In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-21-00084-CV

TIANA STAYTON AND MICHAEL CONNER STAYTON, Appellants

V.

FCI LENDER SERVICE, INC., WILMINGTON SAVINGS FUND SOCIETY, FSB, AS OWNER TRUSTEE OF THE RESIDENTIAL CREDIT OPPORTUNITIES TRUST V-D, AND WILMINGTON SAVINGS FUND SOCIETY, FSB, AS OWNER TRUSTEE OF THE RESIDENTIAL CREDIT OPPORTUNITIES TRUST V-E, Appellees

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On Appeal from the 17th District Court
Tarrant County, Texas
Trial Court No. 017-313032-19

Before Birdwell, Bassel, and Wallach, JJ.
Memorandum Opinion by Justice Wallach

MEMORANDUM OPINION

This appeal arises from a summary judgment on the parties' dueling claims related to a home equity loan. Appellant Tiana Stayton sued Appellee FCI Lender Service, Inc. (FCI), the mortgage servicer of her loan, and subsequently added claims against Appellee Wilmington Savings Fund Society, FSB (Bank), as Owner Trustee of the Residential Credit Opportunities Trust V-D, and as Owner Trustee of the Residential Credit Opportunities Trust V-E. FCI filed counterclaims against Tiana and her husband, Appellant Michael Conner Stayton, for foreclosure. The trial court granted judgment for FCI and against the Staytons, and the Staytons now appeal. In three points, they challenge the trial court's evidentiary rulings, the evidentiary sufficiency to support the summary judgment, and the permissibility of FCI's counterclaims. Because the Staytons have not shown that the trial court erred by granting summary judgment, we affirm. *See McNally v. McNally*, No. 02-18-00142-CV, 2020 WL 5241189, at *4 (Tex. App.—Fort Worth Sept. 3, 2020, pet. denied) (mem. op.) (setting out well-established summary-judgment standard and scope of review).

Background

The Staytons received a home equity loan in 2004 and defaulted in August 2009. The note was accelerated in September 2016. The then-beneficiary of the deed of trust filed a Rule 736 application for nonjudicial foreclosure. *See* Tex. R. Civ. P. 736. The district court granted the application. The property was not sold at foreclosure, however; before the property could be sold, Tiana sued the prior

mortgage servicer. The district court dismissed her suit with prejudice. Then Michael sued a different prior mortgage servicer; as with Tiana's suit, the district court dismissed Michael's claims with prejudice. Shortly thereafter, on September 11, 2019, the deed of trust and note were transferred to Bank as Trustee of V-D trust.

In November 2019, Tiana filed the underlying lawsuit against FCI, Bank's mortgage servicer. FCI filed a general denial, counterclaims against Tiana, and a third-party petition against Michael. Included in FCI's counterclaims were claims for judicial foreclosure under Texas Rule of Civil Procedure 309 and for authorization to conduct nonjudicial foreclosure under Texas Property Code Section 51.002. FCI then filed a combined motion for summary judgment on Tiana's claims and on its own claims.

While the motion was pending, the note and deed of trust were transferred to Bank as Trustee of V-E. The Staytons—with Michael now named as a plaintiff—filed an amended petition and an answer. In their petition, the Staytons added Bank as Trustee of V-D and Bank as Trustee of V-E as additional defendants. The Staytons' claims included lack of standing, property code violations, breach of contract, Texas Debt Collection Act violations, and deficiencies of pleadings in the former lawsuits. In response to FCI's counterclaims, the Staytons raised limitations and Texas Civil Procedure Rule 736.11(a)'s automatic-stay requirements. *See* Tex. R. Civ. P. 736.11.

FCI amended its motion for summary judgment on the Staytons' claims and on its claims for judicial and nonjudicial foreclosure, contending that the summary

judgment evidence established the lien, the Staytons' default, the amount due, and FCI's right to foreclose. The trial court granted an interlocutory summary judgment for FCI as mortgage servicer for Bank as Trustee of V-E. FCI then filed a motion for summary judgment seeking judgment on the Staytons' claims against Bank as Trustee of V-D because, according to FCI, the Staytons had refused to dismiss their claims against Bank as Trustee of V-D despite its no longer having an interest in the property. That motion and the Staytons' response mirrored the previous motion and response. The trial court granted the summary judgment, which became the final judgment.[1]

Discussion

We consider the Staytons' first and second points together because both points challenge FCI's summary judgment evidence. The Staytons' first point argues that the trial court erred by granting summary judgment "because the evidence was tendered by means that were insufficient by rule." Under this issue, they challenge the business

[1]Bank as Trustee for V-E did not file its own motion for summary judgment on the Staytons' claims against it, and FCI's motions did not appear to seek judgment on behalf of Bank in that capacity. However, the trial court's final judgment stated that it "dispose[d] of all claims and all parties, and all relief not expressly granted is denied." Accordingly, the judgment disposed of all remaining claims in the suit, including any claims the Staytons had against Bank that were not addressed in the summary judgment motions. *See Roberts v. Roper*, 373 S.W.3d 227, 231 (Tex. App.—Dallas 2012, no pet.) (citing *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001)). The Staytons do not argue that the trial court erroneously granted relief that had not been requested by Bank, and they therefore have waived any error in that part of the judgment. *Id.* at 231 & n.2 (citing *Jacobs v. Satterwhite*, 65 S.W.3d 653, 655–56 (Tex. 2001) and *Ontiveros v. Flores*, 218 S.W.3d 70, 71 (Tex. 2007)).

records affidavit executed by FCI employee Hector Manuel Garcia. The Staytons' second point argues that the trial court erred by granting summary judgment because "the summary judgment evidence established that there were outstanding fact issues (conflicting evidence) on at least one element of each outstanding claim."

Under both of these points, the Staytons raise challenges to Garcia's affidavit. At no point, however, do the Staytons discuss the specific elements of any of their claims or how FCI's summary judgment evidence was insufficient to negate those elements. Likewise, they do not discuss what FCI needed to prove to obtain summary judgment on its counterclaims or how the evidence was insufficient to meet that burden. Instead, the Staytons argue generally that FCI's evidence "was, on its face, insufficient to support [FCI's] defenses (or counterclaims, had they been permissible)."[2] However, as the Staytons point out, the Garcia affidavit supported all of FCI's summary judgment evidence. Accordingly, with respect to the Staytons' arguments under their first two points that Garcia's affidavit did not qualify as an affidavit, we construe their brief to assert that summary judgment was improper on each summary judgment ground asserted by FCI, including the grounds attacking the Staytons' claims. As for those arguments under the Staytons' second point challenging the specific parts of Garcia's affidavit relating to FCI's entitlement to foreclose, we

[2]The Staytons' third point asserts that the counterclaims were not permissible.

construe those parts of their brief to challenge the summary judgment on FCI's counterclaims.

I. Garcia affidavit's admissibility

We begin with the Staytons' argument under their first point that Garcia's business records affidavit supporting FCI's summary judgment motion "was not in fact an affidavit." Under Texas law, an affidavit is "a statement in writing of a fact or facts signed by the party making it, sworn to before an officer authorized to administer oaths, and officially certified to by the officer under his seal of office." Tex. Gov't Code Ann. § 312.011. The Staytons contend that because Garcia's signature was "followed by a California All-Purpose Acknowledgment rather than a notarization affirming that Mr. Garcia had sworn to the statements above his signature," the affidavit "was insufficient to meet the requirements of [Texas Rule of Civil Procedure 166a(f)] that it be admissible in evidence."

Even assuming the affidavit does not meet the requirements for an affidavit under Texas law, the Staytons cannot complain about the defect on appeal unless they preserved their objection in the trial court. *See* Tex. R. App. P. 33.1; *Mansions in the Forest, L.P. v. Montgomery Cnty.*, 365 S.W.3d 314, 317 (Tex. 2012). To preserve it, they had to object on the same basis in the trial court and, crucially, secure a ruling on the objection. FCI contends that the Staytons failed to secure any such ruling. *Mansions in the Forest, L.P.*, 365 S.W.3d at 317. The Staytons do not direct us to any place in the

record where the trial court ruled on any of their evidentiary objections, and we have not found any such ruling. We therefore overrule this part of their first point.

In an unrelated argument under this point, the Staytons assert that the trial court's judgment granted FCI the authority to conduct a nonjudicial foreclosure sale under Property Code Section 51.002 and also authorized a judicial foreclosure under Texas Rule of Civil Procedure Rule 309, "which is impermissible relief, Appellees never having elected their remedy." They cite *Brown v. EMC Mortgage Corp.*, which held that when a lender has sought judicial foreclosure under Rule 309—which authorizes a foreclosure sale conducted by a sheriff or constable—the trial court judgment may not authorize the lender to conduct the sale at public auction. 326 S.W.3d 648, 654 (Tex. App.—Dallas 2010, pet. denied). However, unlike in this case, the *Brown* opinion contains no indication that the lender had also requested a court order permitting it to proceed with nonjudicial foreclosure. *See id.*; *Santiago v. Cent. Mortgage Co.*, No. 05-14-00552-CV, 2015 WL 1805048, at *7 (Tex. App.—Dallas Apr. 21, 2015, pet. denied) (mem. op.) (discussing *Brown*). *Brown* does not address a prevailing party's election of permissible remedies. The Staytons provide no other argument for why the trial court's judgment was reversible error on this basis and provide no other authority to support any such argument, and they do not argue (or provide authority) that the trial court had no authority to authorize nonjudicial foreclosure under the Property Code. *See* Tex. R. App. P. 38.1; *see also Chance v. CitiMortgage, Inc.*, 395 S.W.3d 311, 313 (Tex. App.—Dallas 2013, pet. denied) (upholding order permitting nonjudicial

foreclosure on home equity loan). We therefore overrule the remainder of their first point.[3]

II. Summary Judgment on the Staytons' and Appellees' Claims

We now turn to the Staytons' arguments under their second point. Most of those arguments challenge specific parts of Garcia's affidavit, and most of those challenges relate to FCI's entitlement to foreclosure. This section of the Staytons' brief is largely unsupported by authority. *See* Tex. R. App. P. 38.1(i).

First, the Staytons argue that Garcia's affidavit was "not internally consistent." The Staytons do not, however, explain in this part of their brief how Garcia's affidavit was internally inconsistent, and they cite no authority to support their assertion. Thus, to the extent that this assertion refers to something other than their arguments that follow, it is inadequately briefed, and we overrule it. *See id.*

Second, the Staytons argue that Garcia's statement that "FCI is the servicer of the Loan and Wilmington V-E is the mortgagee" was "a conclusory assertion made without predicate." The Staytons may raise this argument on appeal despite not preserving it in the trial court. *See Truitt v. Hatfield*, No. 02-21-00004-CV, 2021 WL 5742083, at *6 (Tex. App.—Fort Worth Dec. 2, 2021, no pet.) (mem. op.) (allowing challenge to conclusory statements for first time on appeal). "A conclusory

[3]Obviously, FCI cannot sell the same property twice, but FCI has not attempted to do so. No foreclosure sale has occurred yet.

statement is one that does not provide the underlying facts to support the conclusion and is not readily controvertible." *Id.*

In his affidavit, Garcia stated that he is "currently employed by FCI" in a "loan resolution" capacity and that he is a custodian of records for FCI. He stated that "[w]hen FCI receives documents from other parties, such as mortgage servicers or mortgagees, those documents are placed in FCI's business records at or near the time they are received, and are adopted as business records of FCI." He further stated that he had access to the servicing records and loan data for the Staytons' account and that he had reviewed those records. Garcia thus explained the basis on which he had knowledge that FCI was the current mortgage servicer and that V-E is the mortgagee. We overrule this part of the Staytons' second point.

Third, the Staytons contend that although Garcia asserted that he had reviewed FCI's records, he did not "indicate if he simply reviewed images on a screen, as anyone related or unrelated to FCI could do, or if he actually made a personal, physical inspection of real documents to see if they were in fact in the custody of FCI." The Staytons appear to argue that mortgage servicers cannot store and review electronic copies of documents or that an affiant discussing business records must specify the format of the documents reviewed, but they provide no authority or legal analysis to support this argument, and we thus overrule this part of their second point. *See* Tex. R. App. P. 38.1(i).

Fourth, the Staytons challenge Garcia's statement, set out above, about FCI receiving documents from other parties and placing them in FCI's files. The Staytons argue that Garcia's statement "does not indicate at what time FCI received any certain record, does not specify which records he reviewed, nor of what form (original, or what generation copy in what form or from whom received) Garcia might have inspected them." Garcia's affidavit does refer to specific records that he reviewed regarding the assignment of the Staytons' note and deed of trust, and he attached copies of those documents. He referred to FCI's own records regarding the Staytons' default and attached a copy of a statement from FCI showing the payments that the Staytons had failed to make. The Staytons do not cite any authority or state any rule of law for the proposition that Garcia's affidavit was conclusory unless it recited when FCI received the relevant records or that Garcia was required to state the form of the record that he had reviewed. *See id.* We overrule this part of their second point.

Fifth, the Staytons note Garcia's reference to an assignment by Citi Residential Lending attached to the summary judgment motion, and they assert that Garcia "does not explain how [Citi] was able to act therein as attorney-in-fact for a defunct entity, namely Argent Mortgage Company, LLC,[4] which is vital since an agent can only act under a power of attorney for an extant entity." The Staytons do not, however, cite any authority to support their argument or direct this court to any record evidence

[4]Argent was the original lender.

that Argent was defunct at the time that its agent executed the assignment. *See id.* Accordingly, this argument is also waived for inadequate briefing.

Sixth, the Stayons make the same argument they did under their first point that Garcia's affidavit is not an affidavit for purposes of Civil Procedure Rule 166a. For the same reason we rejected that argument above, we reject it here.

Seventh, the Staytons point to Garcia's reference to the copy of the note attached to his affidavit, and they argue that Garcia "does not explain the dates of the indorsements on the last page nor where any subsequent indorsements or allonges might appear." The note was indorsed twice: to Ameriquest Mortgage Company by Argent Mortgage Company LLC and in blank by Ameriquest Mortgage Company. *See Grady v. Nationstar Mortg., LLC*, No. 02-19-00006-CV, 2020 WL 5242418, at *6 (Tex. App.—Fort Worth Sept. 3, 2020, pet. denied) (mem. op.) (noting that when note is indorsed in blank, it is payable to bearer, and party's having possession of note is enough to prove entitlement to collect on it). The indorsements are undated. The Staytons provide no further elaboration for this argument, do not explain the importance of any particular date (or lack thereof) with respect to the indorsements, and provide no citation to authority from which we could glean what their argument might be. *See, e.g.*, *EverBank, N.A. v. Seedergy Ventures, Inc.*, 499 S.W.3d 534, 541, 543 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (stating that indorsement need not be dated and holding that appellee proved its status as note holder via note with specific indorsement followed by blank indorsement); *see also Hood v. CIT Bank, NA*,

No. 14-18-00496-CV, 2021 WL 629751, at *4 (Tex. App.—Houston [14th Dist.] Feb. 18, 2021, no pet.) (mem. op.) (stating that Texas law does not require an indorsement to have a date, that the appellant had cited no authority requiring a date, and that the appellee's possession of the note indorsed in blank was sufficient to show appellee's status as holder). We thus overrule this argument as inadequately briefed. *See* Tex. R. App. P. 38.1(i).

Finally, the Staytons argue that "the best evidence of the Note is the Note itself" and that in this case "we have variances between the apparent chain of indorsement and the chain of assignment, and a lack of linear chaining by FCI or anyone else to rationalize the public record with the current claims of ownership and servicing." Elsewhere they explain what they mean by a "gap of linear chaining"—a gap in Garcia's discussion of the note's and deed of trust's respective chain of assignment. Specifically, the Staytons assert that in discussing the deed of trust's assignments, Garcia does not acknowledge that JPMC assigned the deed of trust to MERS and that Garcia does not explain when MERS then assigned the deed of trust or the note to a different entity:

> Garcia nowhere refers to or explains Texas Corrective Assignment of Deed of Trust ("Sixth Assignment"), dated November 13, 2017, purportedly executed by JPMC to MERS as nominee for Chase. The Sixth Assignment was recorded November 20, 2018 as instrument D217268554. It is plainly of record in Tarrant County, Texas, but Garcia does not demonstrate how or where MERS thereafter assigned away any rights in the Note or the claimed lien of the Home Equity Security Instrument.

The 2017 corrective assignment referenced by the Staytons was a correction of a 2009 assignment of the deed of trust to MERS, as nominee for JPMorgan Chase Bank. The instrument stated that it related back to the previous assignment recorded in 2009. *See* Tex. Prop. Code Ann. § 5.028. The Staytons do not argue that the correction was ineffective or did not relate back to the earlier assignment of the deed of trust. Contrary to the Staytons' assertion, evidence attached to Garcia's affidavit shows that deed of trust and note were both then transferred from MERS to JPMC.[5]

If the Staytons believe that any other alleged problems with FCI's evidence defeated FCI's right to summary judgment on its own claims or on the Staytons' claims, the Staytons do not identify those problems in their brief. Accordingly, we overrule the remainder of their second point.

III. Permissibility of FCI's Claims

The Staytons' third point asserts that the trial court erred by granting summary judgment because FCI's foreclosure counterclaims were impermissible. Citing *Reddick v. Deutsche Bank National Trust Co.*, No. 3:16-CV-1997-D, 2017 WL 6343542, at *3 (N.D. Tex. Dec. 12, 2017), and *Steptoe v. JPMorgan Chase Bank N.A.*, 464 S.W.3d

[5]Additionally, as we noted above, Garcia attached a copy of the note indorsed in blank, which he described as a true and correct copy, and he stated that it was a record contained in FCI's files. *See EverBank*, 499 S.W.3d at 541 (holding that "by producing a note indorsed in blank, EverBank was not required to show how the note was transferred" to prove it was the note's holder). Other than their undeveloped argument about the indorsements' lack of dates, the Staytons do not challenge the effectiveness of the blank indorsement.

429, 433 (Tex. App.—Houston [1st Dist.] 2015), the Staytons correctly point out that a lender may not assert a Rule 736 foreclosure proceeding as a counterclaim in a borrower's suit against the lender. The Staytons then assert that FCI's counterclaim for judicial foreclosure under Rule 309 was also barred and that for the duration of their suit, "there was a complete bar to any independent claims or counterclaims by the creditor."

In other words, to sustain the Staytons' point, we would have to hold that because a Rule 736 proceeding may not be brought as a counterclaim in a borrower's suit against a lender, FCI was also prohibited from asserting any other type of foreclosure counterclaim in this suit. This court has already rejected that argument. *See Kerr v. Bank of N.Y. Mellon Tr. Co., N.A. as Tr. of CWABS Asset-Backed Certificates Tr. 2007-12*, No. 02-20-00179-CV, 2021 WL 1421440, at *3–4 (Tex. App.—Fort Worth Apr. 15, 2021, pet. denied) (mem. op.). We overrule the Staytons' third point.

Conclusion

Having overruled the Staytons' three points, we affirm the trial court's final judgment.

/s/ Mike Wallach
Mike Wallach
Justice

Delivered: May 26, 2022