COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00313-CV

RCC HERITAGE GLADE, LTD., RCP HERITAGE GLADE, LTD., AND RICHARD A. MYERS — APPELLANTS

V.

BRANCH BANKING & TRUST COMPANY — APPELLEE

FROM THE 96TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 096-259032-12

MEMORANDUM OPINION[1]

I. Introduction

In four points, Appellants RCC Heritage Glade, Ltd. (RCC), RCP Heritage Glade, Ltd. (RCP), and Richard A. Myers (collectively, Appellants) appeal the trial

[1]*See* Tex. R. App. P. 47.4.

court's judgment on a jury verdict for Appellee Branch Banking & Trust Co. (BBT). We affirm.

II. Factual and Procedural Background

Myers formed RCC to acquire and develop real property. In June 2006, RCC executed a $2,450,911 note to Colonial Bank, secured by a deed of trust, both signed by Myers, president of RCC's general partner, Realty Capital Partners II, Inc. (RCP II). Myers also executed a guaranty agreement promising to pay the note's outstanding balance if RCC failed to pay.

RCC subsequently entered into a reinstatement, modification, renewal, and extension agreement with Colonial Bank, and Myers entered into a reaffirmation of the guaranty. Then Colonial Bank failed, the FDIC was appointed its receiver, and BBT acquired the note and guaranty through a purchase and assumption agreement. At that point, the note's alleged outstanding balance was $1,229,659.55. In 2010, while BBT was working on the loan balance number with the FDIC, RCC executed another reinstatement, modification, renewal, and extension agreement, RCP executed a guaranty agreement with BBT, and Myers executed an amendment and reaffirmation of guaranty.

RCC subsequently defaulted on the note. BBT conducted a foreclosure sale of the property securing the note in February 2012, acquired it for

$1,088,000,[2] and then sued Appellants in April 2012 for the difference between the total amount of principal under the note ($1,226,611.36) and the property's sale price at foreclosure ($1,088,000), in addition to accrued but unpaid interest, other assorted fees, and attorney's fees.

More than two years later, in September 2014, Appellants filed a motion to determine fair market value, "to assert their right to offset under" property code section 51.003(b). In November 2014, the parties filed an agreed motion for continuance so that they could "attempt to resolve outstanding discovery issues" and asked for a trial setting in May 2015.[3] The case was reset for a May 11, 2015 jury trial.

On April 10, 2015, BBT filed an original answer to Appellants' counterclaim. That same day, BBT also transmitted its first supplemental response to Appellants' request for disclosure, listing Micah Beck, a commercial real estate appraiser, as an expert who would testify about the property's fair

[2]One of BBT's witnesses explained that BBT had bid $1,088,000 instead of the property's appraised value of $1,360,000 based on BBT's foreclosure matrix, which accounted for the cost of brokerage commissions, title insurance, property taxes, property insurance, and all of the other "costs and expenses associated with holding a property and selling a property."

[3]BBT's counsel, who testified in support of BBT's request for $147,113.79 in attorney's fees, stated that approximately two years into the litigation "there was a flurry of activity" in which Appellants filed certain challenges, including the determination of fair market value, which resulted in a "fairly significant increase in the attorneys' fees and expenses" from that point forward. He stated that until the "flurry" occurred, attorney's fees had been in the range of $35,000.

market value.[4] On April 27, 2015, BBT filed a notice of filing of business record affidavits from Beck, sponsoring Beck's summary appraisal report. And on April 30, 2015, BBT filed its first amended petition, adding RCP II as a defendant.

On May 7, 2015, four days before trial, Appellants filed their second amended answer, pleading offset and payment, and their original counterclaims for overpayment and for attorney's fees.

Before the trial began on May 11, BBT moved for a continuance, which Appellants opposed. The trial court denied the motion and also denied BBT's motion to exclude Myers's testimony about fair market value evidence based on late designation.[5] After jury selection but before opening statements, the trial court considered Appellants' motion to exclude Beck based on untimely expert designation and denied the motion because—as listed by the trial court—Appellants had announced ready that morning, had opposed BBT's motion for continuance, and had not brought any of their complaints to the trial court's attention prior to that time "by any form of motions to compel or anything like that."

During the trial, the parties presented evidence about the note, the guaranty, the subsequent agreements reinstating, modifying, renewing, and

[4]BBT's original response to Appellants' request for disclosure was sent on November 5, 2014, and only listed its lead attorney as an expert who would testify about attorney's fees.

[5]The trial court heard additional argument about Myers's testimony during the trial and again denied the motion to exclude.

extending them, and the property's fair market value at the time of the foreclosure. Before Beck's testimony, Appellants renewed their objection to his testimony based on untimely expert designation. After the trial court overruled the objection, Appellants made an informal bill of exception that included BBT's original November 2014 disclosure and its April 10, 2015 supplemental disclosure.

The trial court granted BBT's motion for directed verdict on Appellants' affirmative defense of payment and RCP's and Myers's defense of offset. In its unanimous verdict, the jury found that $1,398,806.48 was the amount due on the note on the day of foreclosure and that the property's fair market value on the day of foreclosure was $1,360,000. The jury also awarded attorney's fees to BBT. The trial court entered judgment in accordance with the verdict.

III. Discussion

In four points, Appellants argue that the trial court abused its discretion by allowing Beck to testify, that it erred by granting a directed verdict against Myers and RCP on their claim of statutory right of offset and on their affirmative defense of payment, and that if Appellants prevail, the award of attorney's fees for BBT should be reversed.

A. Expert Testimony

In their first point, Appellants complain that Beck should not have been permitted to testify because BBT failed to comply with rule of civil procedure 194.2(f), "including, but not limited to, [1] failing to timely disclose its expert, [2]

failing to disclose its opinion of the fair market value on the date of the foreclosure, and [3] failing to provide documents within the expert's files reviewed or used by the expert." BBT responds that Appellants did not preserve all of these complaints, that good cause existed for any late designation, that there was no unfair surprise or prejudice, and that any error was harmless. Assuming, without deciding, that Appellants preserved all of these complaints, we will review the trial court's evidentiary decisions for an abuse of discretion. *See Gharda USA, Inc. v. Control Sols., Inc.*, 464 S.W.3d 338, 347 (Tex. 2015).

Under rule of civil procedure 193.6, a party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness who was not timely identified unless the trial court finds that (1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties. Tex. R. Civ. P. 193.6(a)(1)–(2). The party seeking to introduce the evidence or call the witness has the burden of establishing good cause or lack of unfair surprise or prejudice. Tex. R. Civ. P. 193.6(b)–(c); *see Humphrey v. Yancey*, No. 05-15-00653-CV, 2016 WL 3568042, at *4 (Tex. App.—Dallas June 30, 2016, pet. denied) (mem. op.) (observing that rule 193.6 provides exceptions to the exclusionary rule). "A finding of good cause or of the lack of unfair surprise or unfair prejudice must be supported by the record." Tex. R. Civ.

P. 193.6(b). But even an erroneous evidentiary ruling is still subject to a harm analysis; we will not reverse an entire judgment based upon an erroneous evidentiary ruling unless the ruling probably caused the rendition of an improper judgment. *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 136 (Tex. 2012); *Reliance Steel & Aluminum Co. v. Sevcik*, 267 S.W.3d 867, 871 (Tex. 2008).

During the pretrial hearing on the parties' motions in limine, the trial court pointed out on the record that Appellants acknowledged that they had known about the materials and testimony prior to trial, had announced ready, had opposed continuing the trial, and had waited until the eve of trial to bring their discovery-related complaints to the trial court's attention and to seek to have the evidence excluded. This, combined with the trial court's decision to permit Beck to testify, supports an implicit finding by the trial court that Appellants were not unfairly surprised or prejudiced. *See Bellino v. Comm'n for Lawyer Discipline*, 124 S.W.3d 380, 384 (Tex. App.—Dallas 2003, pet. denied) (concluding that the trial court implicitly determined that there was good cause or no unfair surprise in the late disclosure of witnesses when it permitted the witnesses to testify); *see also Humphrey*, 2016 WL 3568042, at *4.[6] Because the trial court's implicit

[6]In *Humphrey*, although the evidence at issue was not produced until the day of trial, the trial court found that there was no prejudice or harm in the delay when the opponent's counsel did not ask the trial court for a recess or continuance so he could review the evidence, he had the opportunity to cross-examine the witness about the untimely evidence, and he used the evidence to support one of his arguments in the trial court and on appeal. 2016 WL 3568042, at *4. Like the trial court, the appellate court concluded that there was no evidence of any prejudice. *Id.* The record here reflects that Appellants

finding of lack of unfair surprise or prejudice is supported by the record before us, we cannot say that its decisions here constituted an abuse of discretion, and we overrule Appellants' first point.

B. Directed Verdict

In their second and third points, Appellants complain about the trial court's directed verdicts on their affirmative defense of payment and on their claim of offset.

A directed verdict is proper only under limited circumstances: (1) when the evidence is insufficient to raise a material fact issue, or (2) when the evidence conclusively establishes the right of the movant to judgment or negates the right of the opponent. *See Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 77 (Tex. 2000); *Farmers Grp. Ins., Inc. v. Poteet*, 434 S.W.3d 316, 331–32 (Tex. App.—Fort Worth 2014, pet. denied).

1. Waiver

Property code section 51.003 applies to an action brought to recover the deficiency after a foreclosure sale and provides that if the trial court determines that the fair market value of the real property is greater than its foreclosure sale price,

> the persons against whom recovery of the deficiency is sought are entitled to an offset against the deficiency in the amount by which

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thoroughly cross-examined Beck regarding his testimony and offered into evidence Beck's slide summarizing his testimony about the property's fair market value.

> the fair market value, less the amount of any claim, indebtedness, or obligation of any kind that is secured by a lien or encumbrance on the real property that was not extinguished by the foreclosure, exceeds the sale price.

Tex. Prop. Code Ann. § 51.003(a), (c) (West 2014); *Branch Banking & Trust Co. v. TCI Luna Ventures, LLC*, No. 05-12-00653-CV, 2013 WL 1456651, at *5 (Tex. App.—Dallas Apr. 9, 2013, no pet.) (op. on reh'g); *see also Myers v. Sw. Bank*, No. 02-14-00122-CV, 2014 WL 7009956, at *4 (Tex. App.—Fort Worth Feb. 5, 2015, pet. denied) (mem. op.) ("Section 51.003 provides an affirmative defense to the traditional deficiency calculation based on the amount of a foreclosure sale."). A party is entitled to an offset only if it requests, proves, and obtains a finding of the property's section 51.003 fair market value as of the date of the foreclosure sale, and that value exceeds the foreclosure sales price. *See PlainsCapital Bank v. Martin*, 459 S.W.3d 550, 557 (Tex. 2015).

A party waives the statutory right of offset under section 51.003(c) by agreeing to a general waiver of defenses in a guaranty agreement. *Moayedi v. Interstate 35/Chisam Rd., L.P.*, 438 S.W.3d 1, 2 (Tex. 2014). If the guaranty agreement is unambiguous, its interpretation is a question of law for the court. *Id.* at 7–8 (holding that when Moayedi waived "any," "each," and "every" defense, that waiver resulted in "a broad waiver of all possible defenses," including his statutory right to offset).

The guaranty agreement signed by Myers guaranteed the prompt and full payment to the lender of the note executed by RCC, RCC's performance of all

obligations under the deed of trust that secured the note, all other obligations under the loan documents, and

> the prompt and full payment to Lender of any and all other indebtedness and liabilities of all kinds which are now *or hereafter may be owing to Lender without deduction by reason of Borrower's alleged setoff, defense, or counterclaim* (whether created directly or acquired by Lender indirectly by assignment or otherwise, and whether now existing or hereafter arising, absolute or contingent, joint and/or several, due or to become due, primary or secondary, and all renewals and extensions thereof), including, but not limited to, principal, interest, reasonable attorney's fees, late charges, and other charges becoming due with respect to such indebtedness . . . and the Note, Deed of Trust, and any and all other documents pertaining to any indebtedness and/or Obligations . . . . [Emphasis added.]
>
> Guarantor's liability for payment of principal, interest which has accrued on the Obligations, late charges and related expenses, including court costs and reasonable attorney's fees generated by Borrower's default under the Obligations *shall be unlimited*. . . . [Emphasis added.]
>
> . . . .
>
> Guarantor hereby waives all demand and notices of any default of Borrower or any modifications relating to the payment of the Note or the performance of any or all of the Obligations of Borrower under any of the Loan Documents. This is a guaranty of payment and performance and not of collection and it is an agreement of guaranty, not of suretyship.
>
> This guaranty extends to and covers any renewal and extension of any of Borrower's Obligations . . . .
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> . . . .
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> *Nothing* shall discharge or satisfy the liability of Guarantor *except the full performance of the Obligations*. Moreover, Guarantor's liability for the Obligations *is unconditional, without deduction by reason of setoff, defense or counterclaim by Borrower*. . . . [Emphasis added.]

The agreement also provided that a subsequent guaranty by Myers or any other guarantor of RCC's liability to the lender "shall be construed as an additional or supplementary guaranty unless otherwise expressly provided therein." The same language is contained in RCP's guaranty agreement.

Myers's 2009 reaffirmation of the guaranty approved the note's modification and stated, "There are no offsets, claims or defenses of Guarantor with respect to the Guaranty.[7] Further, the Guaranty is not released diminished or impaired in any way by this Reaffirmation, and the Guaranty is hereby ratified and confirmed in all respects." Myers's 2010 amendment and reaffirmation of guaranty contained the same language with regard to offsets, claims, or defenses.

Appellants argue, "It is abundantly clear from the unambiguous language above that neither Myers nor RCP waived their right to offset, a future right, pursuant to Tex. Prop. Code § 51.003," because merely agreeing to pay RCC's debt did not mean they were relinquishing their own rights that they—as opposed

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[7] *Cf. Salvagio v. Madison Realty Capital, L.P.*, No. H–11–2183, 2012 WL 5397190, at *2 (S.D. Tex. Nov. 5, 2012). In *Salvagio*, one of the primary clauses at issue stated that the borrower and guarantor acknowledged and agreed that "they have no offsets . . . and that if [they] now have, or ever did have, any offsets . . . from the beginning of the world through this date and through the time of execution of this Agreement, all of them are hereby expressly WAIVED." *Id.* at 2. The court concluded that the waiver language did not "have the kind of prospective, or forward-looking, or contingent waiver language that would permit the Court to hold as a matter of law that the parties mutually agreed that the borrower in 2008 waived a future statutory offset that did not arise under Section 53.001 until 2011." *Id.* at *3.

to RCC—might have in the future.[8] But this argument ignores both their unconditional assumption of unlimited liability for RCC's debt and the plain language of the 2009 and 2010 reaffirmations, which waives any offsets, claims or defenses "*of Guarantor* with respect to the Guaranty." [Emphasis added.] We overrule Appellants' second point.

2. Payment Defense

In their third point, Appellants argue that the trial court erred by granting directed verdict to BBT on Appellants' affirmative defense of payment. BBT responds that the trial court correctly granted directed verdict on this defense because Appellants presented no evidence of any rental payments paid to or received by the lender. *See Sw. Fire & Cas. Co. v. Larue*, 367 S.W.2d 162, 162 (Tex. 1963) (stating that payment is an affirmative defense on which the defendant has the burden of proof).

Property code section 64.051, "Security Instrument Creates Assignment of Rents; Assignment of Rents Creates Security Interest," provides,

> (a) An enforceable security instrument creates an assignment of rents arising from real property described in that security instrument, unless the security instrument provides otherwise or the security

[8]This is not the first time Myers has made this argument. *See Myers v. HCB Real Holdings, LLC*, No. 05-13-00113-CV, 2015 WL 2265152, at *5 (Tex. App.—Dallas May 14, 2015, pet. denied) (mem. op.) (reciting guarantors' argument as to insufficiency of the guaranty language to waive a statutory right accruing in the future). In *HCB*, the court concluded that the language in the guaranty with regard to any defense, right of offset, or claims the borrower or guarantors "may have" was sufficient to waive any prospective offset rights as well as those existing when the guaranty was signed. *Id.*

> instrument is governed by Section 50(a)(6), (7), or (8), Article XVI, Texas Constitution.
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> (b) An assignment of rents creates a presently effective security interest in all accrued and unaccrued rents arising from the real property described in the security instrument creating the assignment, regardless of whether the security instrument is in the form of an absolute assignment, an absolute assignment conditioned on default or other event, an assignment as additional security, or any other form. The security interest in rents is separate and distinct from any security interest held by the assignee in the real property from which the rents arise.
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> (c) An assignment of rents does not reduce the secured obligation except to the extent the assignee collects rents and applies, or is obligated to apply, the collected rents to payment of the secured obligation.

Tex. Prop. Code Ann. § 64.051 (West 2014).

Appellants argue that while property code section 64.051(b) provides that an absolute assignment of rents is a security interest and not a pro tanto reduction of indebtedness, because the statute did not go into effect until June 17, 2011, it does not affect the interpretation of the assignment of rents in the deed of trust here. They contend that *Taylor v. Brennan*, 621 S.W.2d 592 (Tex. 1981), governs instead,[9] arguing that the deed of trust created an absolute assignment of rentals that must be considered as a pro tanto payment.

[9] *Taylor* was based a suit for damages for waste of security involving the interpretation of an assignment-of-rentals instrument that had been executed in connection with the purchase of an apartment complex that was subject to a first lien. 621 S.W.2d at 593. The seller sued the buyer, alleging that the various security agreements assigned the rents, which were to be used for payment of the first lien and second lien mortgage notes such that the buyer's failure to apply the rents to discharge the first lien payments constituted a waste of security. *Id.* The court observed, "When an assignment of rentals is given as 'further' or

BBT responds that only subsection (a) of section 64.051 was limited by the original legislation and that subsequent legislation clarified that subsections (b) and (c) of section 64.051 apply to *all* assignments of rent, no matter when executed.

Section 64.051 became effective on June 17, 2011. See Act of May 23, 2011, 82nd Leg., R.S., ch. 636, § 2, 2011 Tex. Sess. Law Serv. 1530, 1533, 1537. At the time that it was enacted, the legislature provided,

> Section 3. (a) Except as otherwise provided by this section, Chapter 64, Property Code, as added by this Act, governs the enforcement of an assignment of rents, the perfection and priority of a security interest in rents, and the attachment and perfection of a security interest in proceeds *regardless of whether the document creating the assignment of rents was signed and delivered before the effective date of this Act.*
>
> . . . .
>
> (c) *Subsection (a), Section 64.051, Property Code, as added by this Act, applies only to a security instrument signed and delivered on or after the effective date of this Act*. A security instrument signed and delivered before the effective date of this Act is governed by the law that applied to the instrument immediately before that date, and the former law is continued in effect for that purpose.

'additional' security, there is a strong indication the parties intended a pledge . . . while an absolute assignment of rentals is not security, but is a pro tanto payment of the obligation." *Id.* at 594 (citations omitted). Based on the language in the granting clause at issue, the court concluded that the parties intended only to create a pledge of rentals such that the seller could not recover the rents collected by the buyer before it took any action to foreclose, and it reversed the part of the appellate court's judgment that awarded damages for waste of security. *Id.* at 595.

Id. § 3, 2011 Tex. Sess. Law Serv. at 1537 (emphasis added). Therefore, as of June 17, 2011, as stated by BBT, subsection (a) of section 64.051 did not apply—that is, no automatic assignment of rents arose when the deed of trust was signed—but the remainder of section 64.051 governed, including subsection (c), which provided that the assignment of rents did not reduce the secured obligation except to the extent that the assignee (BBT) collected any rent and applied it, or was obligated to apply it, to RCC's note.[10] *See id*.; *see also*

[10]Further, when the legislature amended the statute again in 2013, it provided clarification regarding its position on *Taylor* and the pro tanto reduction theory, stating,

> Section 11. The legislature finds that Subsection (c), Section 64.051, Property Code, as added by Chapter 636 (Senate Bill No. 889), Acts of the 82nd Legislature, Regular Session, 2011, was intended by the 82nd Legislature to eliminate confusion arising from language in the Texas Supreme Court's decision in *Taylor v. Brennan*, 621 S.W.2d 592 (Tex. 1981), to the effect that an absolute assignment of rents is a pro tanto payment of a secured obligation. *In accordance with Subsection (c), Section 64.051, Property Code, as added by Chapter 636 (Senate Bill No. 889), Acts of the 82nd Legislature, Regular Session, 2011, unless the parties expressly agree otherwise, a secured obligation is reduced only if and to the extent that the assignee collects rents and applies the rents to the obligation. Simply taking an assignment of rents does not reduce the secured obligation*.

See Act of May 17, 2013, 83rd Leg., R.S., ch. 453, §§ 3, 11, 2013 Tex. Sess. Law Serv. 1280, 1282, 1284–85 (emphasis added). The legislature further provided,

> Section 12. (a) Except as otherwise provided by this section, Chapter 64, Property Code, as added by Chapter 636 (Senate Bill No. 889), Acts of the 82nd Legislature, Regular Session, 2011, and amended by this Act, governs the enforcement of an assignment of rents, the perfection and priority of a security interest in rents, and

Johnson v. World Alliance Fin. Corp., No. SA-14-CA-281-OLG, 2015 WL 12570894, at *3–4 (W.D. Tex. July 15, 2015) (observing that under section 64.051(b), "no matter the language in an assignment of rents clause, whether an 'absolute' or 'collateral' assignment is described, all rents assigned are in fact security interests"), *aff'd*, 830 F.3d 192 (5th Cir. 2016).

In the deed of trust, effective June 9, 2006, RCC warranted that as of that date, there were no leases affecting the property but that it nonetheless assigned to its lender a security interest in all of its rights under future leases on the property. The deed of trust contains a clause, "Absolute Assignment of Rents," that provides in pertinent part that the assignment of "all rents, insurance, income, receipts, and profits from the Property, and all security deposits and other security therefor," are absolutely and unconditionally assigned and transferred to the lender but that prior to the occurrence of an event of default, the rents would be collected by RCC as trustee for the lender's benefit and in an event of default, the deed of trust spelled out how collected rents should be applied. It also provided that if the rents were insufficient to meet the costs of taking control of and managing the property and collecting the rents, any funds

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> the attachment and perfection of a security interest in proceeds *regardless of whether the document creating the assignment of rents was signed and delivered before the effective date of this Act or before June 17, 2011*.

Id. § 12(a), 2013 Tex. Sess. Law Serv. at 1285 (emphasis added).

expended by the lender for those purposes would become an indebtedness of RCC to the lender.

Per section 64.051(c), the assignment would not reduce RCC's obligation except to the extent BBT actually collected the rent and applied it to payment of the secured obligation. *See* Tex. Prop. Code Ann. § 64.051(c). Therefore, we now look to the evidence at the trial to determine whether there was any evidence that BBT actually collected any rent.

The only evidence regarding any rent consisted of RCC's profit and loss statement and Myers's testimony that the amount of $134,353.42 that was listed as "total RENTAL INCOME" on RCC's profit and loss statement from June 1, 2006 through October 2, 2014, "looks like it's rental income that was paid to RCC Heritage Glade during that time period," and that he thought it was "mostly from the executive suites."

On appeal, Appellants contend that "[t]here was clearly evidence of the terms of the Deed of Trust in the record as well as evidence of the rent payments referenced below" and that the trial court "failed to take into account the rents and income derived from the Property paid by RCC to Colonial NA, Colonial, or BB&T." Appellants assert that $222,033.00 should have been deducted—$134,353.42 in rental income and $87,679.58 from the sale of a building.

RCC warranted in the deed of trust that as of June 9, 2006, there were no leases affecting the property. The foreclosure sale occurred on February 27, 2012. RCC's profit and loss statement showed $134,353.42 in total rental

income for June 1, 2006 through October 2, 2014. Presumably, then, at some point between June 9, 2006, when there were no leases, and August 30, 2011, when RCC was sent a notice of default, some tenants may have paid rent to RCC. The profit and loss statement lists Executive Music Group, Kay Bryson Realty, Entreone LLC, Sharcom, Upromise, Lynn Mabe, and Texas Health Resources as entities paying rental income, but there is nothing on the profit and loss statement that ties any of the tenants to a particular piece of real property or to any particular dates within the June 1, 2006 to October 2, 2014 time period.

No evidence was presented regarding when the leases began and, under the terms of the deed of trust, until RCC defaulted on the loan, *RCC* was responsible for collecting the rent. After default, BBT was entitled to collect the rents but—per the terms of the deed of trust—had to first apply any proceeds to managing the property and all of the costs associated with managing the property, resulting in more debt by RCC to BBT if the rents were insufficient to meet those costs. No evidence was presented at trial that any rental payments were actually made to or received by BBT or its predecessors. Because section 64.051(c) provides that the debt would not be reduced except to the extent BBT actually collected rent and applied it to the secured obligation, and because there is no evidence that BBT ever collected any rent, we conclude that the trial court did not err by granting a directed verdict on Appellants' affirmative defense of payment. *See Prudential Ins. Co. of Am.*, 29 S.W.3d at 77; *Farmers Grp. Ins., Inc.*, 434 S.W.3d at 331–32. Therefore, we overrule Appellants' third point.

C. Attorney's Fees

In their fourth point, Appellants argue that the award of attorney's fees should be reversed if they prevail on appeal. As we have previously overruled Appellants' first three points, we likewise overrule their fourth.

IV. Conclusion

Having overruled all of Appellants' points, we affirm the trial court's judgment.

/s/ Bonnie Sudderth
BONNIE SUDDERTH
JUSTICE

PANEL: LIVINGSTON, C.J.; DAUPHINOT and SUDDERTH, JJ.

DELIVERED: December 29, 2016