In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-17-00020-CV

STONE HAYNES JR., Appellant

V.

JP MORGAN CHASE BANK, N.A. AND PLEASURE PIER HOMEOWNERS ASSOCIATION, Appellees

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On Appeal from the 58th District Court
Jefferson County, Texas
Trial Cause No. A-198,593

MEMORANDUM OPINION

This is an appeal by Appellant, Stone Haynes Jr. (Haynes or Appellant), from the trial court's orders granting summary judgments to Appellees, JP Morgan Chase Bank, N.A. (Chase), and Pleasure Pier Homeowners Association (HOA) (collectively Appellees). Haynes filed a pro se "Application for Temporary Restraining Order and Original Petition for Declaratory Judgment" (Original Petition) on June 7, 2016. On June 21, 2016, Haynes filed a pro se "Application for

Temporary Injunction and 1st Petition for Declaratory Judgment" (Amended Petition), wherein Haynes alleged that in 2006 he purchased property located at 1310 Central, Beaumont, Texas, (Central Property), and in 2007 he also purchased certain condominium property located at 560 Pleasure Pier Blvd., Port Arthur, Texas (Condo Property). Chase and the HOA are named as defendants in the Amended Petition. Haynes alleged that Chase financed the purchase of each property and that Chase had caused the properties to be posted for foreclosure. Haynes further alleged that the HOA has erroneously foreclosed on the Condo Property. Haynes alleged that he was entitled to a temporary injunction and declaratory judgment against Chase and the HOA because the foreclosures by Chase and the HOA were wrongful. Chase filed an answer on June 30, 2016, and the HOA filed its answer on July 1, 2016.

Chase filed a Traditional Motion for Summary Judgment on November 1, 2016, and the HOA filed a Motion for Summary Judgment[1] on November 14, 2016. Haynes filed Plaintiff's Response to Defendant's Traditional Motion for Summary Judgment wherein he stated he was responding to the motion filed by Chase. In his response, Haynes challenged foreclosure by Chase and by the HOA, and he included

[1] The Motion for Summary Judgment filed by the HOA also appears to be a traditional motion for summary judgment.

an argument about the "legal status" of Texas Regional Acceptance Company, LLC (TRAC), which Haynes alleged was the record owner of the Condo Property. The trial court granted both motions for summary judgment, entering an Order Granting JPMorgan Chase Bank, N.A.'s Traditional Motion for Summary Judgment and a separate Summary Judgment in Favor of Pleasure Pier Homeowners Association. In its order granting Chase's motion, the court also ordered that

> . . . any and [all] accelerations of the Central Property Note and the Pleasure Island Note prior to March 16, 2016 were timely abandoned, such that no acceleration prior to March 16, 2016 is effective to accrue a cause of action for purposes of the four year statute of limitations for foreclosure[.]

The trial court did not specify the basis for granting summary judgment for the HOA. Haynes filed a notice of appeal.

It is undisputed that Haynes secured a loan for the purchase of the Central Property in December of 2006, and it was secured by a Deed of Trust. The summary judgment evidence also reflects that Haynes secured a loan for the purchase of the Condo Property in March of 2007, and it was also secured by a Deed of Trust. Both deeds of trust were later assigned to Chase.

In its motion for summary judgment, Chase alleged that over the years, it accelerated the notes on both properties and also sent notices of rescission. As to the Central Property, Chase sent Notices of Acceleration to Haynes in December of

2009, and June of 2010. On August 15, 2013, Chase sent Haynes a "Rescission of Acceleration of Loan Maturity" as to "the notice of acceleration dated 07/13/2012 and all prior notices of acceleration." On December 9, 2013, Chase sent another Notice of Acceleration. On February 27, 2014, Chase executed and recorded a "Rescission and Abandonment of Acceleration" purporting to abandon and rescind notices of acceleration "made prior to the date of execution of this document." In June of 2015, July of 2015, and January of 2016, Chase sent Haynes four additional Notices of Acceleration. On March 16, 2016, Chase sent a "Rescission of Acceleration" for the "notice of acceleration dated January 21, 2016, and all prior notices of acceleration." Finally, on April 21, 2016, Chase sent another Notice of Acceleration.

As to the Condo Property, Chase sent a Notice of Acceleration in November of 2010 and July of 2012. In February of 2014, Chase executed and recorded a "Rescission and Abandonment of Acceleration" as to accelerations made prior thereto. In July and September of 2015, and in February of 2016, Chase sent additional notices of acceleration. On March 16, 2016, Chase sent a "Rescission of Acceleration" as to "the notice of acceleration dated February 2, 2016 and all prior notices of acceleration." According to Chase, there was a typographical error in the

March 16th rescission which left the February 3, 2016 Notice of Acceleration in place.

Issues on Appeal

Haynes argues on appeal that the trial court erred in granting the summary judgments for Chase and the HOA because "[t]he statute of limitations forecloses the rights of JP Morgan Chase and Pleasure Pier. Tex[.] Civ. Prac[.] & Rem. Code Sec. 16.035." Haynes argues that their liens are null and void under Section 16.035(e). According to Haynes, "JP Chase's actions in abandoning the acceleration did not toll limitations." Haynes contends that Chase could not "unilaterally" rescind the prior notices of foreclosure and notices of acceleration and therefore the foreclosure was time barred. Chase argues that it was well within its four-year statute of limitations when it sought to foreclose on the lien on the property. Haynes also argues that as to the HOA "the foreclosure was invalid because the Registered Agent and Managing Partner was never notified[]" or at least, a fact issue exists as to whether the Registered Agent and Managing Partner was notified.

Standard of Review

We review grants of summary judgment de novo. *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015). In our review we take as true all evidence favorable to the non-movant, indulge every reasonable inference in favor of the non-

movant, and resolve any doubts in the non-movant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

A genuine issue of material fact exists if the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997) (quoting *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995)). Evidence does not create an issue of material fact if it is "so weak as to do no more than create a mere surmise or suspicion" that the fact exists. *Kia Motors Corp. v. Ruiz*, 432 S.W.3d 865, 875 (Tex. 2014) (quoting *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004)). A party moving for traditional summary judgment meets its burden by proving that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). "When a trial court's order granting summary judgment does not specify the grounds relied upon, the reviewing court must affirm summary judgment if any of the summary judgment grounds are meritorious." *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).

Chase Bank's Summary Judgment

A secured lender "must bring suit for . . . the foreclosure of a real property lien not later than four years after the day the cause of action accrues." Tex. Civ.

Prac. & Rem. Code Ann. § 16.035(a) (West 2002). "On the expiration of the four-year limitations period, the real property lien and a power of sale to enforce the real property lien become void." *Id.* § 16.035(d).

"If a series of notes or obligations or a note or obligation payable in installments is secured by a real property lien, the four-year limitations period does not begin to run until the maturity date of the last note, obligation, or installment." *Id.* § 16.035(e). "When this four-year period expires, the real-property lien and the power of sale to enforce the lien become void." *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 567 (Tex. 2001) (citing Tex. Civ. Prac. & Rem. Code Ann. § 16.035(d)). Nevertheless, if the note or deed of trust contains an optional acceleration clause, the cause of action accrues (and the statute of limitations begins to run) when the holder "actually exercises" its option to accelerate. *Id.* at 566; *Khan v. GBAK Props., Inc*., 371 S.W.3d 347, 353 (Tex. App.—Houston [1st Dist.] 2012, no pet.). The note holder, however, may only "accelerate" the maturity date of the note if its last installment is not yet due. *See CA Partners v. Spears*, 274 S.W.3d 51, 65 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). Accordingly, once the maturity date of the last installment has passed, the holder's cause of action accrues—and limitations begin to run—on the maturity date of the final installment. *Id*.

A noteholder who effectively exercises its option to accelerate may nevertheless "'abandon acceleration if the holder continues to accept payments without exacting any remedies available to it upon declared maturity.'" *Khan*, 371 S.W.3d at 353 (quoting *Holy Cross*, 44 S.W.3d at 566-67). Acceleration can also be abandoned by agreement or other action of the parties. *See Holy Cross*, 44 S.W.3d at 566-67 (citing *San Antonio Real-Estate, Bldg. & Loan Ass'n v. Stewart*, 61 S.W. 386, 388 (Tex. 1901)); *Khan*, 371 S.W.3d at 353. Abandonment of acceleration has the effect of restoring the contract to its original condition, including restoring the note's original maturity date. *See Khan*, 371 S.W.3d at 353 (citing *Holy Cross*, 44 S.W.3d at 567).[2]

Appellant's first issue presents the question whether Chase may make a unilateral abandonment of acceleration. Haynes argues that the Texas Supreme Court has not yet ruled upon whether or not a lender can unilaterally rescind or abandon a notice of acceleration by sending a letter of abandonment or rescission. Haynes argues that traditional contractual concepts require an agreement from both

[2] Neither party in this case contends that the maturity date of the final installment has already passed.

parties to the contract in order for the acceleration to be rescinded; we disagree.[3]

"Texas courts have framed the issue of abandonment of acceleration by reference to traditional principles of waiver." *Boren v. U.S. Nat'l Bank Ass'n*, 807 F.3d 99, 105 (5th Cir. 2015) (citing *Khan*, 371 S.W.3d at 354 n.1; *Denbina v. Hurst*, 516 S.W.2d 460, 463 (Tex. App.—Tyler 1974, no writ); *Dallas Joint Stock Land Bank v. King*, 167 S.W.2d 245, 247 (Tex. App.—Fort Worth 1942, writ ref'd)); *see also Graham v. LNV Corp.*, No. 03-16-00235-CV, 2016 Tex. App. LEXIS 11555, at *9 (Tex. App.—Austin 2016, pet. denied). "Under Texas law, the elements of waiver include: '(1) an existing right, benefit, or advantage held by a party; (2) the party's actual knowledge of its existence; and (3) the party's actual intent to relinquish the right, or intentional conduct inconsistent with the right.'" *Boren*, 807 F.3d at 105 (quoting *Thompson v. Bank of America Nat'l Ass'n*, 783 F.3d 1022, 1025 (5th Cir. 2015)); *Graham*, 2016 Tex. App. LEXIS 11555, at *10 (citing *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778 (Tex. 2008)). "Waiver is a question of law when the facts that are relevant to a party's relinquishment of an existing right are undisputed." *Boren*, 807 F.3d at 106; *Graham*, 2016 Tex. App. LEXIS 11555, at *10. In *Boren* and in *Graham*, both courts reached the conclusion that when a lender

[3] Haynes has not alleged either in the trial court or on appeal that he objected to the rescissions or that he detrimentally relied upon any of the notices of acceleration.

has exercised an option to accelerate its loan and then seeks to rescind the acceleration, the lender may unilaterally send a notice of rescission thereby resetting the statute of limitations. *See Boren*, 807 F.3d at 105; *Graham*, 2016 Tex. App. LEXIS 11555, at **9-13. We agree.

As emphasized in *Graham*, we find support for our conclusion in the 2015 enactment of section 16.038 of the Texas Civil Practices and Remedies Code, entitled "Rescission or Waiver of Accelerated Maturity Date[.]" The statute states, in relevant part:

> If the maturity date of . . . a note . . . payable in installments is accelerated, and the accelerated maturity date is rescinded or waived in accordance with this section before the limitations period expires, the acceleration is deemed rescinded and waived and the note . . . shall be governed by Section 16.035 as if no acceleration had occurred.

Tex. Civ. Prac. & Rem. Code Ann. § 16.038(a) (West Supp. 2016). The statute provides that rescission or waiver is effective if made by "a written notice of a rescission or waiver" served by first class or certified mail. *Id.* § 16.038(b), (c). The Legislature also expressly provided that the new statute "applies with respect to a maturity date accelerated before, on, or after the effective date of this Act [June 17, 2015] and any notice of a rescission or waiver of an accelerated maturity date served before, on, or after the effective date of this Act." *See* Act of May 26, 2015, 84th Leg., R.S., ch. 759, § 2, 2015 Tex. Gen. Laws 2308, 2309. The statute does not create

an exclusive method for abandoning or waiving acceleration, but it does provide a statutory method by which a lender can unilaterally waive its earlier acceleration. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.038. Accordingly, we conclude that the trial court did not err in granting the summary judgment in favor of Chase because the summary judgment evidence conclusively established that the four-year statute of limitations did not bar Chase from foreclosing on its lien on the Central Property, nor did it bar Chase from foreclosing on its lien on the Condo Property because the foreclosure proceedings occurred well within the accrual of the four-year limitations.

We overrule Haynes's first issue and we affirm the trial court's judgment granted in favor of Chase.

The HOA's Summary Judgment

Appellant's second appellate issue challenges the trial court's order of summary judgment for the HOA. Under the Texas Rules of Appellate Procedure, an appellant's brief is required to 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). "Rule 38 requires [an appellant] to provide us with such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue." *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118, 128 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). When the

appellate issue is unsupported by argument or lacks citation to the record or legal authority, nothing is presented for review. *See Valadez v. Avitia*, 238 S.W.3d 843, 845 (Tex. App.—El Paso 2007, no pet.); *Nguyen v. Kosnoski*, 93 S.W.3d 186, 188 (Tex. App.—Houston [14th Dist.] 2002, no pet.). Accordingly, an appellant may forfeit error through its failure to brief adequately. *See Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 284-85 (Tex. 1994) ("error may be waived by inadequate briefing[]"); *McKellar v. Cervantes*, 367 S.W.3d 478, 484 n.5 (Tex. App.—Texarkana 2012, no pet.) ("Bare assertions of error, without argument or authority, waive error."); *Washington v. Bank of N.Y.*, 362 S.W.3d 853, 854-55 (Tex. App.—Dallas 2012, no pet.); *In re Lester*, 254 S.W.3d 663, 668 n.3 (Tex. App.—Beaumont 2008, orig. proceeding). If a party fails to advance a viable argument on appeal with citations to appropriate authority, an appellate court is not required to conduct an independent review of the record and applicable law to determine whether any error occurred. *See Happy Harbor Methodist Home, Inc. v. Cowins*, 903 S.W.2d 884, 886 (Tex. App.—Houston [1st Dist.] 1995, no writ) ("We will not do the job of the advocate.").

In challenging the grant of summary judgment in favor of the HOA, Appellant's brief argues that the HOA's lien against the Condo Property had become null and void due to the expiration of the statute of limitations. Appellant has cited

no evidence in the record that the HOA accelerated a note; rather, the summary judgment evidence reflects that the HOA's lien was based on an alleged failure to pay HOA dues and not a failure to pay under the terms of a promissory note. Appellant does not cite to relevant authority to support his allegation that the statute of limitations would bar the HOA's non-judicial foreclosure, nor does he provide record references for his contentions.

Appellant argues in his brief that a fact issue remains "whether the proper officer of the property owner was notified" prior to the HOA's December 2015 foreclosure. Nevertheless, Appellant has provided no record references to support his factual assertions that TRAC (and not Haynes) was the record owner of the Condo Property and that TRAC did not receive notice. Neither has Appellant cited to any legal authority for his arguments on this issue relating to the HOA.

Appellant generally states that he is entitled to "a broader scope of review[]" under *Malooly Brothers, Inc. v. Napier*, 461 S.W.2d 119 (Tex. 1970). In *Malooly*, the Supreme Court explained that in challenging a summary judgment, an appellant may argue broadly that the trial court erred in granting the summary judgment and, having done so, the appellant may argue all the reasons the trial court erred. *Id.* at 121; *see also Plexchem Int'l v. Harris Cty. Appraisal Dist.*, 922 S.W.2d 930, 930-31 (Tex. 1996) (explaining *Malooly*); *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471,

473 (Tex. 1995) (same). But an appellant making a general *Malooly* point of error must still meet briefing requirements by presenting proper argument and authorities. *See De Pino v. Jefferson-Pilot Life Ins. Co.*, No. 13-07-00367-CV, 2009 Tex. App. LEXIS 2248, at **9-13 (Tex. App.—Corpus Christi Apr. 2, 2009, no pet.) (mem. op.) (raising a *Malooly* issue on appeal does not relieve appellant of the burden to provide proper argument and supporting authorities); *Hernandez v. State & Cty. Mut. Ins. Co.*, No. 13-06-634-CV, 2008 Tex. App. LEXIS 3896, at *4 (Tex. App.—Corpus Christi May 22, 2008, no pet.) (mem. op.) (noting that merely raising an issue does not satisfy the appellant's burden, and for the court to reverse a summary judgment, the appellant must also present argument and authorities); *Cruikshank v. Consumer Direct Mortg., Inc.*, 138 S.W.3d 497, 502-03 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) ("Although Cruikshank has made a general *Malooly* point of error, we hold this is only sufficient to preserve a complaint if the specific ground challenged on appeal is supported by argument."). Even assuming Appellant properly presented a *Malooly* issue regarding summary judgment for the HOA, Appellant has wholly failed to support his argument by citing to the record or to proper authority.

We conclude that, due to the inadequacy of his brief, Appellant has waived his issue on appeal as to his complaints regarding the summary judgment that the

trial court granted the HOA. *See* Tex. R. App. P. 38.1(i); *Fredonia State Bank*, 881 S.W.2d at 284. Finding that nothing has been preserved for our review, we affirm the trial court's judgment for the HOA. *See Martinez v. El Paso Cty.*, 218 S.W.3d 841, 845 (Tex. App.—El Paso, 2007, pet. struck); *Washington*, 362 S.W.3d at 854-55.

Having overruled Appellant's issues, we affirm the judgments of the trial court.

AFFIRMED.

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LEANNE JOHNSON
Justice

Submitted on August 10, 2017
Opinion Delivered September 21, 2017

Before Kreger, Horton, and Johnson, JJ.