COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00124-CV

PADRAIC GILLESPIE AND TRACY GILLESPIE — APPELLANTS

V.

NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-3, A DELAWARE STATUTORY TRUST — APPELLEE

FROM COUNTY COURT AT LAW NO. 3 OF TARRANT COUNTY
TRIAL COURT NO. 2014-006194-3

MEMORANDUM OPINION[1]

In this appeal from a bench trial and final judgment, we are asked to determine the admissibility of a business-records affidavit and attendant documents and to determine the sufficiency of the evidence to support several of the trial court's findings of fact. We conclude that even considering the

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

challenged evidence, the trial court's findings and resulting judgment were not supported by legally sufficient evidence. Accordingly, we reverse and render a take-nothing judgment.

I. BACKGROUND

A. THE LOAN

On May 1, 2002, Bank One, N.A. entered into a loan-purchase agreement with The First Marblehead Corporation (First Marblehead) "for loans that were originated under Bank One's . . . EDUCATION ONE Loan Program." Three years later on July 12, 2005, appellant Padraic Gillespie,[2] as the borrower, and appellant Tracy Gillespie, as a cosigner (collectively, the Gillespies), signed a note[3] with "Bank One (JP Morgan Chase Bank, N.A.)" under which Bank One agreed to lend $12,500 to the Gillespies under its Education One loan program. Under the terms of the note, the Gillespies' repayment obligations would begin on December 20, 2008, but interest on the loan amount accrued as of the date the funds were disbursed to the Gillespies. Bank One's records reflected that it disbursed the principal amount of the loan—$13,368.98[4]—to the Gillespies on July 26, 2005.

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[2]Padraic was a student at the University of North Texas.

[3]The note consisted of a one-page "NOTE DISCLOSURE STATEMENT" and a four-page "Loan Request/Credit Agreement." Our references to "the note" in this opinion will include these two documents.

[4]This amount reflected the $12,500 amount financed plus an $868.98 "Prepaid Finance Charge."

On October 12, 2005, First Marblehead, The National Collegiate Funding LLC (National Funding), and Bank One entered into "Pool Supplements" regarding "loans that were originated under Bank One's . . . EDUCATION ONE Loan Program" (the pool supplement). That same day, National Funding entered into a deposit and sale agreement (DAS) with appellee National Collegiate Student Loan Trust 2005-3 (the Trust) under which National Funding sold and assigned to the Trust "the student loans listed on Schedule 2 to each of the Pool Supplements set forth on Schedule A." The Gillespies made no payments on their loan between December 2008 and April 2010, but were granted four deferments of their repayment obligations extending from February 1, 2010, through May 31, 2011. Even so, the Gillespies did not meet their repayment obligations.[5]

B. THE TRUST'S SUIT

On November 14, 2014, the Trust filed suit against the Gillespies seeking repayment of the unpaid balance on the note—$20,824.84—and asserting that it had either originated or acquired the Gillespies' loan through a "qualified financial institution."[6] The Trust raised a claim for breach of contract against Padraic directly and against Tracy based on her personal guarantee of the note. The

[5]In fact, their only two payments occurred on April 27, 2010 ($25.00), and December 1, 2010 ($300.00).

[6]The Trust also pleaded for prejudgment interest and attorney's fees, but it waived these amounts at trial.

Gillespies answered by filing a general denial along with a verified denial raising their assertion that the Trust did not have the capacity to sue because it is not a legal entity. They also raised the affirmative defense of limitations.

A nonjury trial was held on March 29, 2016. No witnesses were called, but the Trust offered into evidence the business-records affidavit of Kayla Chandler, who was a legal case manager for the Trust's loan servicer.[7] The affidavit attempted to authenticate thirty-six pages of records ostensibly related to the Gillespies' loan. *See* Tex. R. Evid. 901(a), 902(10). The Gillespies objected to portions of Chandler's affidavit as inadmissible hearsay. The trial court sustained those objections and struck those statements that went beyond certifying that the attached records were true and correct—beyond the authentication requirements of rules 901 and 902. The remainder of the affidavit was admitted, authenticating the attached business records. *See* Tex. R. Evid. 901(a), 902(10).

The Gillespies also objected to the admissibility of portions of the attached, authenticated records: (1) the pool supplement, which supplemented the May 1, 2002 note-purchase agreement between First Marblehead and Bank One; (2) a single page following the pool supplement (the orphan page), which the Trust asserted was included as part of the pool supplement's schedule 1 and showed that the Gillespies' note was included in those pooled for sale; (3) the DAS, assigning National Funding's rights and interests under the pool supplement to

[7]The Trust had served the affidavit and attached records on the Gillespies more than fourteen days before the trial. *See* Tex. R. Evid. 902(10)(A).

the Trust; and (4) a February 2016 printout of the financial activity on the Gillespies' loan from its inception to the date the Trust declared it to be in default. The trial court overruled most of the objections but sustained the Gillespies' objection to the pool supplement.[8] The trial court concluded that the pool supplement was not a business record but indicated that it might be admissible as a public record "[i]f [the Trust] wish[es] to introduce it in a different way." The Trust did not re-offer the pool supplement.

At the conclusion of the trial, the trial court found the Gillespies jointly and severally indebted to the Trust for $20,824.84 and awarded that amount in the final judgment. The Gillepsies requested that the trial court enter findings of fact and conclusions of law, which it did. In its findings, the trial court found that the Gillespies entered into a loan agreement with Bank One,[9] that Bank One transferred and assigned the Gillespies' note to National Funding, and that National Funding simultaneously transferred it to the Trust. In its conclusions, the trial court stated that the Trust's "Business Records Affidavit, and the documents and records attached thereto, were properly admitted into the evidentiary record at trial." It also concluded that because the Trust "acquired"

[8]The Trust does not argue on appeal that this ruling was an abuse of discretion but instead mistakenly briefs the appeal as if the pool supplement had been admitted.

[9]The trial court found that the agreement was with JP Morgan, Bank One's successor after a merger. This difference is not material to this appeal; thus, we will refer to the original lender as Bank One.

the Gillespies' loan through Bank One and National Funding, the Trust had standing to bring suit to recover under the loan, which was a "valid contract" that the Gillespies breached. The Gillespies now appeal and challenge several of the trial court's evidentiary rulings and the sufficiency of the evidence to support some of the trial court's findings and conclusions.

II. SUFFICIENCY OF THE EVIDENCE

In their second issue, the Gillespies assert that the evidence was legally insufficient to show that the Trust was an assignee of Bank One's interest in the Gillespies' note or that the Gillespies breached a contract with the Trust, leading to the Trust's damages. Although the Gillespies claim in passing that the evidence was factually as well as legally insufficient, their briefing regarding sufficiency argues solely that there was no—legally insufficient—evidence of portions of the Trust's case. We will address their argument as they briefed it and will look to whether the evidence was legally sufficient to support the trial court's challenged findings.[10] *See* Tex. R. App. P. 38.1(i); *Gutierrez v. Martinez*, No. 01-07-00363-CV, 2008 WL 5392023, at *2 n.4 (Tex. App.—Houston [1st Dist.] Dec. 19, 2008, no pet.) (mem. op.).

[10]The Trust addressed only legal sufficiency in its brief as well.

A. STANDARD OF REVIEW

A trial court's findings of fact have the same force and dignity as a jury's answers to jury questions and are reviewable for legal and factual sufficiency of the evidence to support them by the same standards. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994). When, as here, the appellate record contains a reporter's record, findings of fact on disputed issues are not conclusive if there is no evidence to support the findings. *Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 52 (Tex. 2003); *Ramsey v. Davis*, 261 S.W.3d 811, 815 (Tex. App.—Dallas 2008, pet. denied). We defer to unchallenged findings of fact that are supported by some evidence. *Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 437 S.W.3d 518, 523 (Tex. 2014).

We may sustain a legal sufficiency challenge only when (1) the record discloses a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence establishes conclusively the opposite of a vital fact. *Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 620 (Tex. 2014) (op. on reh'g). In determining whether there is legally sufficient evidence to support the finding under review, we must consider evidence favorable to the finding if a reasonable factfinder could and disregard evidence contrary to the finding unless a reasonable factfinder could not. *Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007).

B. STANDING TO BRING CLAIM FOR BREACH OF CONTRACT

The trial court found that the Gillespies had entered into an educational loan agreement with Bank One at the Gillespies' request, that the parties had mutually agreed to the note's material terms and conditions, and that the Gillespies failed to make payments as agreed. It further found that the Trust acquired the Gillespies' student loan by assignment though National Funding, conferring standing on the Trust to enforce the terms of the note: "[The Trust] has standing to bring the Suit because, when [the Trust] acquired the Student Loan, [National Funding], as assignor of [Bank One], transferred to [the Trust], without limitation or reservation, all rights and privileges it owned, held, or possessed in, or with regard to, the Student Loan."[11]

The Gillespies attack the lack of evidence to support the existence of a valid and enforceable contract between them and the Trust because there was no evidence that the Trust was a holder in due course of the Gillespies' note with Bank One; therefore, the Gillespies assert the Trust does not have standing to sue to recover under the note.[12] To recover on an assigned cause of action, the

[11]Although the trial court referred to some of its findings as conclusions, we are not bound by the trial court's designations. *See Ray v. Farmers' State Bank of Hart*, 576 S.W.2d 607, 608 n.1 (Tex. 1979).

[12]Although the Gillespies did not clearly raise this particular standing argument in the trial court, standing is a component of subject-matter jurisdiction that may be raised for the first time on appeal and is reviewed de novo as a question of law. *See Rolen v. LVNV Funding, LLC*, No. 2-09-304-CV, 2010 WL 1633402, at *1 (Tex. App.—Fort Worth Apr. 22, 2010, no pet.) (mem. op.).

Trust was required to prove that a cause of action capable of assignment existed and that the cause of action was in fact assigned to the Trust. *See Tex. Farmers Ins. Co. v. Gerdes ex rel. Griffin Chiropractic Clinic*, 880 S.W.2d 215, 217 (Tex. App.—Fort Worth 1994, writ denied). Therefore, the Trust had to produce evidence establishing its privity to Bank One, the lender on the note and the entity in direct privity with the Gillespies. *See R & R White Family Ltd. P'ship v. Jones*, 182 S.W.3d 454, 459 (Tex. App.—Texarkana 2006, no pet.); *Ceramic Tile Int'l, Inc. v. Balusek*, 137 S.W.3d 722, 724–25 (Tex. App.—San Antonio 2004, no pet.); *Skipper v. Chase Manhattan Bank USA, N.A.*, No. 09-05-196 CV, 2006 WL 668581, at *1 (Tex. App.—Beaumont Mar. 16, 2006, no pet.) (mem. op.).

The admitted evidence shows that the Gillespies entered into the note with Bank One, and the note provided that Bank One could assign the note "at any time." Three months later, National Funding, as the seller and owner "of certain student loans," sold and assigned to the Trust specified student loans in the DAS: "This [DAS] sets forth the terms under which the Seller is selling and the Purchaser is purchasing the student loans listed on Schedule 2 to each of the Pool Supplements set forth on Schedule A attached [to the DAS] (the 'Transferred Student Loans')." Further, the DAS provided that National Funding assigned to the Trust its rights "under each of the Pool Supplements listed on Schedule A attached [to the DAS] and the related Student Loan Purchase Agreements listed on Schedule B attached [to the DAS]." Schedule A to the DAS states that First Marblehead, National Funding, and Bank One entered into pool

supplements on October 12, 2005, for loans that were originated under Bank One's Education One program. Schedule B states that Bank One and First Marblehead entered into note-purchase agreements on May 1, 2002, for loans that were originated under Bank One's Education One program.[13]

No document admitted into evidence purports to be the "Schedule 2" referenced in the DAS as specifying which loans were sold by National Funding to the Trust, and the pool supplement was not admitted into evidence. The Trust does not challenge the exclusion of the pool supplement on appeal, but improperly argues that the evidence is sufficient to show its standing based on the DAS as well as the excluded pool supplement.[14] We conclude the Trust failed to show that it was a holder in due course of the Gillespies' note with Bank One. No evidence shows that the Gillespies' note was indeed included in the loans pooled for sale and assigned to the Trust in the DAS. The Trust asserted that the orphan page was part of schedule 1 to the pool supplement and showed

[13]It bears repeating that this agreement occurred three years before the Gillespies' loan with Bank One was originated.

[14]Although "evidence treated by the trial court and the parties as if it had been admitted is, for all practical purposes, admitted," the trial court did not treat the pool supplement as admitted, and the Gillespies do not rely on the pool supplement as if it had been admitted even though the trial court expressly excluded it. *Travelers Indem. Co. of R.I. v. Starkey*, 157 S.W.3d 899, 904 (Tex. App.—Dallas 2005, pet. denied). Only the Trust references the pool supplement as if it had been admitted and that appears to be a briefing error. The Gillespies argue the effect of the admission of the pool supplement only in the alternative, and the trial court did not specifically rely on the pool supplement in its findings and conclusions.

that the Gillespies' loan was part of the pooled loans transferred to National Funding. But the trial court excluded the pool supplement, including its attached schedule 1. Even if the orphan page was not part of the pool supplement document and, thus, was not part of the evidence excluded by the trial court, it proves nothing by itself.[15] The only information on the orphan page is that Padraic, identified by the last four digits of his social-security number, received a $13,368.98 loan from Bank One under its Education One loan program.

Additionally, although the admitted DAS arguably proved the sale and assignment between National Funding and the Trust of certain unspecified loans, no evidence establishes Bank One's assignment to First Marblehead. First Marblehead was National Funding's alleged predecessor in interest to the Gillespies' note; thus, without the link between Bank One and First Marblehead, First Marblehead's assignment to National Funding and National Funding's to the Trust does not establish the Trust's standing to sue on the note. Indeed, the trial court's findings skip the First Marblehead link in the assignment chain: "On or about October 12, 2005, [Bank One] transferred and assigned [the Gillespies'] promissory note . . . to [National Funding]. . . . On that same date, [National

[15]We note that the form of the pool supplement excluded by the trial court here is substantially similar to a pool supplement addressed by this court and found to be insufficient, in the absence of more specified information, to establish that the purported holder of a student loan was a holder in due course though assignment from the original lender. *Nat'l Collegiate Student Loan Trust 2006-2 v. Ramirez*, No. 02-16-00059-CV, 2017 WL 929527, at *3–4 & n.8 (Tex. App.—Fort Worth Mar. 9, 2017, no pet.) (mem. op.).

Funding] transferred and deposited [the Gillespies'] promissory note . . . to [the Trust]." Although the pool supplement, if read in tandem with the DAS, arguably supplies the assignment links from Bank One to First Marblehead, from First Marblehead to National Funding, and from National Funding to the Trust, the pool supplement was not before the trial court.

In summary, no evidence supports the trial court's finding that the Trust was a holder in due course of the Gillespies' note and had received by assignment Bank One's right to recover under the note. *See, e.g.*, *Ramirez*, 2017 WL 929527, at *3–4; *Frontier Commc'ns Nw., Inc. v. D.R. Horton, Inc.*, No. 02-13-00037-CV, 2014 WL 7473764, at *8 (Tex. App.—Fort Worth Dec. 31, 2014, no pet.) (mem. op.); *Jenkins v. CACH, LLC*, No. 14-13-00750-CV, 2014 WL 4202518, at *6–7 (Tex. App.—Houston [14th Dist.] Aug. 26, 2014, no pet.) (mem. op.); *Skipper*, 2006 WL 668581, at *1. We sustain issue two.

III. ADMISSION OF EVIDENCE

In their first issue, the Gillespies argue that the trial court abused its discretion by overruling their objections to the Trust's records it admitted through a business-records affidavit to prove its claim against the Gillespies. Because their sufficiency point is dispositive of this appeal, we need not address these evidentiary issues. *See* Tex. R. App. P. 47.1. However, our consideration of certain portions of the Trust's admitted evidence in our legal-sufficiency review should not be equated to a conclusion that such evidence was, in fact, properly admitted.

IV. CONCLUSION

This appeal is an object lesson in the danger of relying on imprecise or incomplete records to prove a technical issue such as a party's status as a holder in due course on the basis of multiple assignments. The result in this appeal possibly could have been avoided or ameliorated by careful adherence to the rules of evidence and the burden of proof. The mere fact that the subject matter of a suit does not involve a large amount in controversy does not relieve a party of the burden to dot every "i" and cross every "t." Details are important, even where the alleged operative breach seems to be a foregone conclusion. And here, the admitted evidence certainly shows that the Gillespies failed to comply with their repayment obligations under the note. In any event, we cannot turn a blind eye to the absence of any proof that the Trust had standing to assert Bank One's breach-of-contract claim regarding the Gillespies' note even though the result would appear to be inequitable. Accordingly, we reverse the trial court's judgment in the Trust's favor and render a take-nothing judgment in favor of the Gillespies. *See* Tex. R. App. P. 43.2(c), 43.3.

/s/ Lee Gabriel

LEE GABRIEL
JUSTICE

PANEL: WALKER, MEIER, and GABRIEL, JJ.

DELIVERED: June 29, 2017