COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00250-CV

RICHARD CHALKER — APPELLANT

V.

NATIONSTAR MORTGAGE, LLC — APPELLEE

FROM THE 393RD DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. 15-04402-393

MEMORANDUM OPINION[1]

I. INTRODUCTION

Appellant Richard Chalker defaulted under the terms and conditions of a note and initiated the underlying litigation less than one week before his property was scheduled to be sold by non-judicial foreclosure in accordance with the terms of a deed of trust. The trial court ultimately granted summary judgment in

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

favor of Appellee Nationstar Mortgage, LLC and against Chalker. In three issues, Chalker challenges the trial court's summary-judgment rulings. We will affirm.

II. BACKGROUND

In September 2006, Chalker borrowed $491,200 from Lehman Brothers Bank, FSB, a Federal Savings Bank, to refinance his house in Frisco, Texas. Chalker agreed to repay the loan by executing an adjustable rate, thirty-year note in favor of Lehman Brothers. To secure the note, Chalker executed a deed of trust that identified Mortgage Electronic Registration Systems, Inc. (MERS)—the nominee for Lehman Brothers, its successors, and assigns—as the beneficiary. The deed of trust was recorded in the Denton County real property records and provided that MERS could exercise any or all interests granted by Chalker, including the right to foreclose and to sell the property.[2]

In September 2011, MERS assigned its interests under the deed of trust to Aurora Bank, whose successor entity in February 2015 assigned its interests under the deed of trust to Wilmington Trust, National Association, as Successor Trustee to Citibank, N.A., as Trustee to Lehman XS Trust Mortgage Pass-Through Certificates, Series 2006-17, the owner of the note. Nationstar has serviced the loan since July 2012.

[2]Chalker's wife Terri also signed the deed of trust but later deeded her interest in the property to Chalker through a warranty deed dated September 21, 2011.

Chalker was unable to make his mortgage payments after his income declined. In October 2012, Nationstar notified Chalker that as of April 2011, he had defaulted under the terms of both the note and the deed of trust and that if he did not cure the default, Nationstar would accelerate the indebtedness and foreclose on the property secured by the note and deed of trust. Chalker failed to cure the default, and Nationstar's lawyer notified Chalker by letter dated May 11, 2015, that it had elected to accelerate the note's maturity and that the property was scheduled to be sold at a foreclosure sale on June 2, 2015.

On May 28, 2015, Chalker filed his original petition against Nationstar, asserting claims for breach of contract and for fraud.[3] Chalker averred that back in 2006 when he met with Reliant Mortgage, Inc. to sign his application for a "cash out" mortgage loan, he checked the box on page 2 of the application to reflect that he was "self-employed as a 1099 independent contractor." But after the application was sent to Lehman Brothers, "page 2 was changed and his initials [were] forged to reflect [that Chalker was] a salaried employee with a guaranteed income." Chalker alleged that although he was informed before the closing that the loan was being modified so that it was not a "cash out" loan, he was not informed about the substituted and forged page. Chalker's theory was that he would not have qualified for the loan based upon a "1099 irregular income," so Lehman Brothers altered his application to reflect that he was a

[3]Chalker also named MERS and various other individuals as defendants, but they were later dismissed from the lawsuit.

"1040 employee with regular income," thereby qualifying him for the loan, and used his lack of adequate income to deny a modification of the loan when his income later decreased—all to ultimately "access the equity in his home and strip him of his most important asset." Chalker contends that the alteration and forgery in the loan application rendered the note, the deed of trust, and "the whole transaction void on the day the loan was closed."[4]

Nationstar answered and alleged affirmative defenses and counterclaims for declaratory relief, for breach of the note and the deed of trust, and for judicial foreclosure of the property.[5]

Both sides moved for summary judgment. Nationstar filed a combined no-evidence motion on Chalker's breach of contract and fraud claims[6] and a traditional motion on Nationstar's claims for declaratory relief, breach of contract, and judicial foreclosure.[7] Chalker filed a traditional motion for summary judgment

[4]The trial court temporarily enjoined Nationstar from proceeding with the foreclosure sale.

[5]Nationstar sought a declaration that Chalker had a duty to fulfill his obligations under the note and the deed of trust, that Chalker failed to fulfill those obligations, and that his failure to do so constituted a default under the terms of the note and deed of trust.

[6]Aside from the existence of a valid contract, Nationstar challenged each element of Chalker's breach of contract and fraud claims.

[7]Nationstar later filed a supplemental motion for summary judgment. Nationstar observed that Chalker had lived in his house for more than six years without making a single mortgage payment or paying any property taxes and insurance.

on Nationstar's claims for declaratory relief and for judicial foreclosure. He also sought summary judgment on several affirmative defenses—fraud (which he had originally pleaded as a claim for affirmative relief) and limitations (on Nationstar's judicial-foreclosure claim)—and on an unpleaded claim for a declaration that the note and the deed of trust were void. Nationstar's summary-judgment evidence included the transaction documents, the notices of default and foreclosure sale, and account-activity statements. Chalker's summary-judgment evidence included copies of part of his loan application, the note and deed of trust, other documents and correspondence involving the underlying loan transaction, and his affidavit.

The trial court granted Nationstar's motion and denied Chalker's.[8] It signed a final judgment that, among other things, authorized Nationstar to foreclose the deed of trust, to recover amounts owed, and to sell the property if Chalker did not timely pay the money owed under the judgment.

III. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF NATIONSTAR AND AGAINST CHALKER

Chalker argues in his first and third issues that the trial court erred by granting summary judgment in favor of Nationstar and against him. Chalker's nearly identical arguments are largely premised upon his contention that his loan application was fraudulently altered. In his second issue, Chalker contends that

[8]Before ruling, the trial court ordered the parties to brief what effect, if any, the "holder in due course doctrine" had on the issues.

the holder-in-due-course doctrine was irrelevant to the summary-judgment issues.[9]

A. Standards of review

We review a no-evidence motion for summary judgment under the same legal sufficiency standard as a directed verdict. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). The nonmovant has the burden to produce more than a scintilla of evidence to support each challenged element of its claims. *Id.*; *see* Tex. R. Civ. P. 166a(i). In a traditional motion for summary judgment, the movant has the burden to show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). A plaintiff is entitled to summary judgment on a cause of action if it conclusively proves all essential elements of the claim. *See id.*; *MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986). In reviewing either type of summary-judgment motion, we view the evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could and disregarding evidence contrary to the nonmovant unless reasonable jurors could not. *Merriman*, 407 S.W.3d at 248; *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009).

[9]Chalker's briefing is very difficult to follow. He uses no headings and blends his short analyses of the multiple issues. We strive to accurately construe his arguments.

B. Chalker's claims for affirmative relief—fraud and breach of contract

To recover for breach of contract, a plaintiff must show, among other things, that *the defendant* breached a material contractual term. *City of The Colony v. N. Tex. Mun. Water Dist.*, 272 S.W.3d 699, 739 (Tex. App.—Fort Worth 2008, pet. dism'd). And to recover for common-law fraud, a plaintiff must show, among other things, that *the defendant* made a material misrepresentation. *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 524 (Tex. 1998) (op. on reh'g). In both his summary-judgment evidence and his briefing on appeal, Chalker maintains that *Lehman Brothers* committed fraud and breached the note and deed of trust by altering his loan application to reflect that he was "a salaried employee with a guaranteed income rather than a self-employed contract laborer." Chalker produced no evidence that *Nationstar* committed any contractual breach or made any fraudulent representation, nor does he argue or direct us to any authority that Nationstar is vicariously liable for Lehman Brothers' alleged misconduct because Nationstar began servicing the loan in 2012—nearly six years after Chalker submitted the loan application. Because Chalker failed to produce evidence in support of an essential element of his contract and fraud claims, the trial court did not err by granting Nationstar summary judgment on those claims. *See* Tex. R. Civ. P. 166a(i). We overrule this part of Chalker's first issue.

C. Nationstar's claims for affirmative relief—breach of contract, judicial foreclosure, and declaratory judgment—and Chalker's defenses—fraud and limitations

1. Breach of contract

In addition to the defendant's breach, the essential elements of a breach of contract claim are the existence of a valid contract, performance or tendered performance by the plaintiff, and damages sustained as a result of the breach. *City of The Colony*, 272 S.W.3d at 739. Nationstar met its summary-judgment burden to establish, as a matter of law, that it sustained damages as a result of Chalker's failure to comply with both the note in which he agreed to repay the loan in the amount of $491,200 and the deed of trust that secured the note.

Chalker responds that Nationstar was not entitled to summary judgment on its contract claim because its summary-judgment evidence did not contradict Chalker's affidavit "with respect to the alteration and forged initials."

A party is not bound by a contract that is procured by fraud, *Formosa Plastics Corp. USA v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41, 46 (Tex. 1998) (op. on reh'g), but to show fraud, Chalker must have produced evidence that when Lehman Brothers altered his loan application, it did so to induce Chalker to act upon the false representation and enter into the loan agreement. *See JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 653 (Tex. 2018); *Neuhaus v. Kain*, 557 S.W.2d 125, 136 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.) ("To avoid a contract for fraud, the

fraudulent representation must have been relied upon . . . and [one] without which the contract would not have been made."). Chalker's fraud theory, however, is premised on the notion that he would not have *qualified* for the loan had his application accurately reflected that he was a self-employed contract laborer.[10] Thus, if anything, the complained-of misrepresentation was made by Lehman Brothers to induce itself to approve the loan, not to induce Chalker to act on the misrepresentation and enter into the loan agreement. Indeed, Chalker submitted no evidence, nor does he otherwise argue, that he would not have entered into the loan agreement had Lehman Brothers not altered his loan application. On those facts, Chalker's theory goes, he simply would not have qualified for the loan. Unable to show intent to induce reliance, Chalker also has no evidence of justifiable and detrimental reliance, additional elements of his fraud defense.[11] *See JPMorgan Chase Bank, N.A.*, 546 S.W.3d at 653 (requiring claimant to have "actually and justifiably relied upon the representation and suffered injury as a result").

Chalker also argues that there was no meeting of the minds, and therefore no valid loan agreement, due to the alteration, but both the note and the deed of

[10]Chalker states in his brief, "The forgery was obviously made by the original creditor after the fax was sent to the original creditor, *because it needed to change the loan application to make the loan*." [Emphasis added.]

[11]Regarding detrimental reliance, Nationstar initiated judicial foreclosure proceedings against Chalker not because of any consequences flowing from being identified as a salaried employee in the loan application but because his income declined and default followed.

trust, described above, contain all of the essential terms to establish each side's respective obligations and enforceable bargains. *See G.D. Holdings, Inc. v. H.D.H. Land & Timber, L.P.*, 407 S.W.3d 856, 861 (Tex. App.—Tyler 2013, no pet.) ("For a contract to be formed, the minds of the parties must meet with respect to the subject matter of the agreement and all its essential terms."). The trial court did not err by granting Nationstar summary judgment on its claim for breach of contract. We overrule this part of Chalker's first and third issues.

2. Judicial foreclosure and declaratory judgment

Nationstar met its summary-judgment burden to show that it was entitled to foreclosure by submitting evidence of the deed of trust, that Chalker had defaulted on the loan for failing to make payments, that an amount of the indebtedness was due and unpaid, and that the property subject to the deed-of-trust lien was the same property on which Nationstar sought to foreclose. *See McKeehan v. Wilmington Sav. Fund Soc'y, FSB*, No. 01-16-00534-CV, 2018 WL 1747506, at *4 (Tex. App.—Houston [1st Dist.] Apr. 12, 2018, no pet.).

Chalker argues in his reply brief that the trial court erred by granting Nationstar summary judgment on its judicial-foreclosure claim because, as Nationstar "waited 7 years after default to file its foreclosure," limitations had run. Nationstar's claim did not begin to accrue upon default.

"A person must bring suit for the recovery of real property under a real property lien or 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). "If a note or deed of trust secured by real property contains an optional acceleration clause, default does not ipso facto start limitations running on the note. Rather, the action accrues only when the holder actually exercises its option to accelerate." *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001).

Aurora notified Chalker in December 2011 that it was accelerating the maturity of the note, but just a few months later, in February 2012, Aurora filed a notice rescinding the acceleration so that Chalker could cure the default. The civil practice and remedies code addresses this scenario:

> If the maturity date of a series of notes or obligations or a note or obligation 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, obligation, or series of notes or obligations *shall be governed by Section 16.035 as if no acceleration had occurred*.

Tex. Civ. Prac. & Rem. Code Ann. § 16.038(a) (West Supp. 2017) (emphasis added). Nationstar next accelerated the note's maturity on May 11, 2015, and Nationstar filed its counterclaim for judicial foreclosure in April 2017, less than four years later, before the applicable limitations period had run. The trial court properly granted Nationstar summary judgment on its judicial-foreclosure claim. We overrule this part of Chalker's first and third issues.

Chalker asserts no argument addressing the trial court's summary-judgment ruling on Nationstar's claim for a declaratory judgment. Without any argument and citation to relevant authorities explaining why summary judgment was improper on that claim, we can only assume that Chalker has abandoned his challenge to the trial court's ruling. *See* Tex. R. App. P. 38.1(i) (requiring brief to contain clear and concise argument for contentions made). We overrule the remainder of Chalker's first and third issues.

D. Holder in due course

In his second issue, Chalker argues that "the holder in due course defense is not applicable to the circumstances of the loan transaction, note and deed of trust." We need not address this issue because the trial court properly granted summary judgment in favor of Nationstar and against Chalker on other grounds, as explained above. *See* Tex. R. App. P. 47.1. We overrule Chalker's second issue.

IV. CONCLUSION

Having overruled Chalker's three issues, we affirm the trial court's judgment.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: SUDDERTH, C.J.; MEIER and BIRDWELL, JJ.

DELIVERED: August 30, 2018