**NUMBER 13-18-00479-CV**

**COURT OF APPEALS**

**THIRTEENTH DISTRICT OF TEXAS**

**CORPUS CHRISTI – EDINBURG**

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**MARTIN F. CODY JR. AND SHOAL CREEK HOLDINGS, LLC,** **Appellants,**

**v.**

**PENNYMAC CORP.,** **Appellee.**

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**On appeal from the 214th District Court of Nueces County, Texas.**

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# MEMORANDUM OPINION

**Before Justices Benavides, Perkes, and Tijerina**
**Memorandum Opinion by Justice Tijerina**

Appellants Martin F. Cody, Jr. and Shoal Creek Holdings, LLC (SCH) appeal the trial court's summary judgment in favor of appellee PennyMac Corp. By four issues, which we have renumbered and reorganized, appellants complain the trial court erred: (1) by failing to strike the testimony of an undisclosed witness; (2) "without deciding all

reasonable inferences in favor of [appellants] and resolving any doubts about the existence of a genuine issue of material fact in favor of [appellants]"; and (3) by failing to construe contract ambiguities against the drafter. By their last issue, appellants request that we issue an injunction because the trial court failed to apply the election of remedies doctrine. We affirm.

## I. BACKGROUND

Cody was the sole owner and managing member of SCH. SCH owned and operated a condominium in Port Aransas, Texas. On November 26, 2007, Cody secured an adjustable rate note in the sum of $97,600.00 payable to the lender Washington Mutual Bank F.A. (WMB).[1] The note listed the condominium as the property address, and Cody signed it in his individual capacity. The note referenced the deed of trust that is the subject of this appeal:

> In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note.

The same day as the note, SCH executed a deed of trust granting WMB a security interest in the condominium. The deed of trust secured Cody's note, and Cody signed the deed of trust as managing member of SCH.

On February 13, 2013, WMB assigned its interest in the deed of trust to JPMorgan Chase Bank, National Association (Chase Bank). The assignment was recorded in Nueces County. Seven months later, Chase Bank assigned the deed of trust to PennyMac Loan Services, LLC, which was also recorded. On May 1, 2014, PennyMac

[1] In the record, WMB is listed as both Washington Mutual Bank, F.A. and Washington Mutual Bank, N.A.

Loan Services thereafter assigned the deed of trust to appellee and recorded it in Nueces County public records.

In July 2010, Cody defaulted on the note, and Chase Bank initiated notice of default and intent to accelerate. One year later, SCH filed for bankruptcy and expressly agreed to surrender the condominium. However, the condominium was not surrendered to discharge the debt. In December 31, 2012, Cody filed for bankruptcy, whereby he identified Chase Bank as a creditor holding a mortgage on the condominium.

On November 17, 2014, appellee sued appellants seeking to foreclose on the condominium due to Cody's uncured default on the note and refusal to surrender the condominium. Appellants filed a counterclaim for trespass and conversion. Appellee filed motions for summary judgment on appellants' counterclaims and on its claim for judicial foreclosure of the condominium. Appellants filed a response opposing the foreclosure.

The trial court granted appellee's motions for summary judgment on appellants' counterclaims and on its claim for judicial foreclosure and entered a final judgment for foreclosure ordering a sale of the condominium to be made at a public auction. Appellants moved for a new trial, which the trial court denied. This appeal ensued.

## II. SUMMARY JUDGMENT

### A. Witness Testimony

By their first issue, appellants assert that the trial court failed to "strike testimony by an undisclosed witness, and rel[ied] on that testimony in order to establish necessary elements of [appellee's] cause of action." Specifically, appellants challenge a declaration from Johnny Morton, appellee's foreclosure operations supervisor, stating that based upon his records and review of his file, Cody executed a note in favor of WMB as lender,

which was secured by a lien on the condominium as specifically described in the deed of trust executed by SCH. Appellants filed an objection and motion to strike the declaration on the basis that Morton was not specifically disclosed by name although PennyMac provided its custodian of records as a designated witness.

To preserve error, it was incumbent upon appellants to obtain a ruling or refusal to rule on these objections. *See Neely v. Comm'n for Lawyer Discipline*, 302 S.W.3d 331, 344 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (holding that an attorney waived his summary judgment objections when he failed to obtain a ruling). However, the trial court did not rule on appellants' objections to Morton's declaration. Appellants therefore waived their objections. *See Hogan v. J. Higgins Trucking, Inc*., 197 S.W.3d 879, 883 (Tex. App.—Dallas 2006, no pet.) (providing that "there must be some indication that the trial court ruled on the objections in the record or in the summary judgment itself, other than the mere granting of the summary judgment"). We overrule appellants' first issue.

**B. The Note**

By their second issue, appellants argue that the trial court improperly granted appellee's motion for summary judgment because it failed to resolve doubts in their favor. Specifically, appellants assert "no note signed by [SCH] or any person in his or her capacity as officer or representative of [SCH] has been introduced into evidence or otherwise shown to exist."

Appellee moved for summary judgment on the basis that it was entitled to judicial foreclosure; or, in the alternative, that it was entitled to proceed with foreclosure under the deed of trust's power-of-sale provision because Cody defaulted on the note. Appellee also asserted that appellants were judicially estopped from opposing foreclosure as a

result of their bankruptcy representations. "Judicial estoppel precludes a party who successfully maintains a position in one proceeding from afterwards adopting a clearly inconsistent position in another proceeding to obtain an unfair advantage." *Ferguson v. Bldg. Materials Corp. of Am.*, 295 S.W.3d 642, 643 (Tex. 2009). The purpose of the doctrine is to protect the integrity of the judicial process by preventing parties from playing fast and loose with the courts to suit the exigencies of self-interest. *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir.1999). To establish judicial estoppel involving a bankruptcy case, three elements must be proven: (1) the party to be estopped has taken a position clearly inconsistent with its previous position; (2) the previous court must have accepted the previous position; and (3) the previous inconsistent position was not inadvertent. *Id*.

Appellee argued to the trial court that appellants were judicially estopped from asserting in this lawsuit that the note does not secure the deed of trust because in the previous federal bankruptcy proceeding appellants represented to the bankruptcy court that the condominium served as security for the debt owed by Cody. Appellee attached, among other things, multiple exhibits including the note, the notice of default, the deed of trust, the assignment of the deed of trust, and documents from the bankruptcy proceedings. After representing to the bankruptcy court that the condominium served as security for Cody's note, appellants are now taking the opposite position in this lawsuit that the condominium was not secured by the note. Further, there is evidence that the federal bankruptcy court accepted appellants' prior position that the deed of trust secured Cody's note.[2] Thus, appellee met its burden of establishing judicial estoppel. *See id*.; *see*

[2] The evidence shows that appellants filed for bankruptcy and affirmed in that proceeding the condominium as an asset with a lien recorded against it held by Chase Bank—the former assignee of the

*also Siller v. LPP Mortg., Ltd*., No. 04-11-00496-CV, 2013 WL 1484506, at *4 (Tex. App.—San Antonio Apr. 10, 2013, pet. denied) (holding that the doctrine of judicial estoppel applied where appellants took the opposite position that property was not owned by the partnership after the bankruptcy court accepted their prior position that the property was owned by the partnership).

Appellants had the burden to challenge and negate all the grounds that could support the summary judgment. *See Harris v. Ebby Halliday Real Estate, Inc*., 345 S.W.3d 756, 759–60 (Tex. App.—El Paso 2011, no pet.) (holding that the non-movant's failure to address the standard of care element in response to the motion for summary judgment resulted in affirmance of summary judgment on appeal). However, appellants did not address this argument in their response to appellee's motion for summary judgment. As a result, this unchallenged ground independently supports the trial court's summary judgment in appellee's favor. *See Harwell v. State Farm Mut. Auto. Ins. Co*., 896 S.W.2d 170, 173 (Tex. 1995) (providing that when a trial court does not specify the grounds upon which it relied in granting a summary judgment, the court must affirm if any ground is meritorious). Appellants' failure in the trial court and in this Court to address all the grounds raised by the appellee compels this Court to affirm the summary judgment. *See* TEX. R. CIV. P. 166a(c); *Harris*, 345 S.W.3d at 759 ("Any summary judgment ground that is not addressed, will be presumed to be valid."). We overrule appellants' second issue.[3]

## III. CONCLUSION

deed of trust—in the amount of a secured claim for $98,735.84. The bankruptcy petition and its accompanying schedules were signed by Cody under penalty of perjury.

[3] Because this issue is dispositive, we do not need to address appellants' remaining issues. *See* TEX. R. APP. P. 47.1.

We affirm the judgment of the trial court.

JAIME TIJERINA,
Justice

Delivered and filed the
28th day of May, 2020.