015, the Alexanders filed a supplemental amended petition adding a claim entitled "Home Equity Loan Irregularities," alleging the following:

> 28. In addition to the Texas Fair Debt Collection Practices Act, the Plaintiffs plead that the note upon which Defendant bases its rights and duties is void as not in compliance with State statute. The Defendants judicially admit and the Plaintiff did plead that the loan upon which this suit is based is a Texas Home Equity loan. Such a note is a creature of statutory construction and not amendable to alteration or deviation.

> 29. The Defendants compelled the Alexander Plaintiffs to include additional property lots 17, 18 and 19 which are not part of the Alexanders' homestead. These lots appear in the legal description used by both parties and previously attached as "A." Each of these lots has a nonexempt commercial dwelling or rental property which faces the local waterway and is used for vacation rental income.
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> 30. Texas law does not permit the inclusion of additional equity beyond the Debtors' homestead in a Home Equity Loan. Such inclusion invalidates the loan and removes Defendant's rights to collect debt and additional remedies including foreclosure. The lots are each platted separately and taxed separately by the State and Local County Authorities.
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> 31. The irregular and illegal practices described herein are a sole proximate cause of the damages claimed for which the Plaintiffs sue.
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> 32. All prerequisites necessary have been performed by the Plaintiffs who are entitled by statute to the recovery of reasonable and necessary Attorney's fees and costs for which they seek herein.

On July 29, 2015, the appellee's attorney sent a letter to the Alexanders' attorney to cure any non-compliance with the Texas Constitution. The letter acknowledged that the appellee's lien did not extend to any property other than the Alexanders' homestead.

On September 15, 2016, the appellee filed a second motion for summary judgment on its counterclaim for judicial foreclosure. The Alexanders filed a response and cross-motion, asserting they were entitled to a declaration that the appellee forfeited all principal and interest on the home equity loan based on the loan irregularities. The appellee filed a reply and objections to some of the Alexanders' summary judgment evidence. The trial court sustained the appellee's objections and granted summary judgment in the appellee's favor. The trial court's order, however, only permitted the appellee to judicially foreclose on the property which constituted the Alexanders' homestead, and specifically excluded Lots 17, 18, and 19 which the Alexanders alleged in their supplemental pleading were not part of their homestead. The Alexanders appeal.

STANDARD OF REVIEW

To prevail on a traditional motion for summary judgment, the movant must show "there is no genuine issue as to any material fact and the [movant] is entitled to judgment as a matter of law." TEX. R. CIV. P. 166a(c); *see also Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 846 (Tex. 2005). We generally review a trial court's granting of a summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). Because the parties filed competing motions for summary judgment, and the trial court granted the appellee's motion and denied the Alexanders' motion, we "determine all questions presented, and if the trial court erred, render the judgment the trial court should have rendered." *Sw. Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 583 (Tex. 2015).

DISCUSSION

In their brief, the Alexanders contend the trial court erred in granting summary judgment in favor of the appellee and in denying their motion for summary judgment because the summary judgment evidence established the appellee violated the Texas Constitution's provisions governing home equity loans in two ways. First, the Alexanders contend the lien extended to non-homestead assets. Second, the Alexanders contend the loan exceeded 80% of the homestead property's market value.

The appellee responds the summary judgment evidence conclusively established that they cured the first irregularity. The appellee also responds the Alexanders never pled the second irregularity, or if they did, the summary judgment evidence conclusively established the loan did not exceed 80% of the homestead property's market value. We first address the second alleged irregularity.

Article XVI, Section 50 of the Texas Constitution allows a loan or extension of credit to be secured by a homestead only if the loan meets very specific and extensive conditions. TEX.

CONST. art. XVI, § 50; *see also Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542, 545 (Tex. 2016) (noting Texas Constitution prescribes "very specific and extensive limitations" on a homestead lien securing a home equity loan). One of those conditions is that the principal amount of the loan "does not exceed 80 percent of the fair market value of the homestead on the date the extension of credit is made." *Id*. at § 50(a)(6)(B).

In the Alexanders' supplemental pleading, they did not make any allegation of an irregularity based on the original loan amount exceeding 80% of the homestead property's fair market value on the date the loan was made.[1] Instead, the Alexanders first reference this claim in their summary judgment response and cross-motion. Because the Alexanders did not allege any claim based on this irregularity in their live pleading, the appellee's motion was not required to address the claim, and this alleged irregularity did not preclude summary judgment in the appellee's favor.[2] *See Morrell Masonry Supply, Inc. v. Perez*, No. 01-13-00887-CV, 2014 WL 3843519, at *4 (Tex. App.—Houston [1st Dist.] Aug. 5, 2014, no pet.) (mem. op.); *see also Curry v. Bank of America, N.A.*, 232 S.W.3d 345, 353 (Tex. App.—Dallas 2007, pet. denied) (concluding notice from borrower must "do more than make a general allegation and had to describe how the loan is non-compliant"); TEX. CONST. art. XVI, §50(a)(6)(Q)(x)(b) (providing means to cure home equity loan whose principal is in excess of the 80% limitation).

[1] We note the trial court's order also concluded the pleadings did not assert a claim based on Article XVI, Section 50(a)(6)(B).

[2] As previously noted, the 80% limitation is based on the fair market value of the homestead "on the date the extension of credit is made" which was in 2006. We also note a home equity loan under Article XVI, Section 50(a) requires "the owner of the homestead and the lender [to] sign a written acknowledgment as to the fair market value of the homestead property on the date the extension of credit is made." TEX. CONST. art. XVI, § 50(a)(6)(Q)(ix). The record contains a Texas Equity Loan Affidavit signed by the Alexanders stating that such an acknowledgment was signed and that the principal amount of the loan did not exceed 80% of the fair market value of the Alexanders' homestead on the date the extension of credit was made. The record also contains a loan application signed by the Alexanders under penalty of perjury in which they represent the "present market value" of their "homestead" located at 1311 Elmhurst to be $390,000. As previously noted, the original loan amount was $280,000.

With regard to the Alexanders' second alleged irregularity, another condition imposed by the Texas Constitution is that the loan must "not [be] secured by any additional real or personal property other than the homestead." TEX. CONST. art. XVI, § 50(a)(6)(H). In this case, the Alexanders alleged the home equity loan violated this provision because the loan was secured by "lots 17, 18 and 19 which are not part of the Alexanders' homestead."

Accepting that the loan was in violation of this provision, the Texas Constitution contains a "cure" provision in the event an extension of credit fails to meet any of the requirements or the limitations imposed on extensions of credit under Article XVI, Section 50(a)(6). *See id.* at § 50(a)(6)(Q)(x); *see also Doody v. Ameriquest Mortg. Co.*, 49 S.W.3d 342, 346 (Tex. 2001) (noting "section 50(a)(6)(Q)(x)'s cure provision … provides a means for the lender to correct mistakes within a reasonable time in order to validate a lien securing a section 50(a)(6) extension of credit"). Article XVI, section 50(a)(6)(Q)(x) provides:

> … 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 [taking one of six specifically listed actions].

Id. If an extension of credit violates Article XVI, Section 50(a)(6)(H) because it is secured by property other than the homestead, as alleged in this case, the specific action the creditor can take to "cure" the violation is to "send[] the owner a written acknowledgment that the lien is … not secured by [any additional real or personal] property [other than the homestead]." *Id.* at § 50(a)(6)(Q)(x)(b).

In this case, after receiving the Alexanders' supplemental pleading, the appellee's attorney sent the Alexanders' attorney a letter responding to the allegation that the Alexanders were "compelled … to include additional property lots 17, 18 and 19 which were not part of the

Alexanders' homestead." Although the appellee disputed the allegation, the letter stated, "pursuant to Article XVI, Section 50(a)(6)(Q)(x)(b), [the appellee] acknowledges that the lien securing the above-referenced mortgage is not secured by any additional real or personal property other than the homestead." In the letter, the appellee further offered "to execute modified loan documents to memorialize the terms of this letter if Borrowers desire." Therefore, the summary judgment evidence conclusively established that the appellee cured any irregularity with regard to any additional property pledged to secure the Alexanders' home equity loan. Accordingly, the trial court did not err in granting the appellee's motion for summary judgment and denying the Alexanders' motion for summary judgment.[3]

CONCLUSION

The trial court's judgment is affirmed.

Sandee Bryan Marion, Chief Justice

[3] In their last issue, the Alexanders contend the trial court erroneously sustained the appellee's objection to their summary judgment evidence. Because none of the evidence about which the Alexanders complain is relevant to our analysis in affirming the trial court's judgment, we need not address this issue. TEX. R. APP. P. 47.1 (noting opinions need only address issues necessary to disposition of the appeal).