COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00481-CV

LAURIE B. GRADY — APPELLANT

V.

NATIONSTAR MORTGAGE, LLC, AND U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR SPECIALTY UNDERWRITING AND RESIDENTIAL FINANCE TRUST MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2006-BC5 — APPELLEES

FROM THE 236TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 236-280114-15

MEMORANDUM OPINION[1]

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

After Appellant Laurie B. Grady defaulted on her home-equity loan, the noteholder, Appellee U.S. Bank National Association, as Trustee for Specialty Underwriting and Residential Finance Trust Mortgage Loan Asset-Backed Certificates, Series 2006-BC5, successfully sued for an order allowing it to foreclose on its lien. Grady then sued U.S. Bank and the current loan servicer, Appellee Nationstar Mortgage, LLC, alleging that the lien was unenforceable. The trial court granted U.S. Bank and Nationstar's summary-judgment motion, and Grady has appealed. We will affirm.

Background

In July 2006, Grady executed a "Texas Home Equity Security Instrument" in National City Mortgage's favor to secure the repayment of a "Texas Home Equity Note" in the original principal amount of $135,200. Grady defaulted, and on August 9, 2010, the then-current loan servicer wrote her that the loan was in default and that she had to pay $33,070.56 to cure the default. The letter also stated that if the default was not cured before September 8, 2010, the note would be accelerated and foreclosure proceedings would begin.

Grady failed to cure, and in 2014 U.S. Bank filed for a home-equity-foreclosure order in the 342nd District Court.[2] *See* Tex. R. Civ. P. 735, 736. In June 2015, that court signed an order allowing U.S. Bank to foreclose on its lien. The trustee's sale was noticed for August 4, 2015.

[2]A lien securing repayment of a home-equity note may only be foreclosed upon by a court order. *See* Tex. Const. art. XVI, § 50(a)(6)(D).

But the day before the foreclosure sale, Grady sued U.S. Bank and Nationstar in the 236th District Court, alleging that because the note was accelerated in 2007, the four-year statute of limitations in civil practices and remedies code section 16.035 barred U.S. Bank and Nationstar from enforcing the lien.[3] *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.035 (West 2002). She pleaded claims for breach of contract and for violations of the property code and the Texas Debt Collection Act. In addition to damages and attorney's fees, Grady sought—

- an order quieting title to the property;
- a declaration that U.S. Bank's and Nationstar's actions violated the debt-collection act;
- a declaration that limitations bars enforcement of the lien;
- an injunction prohibiting U.S. Bank and Nationstar from violating the debt-collection act; and
- an injunction preventing any foreclosure or forcible-detainer proceedings or any other action interfering with Grady's use or possession of the property.

U.S. Bank and Nationstar moved for no-evidence summary judgment and for judgment as a matter of law. Grady filed a response, but the trial court granted U.S. Bank and Nationstar's motion without specifying the grounds for its ruling and dismissed Grady's claims with prejudice. Grady has appealed, raising two issues: (1) the trial court erred by granting summary judgment because

[3]Grady's suit automatically stayed the foreclosure sale. *See* Tex. R. Civ. P. 736.11(a).

limitations bars any attempted foreclosure of the claimed lien, and (2) the trial court erred by granting summary judgment because the summary-judgment evidence raises a fact issue concerning limitations on at least one element of each of her claims.

Discussion

Grady bases her claims on the theory that the four-year limitations period in civil practices and remedies code section 16.035 bars U.S. Bank and Nationstar from enforcing the lien.[4] *See id.* § 16.035(a), (b), (d). In their summary-judgment motion, U.S. Bank and Nationstar asserted that because there was no evidence of acceleration—which would indeed have started the four-year clock running under section 16.035—limitations did not bar enforcement of the lien. They also argued that even if the loan was accelerated in 2007, acceleration had been abandoned as a matter of law when the parties entered into forbearance agreements in October 2008 and May 2009.

Because U.S. Bank and Nationstar moved for summary judgment under both rules 166a(c) and 166a(i), we will first review the trial court's judgment under

[4]Limitations was only one of the three bases for Grady's debt-collection-act claims, and her property-code claim was not based on limitations. But on appeal, she presents no issue or argument challenging the summary judgment on her nonlimitations-based debt-collection-act claims or her property-code claim. She has thus waived any challenge to the summary judgment on these claims. *See Jacobs v. Satterwhite*, 65 S.W.3d 653, 655–56 (Tex. 2001) (holding that court of appeals erred in reversing summary judgment on a particular claim when appellant did not challenge summary judgment on that claim); *Riston v. Doe*, 161 S.W.3d 525, 527 n.4 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (refusing to consider particular claim when appellant did not challenge summary judgment on that claim).

rule 166a(i) standards. *See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). If Grady failed to produce more than a scintilla of evidence under that standard, we need not analyze whether U.S. Bank and Nationstar's summary-judgment proof satisfied their rule 166a(c) burden. *See id.*

Standard of Review

Under rule 166a(i), after an adequate time for discovery, the party without the burden of proof may, without presenting evidence, move for summary judgment on the ground that there is no evidence to support an essential element of the nonmovant's claim. Tex. R. Civ. P. 166a(i). The motion must specifically state the element (or elements) for which there is no evidence. *Id.*; *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). The trial court must grant the motion unless the nonmovant produces summary-judgment evidence that raises a genuine issue of material fact. *See* Tex. R. Civ. P. 166a(i) & cmt.; *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008).

When reviewing a no-evidence summary judgment, we examine the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion. *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006). We look for evidence that would enable reasonable and fair-minded jurors to differ in their conclusions. *Hamilton*, 249 S.W.3d at 426 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005)). In the course of this review, we credit evidence favorable to the nonmovant if reasonable jurors could, and we disregard evidence contrary to the

nonmovant unless reasonable jurors could not. *Timpte Indus.*, 286 S.W.3d at 310 (quoting *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006)). If the nonmovant brings forward more than a scintilla of probative evidence that raises a genuine issue of material fact, then a no-evidence summary judgment is improper. *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009); *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003), *cert. denied*, 541 U.S. 1030 (2004).

Limitations and Accrual

Under Texas law, a suit to foreclose a real-property lien or a real-property foreclosure sale according to a power of sale in a deed of trust that creates a real-property lien must occur no later than four years after the day the cause of action accrues. Tex. Civ. Prac. & Rem. Code Ann. § 16.035(a), (b). When this four-year period expires, both the real-property lien and the power of sale to enforce that lien become void. *Id.* § 16.035(d).

If a note secured by a real-property lien is payable in installments, limitations does not begin to run until the maturity date of the last installment. *Id.* § 16.035(e). Here, Grady defaulted before the note's August 1, 2036 maturity date, but that default did not start limitations running. *See Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001). That is because when, as here, a note or deed of trust secured by real property contains an optional

acceleration clause,[5] the cause of action "accrues only when the holder actually exercises its option to accelerate." *Id.* Acceleration in that circumstance is a two-step process requiring a clear and unequivocal notice of intent to accelerate followed by a clear and unequivocal notice of acceleration. *Id.*

Analysis

In their summary-judgment motion, U.S. Bank and Nationstar argued generally that no evidence existed to show that the note was accelerated in 2007 and specifically that no evidence existed that the then-lienholder sent Grady a notice of intent to accelerate or a notice of acceleration. Grady responded that because the note was accelerated in 2007, 2008, and 2010, limitations had expired, and the lien was thus unenforceable. In support, Grady attached the following summary-judgment evidence: (1) the August 2010 default-notice letter, (2) an undated monthly budget, (3) the July 2006 home-equity note, and (4) a June 2008 letter from her homeowners-insurance company thanking her for renewing her policy.

This evidence does not raise a genuine issue of material fact about whether the lienholder accelerated the note in 2007, 2008, or 2010 by sending the requisite notices. The note and the June 2008 letter from Grady's insurer are irrelevant to this issue, and Grady produced no evidence of any notices that were sent in either 2007 or 2008. The budget appears to refer to the August 9,

[5]The note's optional acceleration clause is in paragraph 6(C). The "Texas Home Equity Security Instrument" is not in the appellate record.

2010 default-notice letter, which stated that the loan was "in serious default"; that the total amount required to reinstate the loan was $33,070.56 in monthly charges, late charges, and costs; and that Grady had the right to cure the default by paying the past-due amount shown, "plus any additional regular monthly payment or payments, late charges, fees and charges which become due on or before September 8, 2010." The letter warned Grady that the failure to cure her default could result in foreclosure, and it described various ameliorative options available to her, such as entering into a repayment plan or loan modification, selling the property, or conveying the property to the lender in lieu of foreclosure. Finally, the letter stated that "[i]f the default is not cured on or before September 8, 2010, the mortgage payments **will be accelerated** with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time," and "[f]ailure to bring your loan current or to enter into a written agreement by September 8, 2010 as outlined above will result in the acceleration of your debt."

U.S. Bank and Nationstar admit that the August 2010 default-notice letter is a clear and unequivocal notice of *intent* to accelerate. But Grady produced no evidence that this was followed by a clear and unequivocal notice of acceleration. *See Ogden v. Gibralter Sav. Ass'n*, 640 S.W.2d 232, 233–34 (Tex. 1982) ("Although the cases do not always clearly distinguish between [notices of intent to accelerate and notices of acceleration], both types of notices are required."); *EMC Mortg. Corp. v. Window Box Ass'n, Inc.*, 264 S.W.3d 331, 337 (Tex. App.—

Waco 2008, no pet.) ("A proper notice of acceleration 'in the absence of a contrary agreement or waiver, cuts off the debtor's right to cure his default and gives notice that the entire debt is due and payable.'" (quoting *Ogden*, 640 S.W.2d at 234)).

Because Grady did not produce any evidence of a clear and unequivocal notice of acceleration, there was no evidence that the note was in fact accelerated, the event that would have started limitations running. *See Holy Cross*, 44 S.W.3d at 566; *see also Karam v. Brown*, 407 S.W.3d 464, 469 (Tex. App.—El Paso 2013, no pet.) ("To lawfully exercise an option to accelerate upon default provided by a note or deed of trust, the lender must give the borrower both notice of intent to accelerate and notice of acceleration, and in the proper sequence."). Accordingly, the trial court did not err by granting U.S. Bank and Nationstar's no-evidence summary-judgment motion. Having concluded that the trial court properly granted summary judgment on no-evidence grounds, we need not address whether it erred by granting summary judgment on traditional grounds. *See Ridgway*, 135 S.W.3d at 600; *see also* Tex. R. App. P. 47.1.

We overrule Grady's two issues.

Conclusion

Having overruled Grady's two issues, we affirm the trial court's judgment.

/s/ Elizabeth Kerr
ELIZABETH KERR
JUSTICE

PANEL: SUDDERTH, C.J.; KERR and PITTMAN, JJ.

DELIVERED: November 22, 2017