



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-14-00273-CV

YVONNE A. SANCHEZ, APPELLANT

V.

**WELLS FARGO BANK, N.A., AS TRUSTEE UNDER POOLING
AND SERVICING AGREEMENT DATES AS OF APRIL 1, 2005 ASSET
BACKED PASS-THROUGH CERTIFICATES SERIES 2005-WHQ2, APPELLEE**

**On Appeal from the 288th District Court
Bexar County, Texas
Trial Court No. 2011-C1-09181; Honorable Cathy Stryker, Presiding**

July 19, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.

Appellant, Yvonne A. Sanchez, appeals from an order granting summary judgment in favor of Appellee, Wells Fargo Bank, N.A., as Trustee Under Pooling and Servicing Agreement Dates as of April 1, 2005 Asset Backed Pass-Through Certificates Series 2005-WHQ2 (Wells Fargo), in her declaratory judgment action seeking to bar Wells Fargo from foreclosing on her residence. In a single issue, Sanchez asserts the

trial court erred in concluding that the four-year statute of limitations set forth in section 16.035 of the Texas Civil Practice and Remedies Code did not bar enforcement of a Note and Deed of Trust encumbering Sanchez's homestead. We affirm.

BACKGROUND

In February 2005, Sanchez executed a Note for \$357,000 payable to Argent Mortgage Company, LLC, as lender on a loan secured by property on Sunburst Lane in San Antonio, Texas. Concurrent with the Note, Sanchez executed a Deed of Trust securing payment of the Note. Argent assigned the Deed of Trust to Wells Fargo. Sanchez subsequently defaulted on the Note by failing to timely make payments. A multitude of legal proceedings ensued.

In October 2011, Sanchez filed her *First Amended Original Petition Application For Temporary Restraining Order And Request For Declaratory Judgment*. She asserted actions for fraud, breach of contract, quiet title, and declaratory judgment. Under the section entitled "Request for Declaration that Deed of Trust Lien is Void and Quieting of Title," she asserted that the lien arising from the Deed of Trust held by Wells Fargo was void because the four-year limitations period had expired. See TEX. PRAC. & REM. CODE ANN. § 16.035(a) (West 2002).¹ Wells Fargo filed its answer and counterclaimed for all sums due under the Note and Deed of Trust including foreclosure on Sanchez's residence.

In March 2014, Wells Fargo filed its *Motion for Final Summary Judgment* seeking judgment against Sanchez on all her claims including her assertion that the four-year

¹ This section of the Texas Civil Practice and Remedies Code shall be cited throughout the remainder of this opinion simply as "section" or "§."

limitations period under section 16.035 had expired with regard to Wells Fargo's lien. Wells Fargo asserted that the limitations period was tolled by the parties' actions making Wells Fargo's counterclaim timely filed.

In her response to Wells Fargo's motion, Sanchez asserted there existed a single fact question, i.e., whether Wells Fargo was the assignee of the Note and Deed of Trust. In her response, she neither addressed nor provided any evidence related to whether Wells Fargo's counterclaim was untimely filed. In her *Second Amended Original Petition Application For Temporary Restraining Order And Request For Declaratory Judgment*, however, she reiterated that Wells Fargo's claim was untimely filed.

In April 2014, the trial court issued its order granting Wells Fargo's *Final Motion*. In its order, the trial court found Wells Fargo was the current owner and holder of the Note and assignee of the Deed of Trust representing a valid and existing lien on Sanchez's residence. The order also provided that Wells Fargo could proceed to foreclosure of the property as provided in the Deed of Trust per section 51.002 of the Texas Property Code or alternatively through a judicial foreclosure.² This appeal followed.

DISCUSSION

Sanchez contends that, because she created a fact issue regarding the expiration of the applicable statute of limitations in her action for declaratory judgment,

² Sanchez subsequently filed two motions for new trial wherein she asserted that a fact issue existed whether Wells Fargo was the proper assignee of the Note and Deed of Trust and whether Wells Fargo's counterclaim was untimely filed. The trial court denied Sanchez's motions. She does not appeal the trial court's rulings.

the trial court erred by granting summary judgment in Wells Fargo's favor. We disagree.

In reviewing a summary judgment, appellate courts consider only the issues raised by the parties in the trial court. See *In the Estate of Henry H. Blankenship*, 392 S.W.3d 249, 255 (Tex. App.—San Antonio 2012, pet. denied) (citing *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678-79 (Tex. 1979)). Only issues expressly presented to the trial court by written motion, answer, or other response may be considered on appeal from a summary judgment, TEX. R. CIV. P. 166a(c), and only the evidence on file before the trial court at the time of the hearing on the motion for summary judgment may be considered on appeal. *Salmon v. Miller*, 958 S.W.2d 424, 427 (Tex. App.—Texarkana 1997, pet. denied).

Here, Sanchez asserted a single issue in her response to Wells Fargo's summary judgment motion, i.e., whether Wells Fargo was the owner of the Note and Deed of Trust. The only evidence submitted by Sanchez in the summary judgment proceedings was on the issue of Wells Fargo's ownership. As a result, by failing to present it to the trial court in her response, Sanchez waived her claim that the statute of limitations had expired. See TEX. R. APP. P. 33.1. See also *Cook-Pizzi v. Van Waters & Rogers, Inc.*, 94 S.W.3d 636, 643 (Tex. App.—Amarillo 2002, pet. denied); *Beathard Joint Venture v. W. Houston Airport Corp.*, 72 S.W.3d 426, 434 (Tex. App.—Texarkana 2002, no pet.) (holding the failure to raise a matter in avoidance as an affirmative defense in response to a motion for summary judgment constitutes a waiver of that defense on appeal). Further, having considered the entire record *de novo*, Wells Fargo's evidence before the trial court on the issue of the tolling and abandonment was

sufficient for the trial court to find summary judgment in Wells Fargo's favor. See *Neely v. Wilson*, 418 S.W.3d 52, 59 (Tex. 2013) (citing *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005)). See also *Roskey v. Texas Health Facilities Com.*, 639 S.W.2d 302, 303 (Tex. 1982). Accordingly, Sanchez's single issue is overruled.

CONCLUSION

The trial court's order is affirmed.

Patrick A. Pirtle
Justice