Affirmed; Appellant's Motion for Rehearing Denied, Opinion of October 28, 1999 Withdrawn, and Substituted Opinion filed February 3, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00429-CV

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VICENTE R. VELASQUEZ, Appellant

V.

CHASE MANHATTAN MORTGAGE CORPORATION, Appellee

On Appeal from the 295th District Court
Harris County, Texas
Trial Court Cause No. 96-22706

SUBSTITUTED OPINION ON MOTION FOR REHEARING

The opinion issued in this case on October 28, 1999, is withdrawn, the following opinion is issued in its place, and appellant's motion for rehearing is overruled.

In this wrongful foreclosure case, Vicente Velasquez ("Vicente") appeals a judgment entered in favor of Chase Manhattan Mortgage Corporation ("Chase") on the grounds that: (1) the agreement providing the basis for the foreclosure was unauthorized and invalid; and (2) the trial court improperly placed the burden of proof on Vicente. We affirm.

Background

In August of 1983, Vicente and his wife, Lorina, purchased a home in Houston. The warranty deed was signed in the Phillippines, where Vicente and Lorina were then living, and stated that Vicente would "assume or pay" the unpaid balance of the previous owners' mortgage note (the "note"). That note, which Vicente believed he was assuming, had an interest rate of 8.75%. Two months later, while Vicente was still in the Phillippines, Chase contacted Vicente's brother, Raymundo, and had him sign a modification assumption agreement (the "agreement") as "attorney in fact" for Vicente. The agreement provided, among other things, that the interest rate on the note would be increased to 12.75%, and, thus, that a greater amount would have to be paid to retire the debt.[1]

Vicente, Lorina, and their children began living in the house in 1985. In May of 1996, after the house was posted for foreclosure, Vicente filed this suit against Chase to enjoin the foreclosure, obtain a declaratory judgment, and recover damages. In December of 1996, the house was foreclosed upon by and sold to Chase for $57,156.78.[2]

At trial, the jury found that Raymundo was acting as Vicente's attorney in fact when he signed the agreement, and it awarded Chase $35,588.40 in principal,[3] $3,112.06 in interest, and $1,090.33 in attorney's fees. The trial court entered a judgment for Vicente in the amount of $17,365.93.[4]

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1 It is undisputed that, by the time of foreclosure, Vicente's payments would have been sufficient to pay off the note at the original interest rate of 8.75%. During the approximately twelve years that Vicente made payments on the note, his monthly payments ranged from $541.00 to $819.00. Vicente claims that he always made higher monthly payments than were required because he wanted to pay the loan off faster.

2 Chase had appraised the value of the house at $85,000 in 1996.

3 Chase claimed that the principal balance on the note was $35,588.40 based on an interest rate of 12.75%.

4 This amount is essentially equal to the difference between Chase's bid at the foreclosure sale ($57,156.78) and the amount the jury found that Vicente owed Chase under the note ($39,790.79).

Validity of the Agreement

Vicente's first point of error argues that the agreement was ineffective because: (1) both Vicente and Lorina were liable on the note whereas the agreement was executed only on behalf of Vicente; (2) there was no written power of attorney authorizing Raymundo to sign the agreement on Vicente's behalf; (3) there was no evidence that Raymundo had authority to enter into it on Vicente's behalf; and (4) Raymundo never appeared before the notary who notarized his signature.

Items (1), (2), and (4) above do not challenge the fact findings made by the jury but instead urge legal reasons for holding that the agreement was not enforceable, despite those findings. However, Vicente has cited no portion of the record reflecting that the factual assertions in items (1), (2), and (4) were ever put in issue and either decided by the trial court, submitted to the jury, stipulated, or shown to be undisputed. Nor does Vicente complain on appeal of the trial court's failure to rule on or submit any of those assertions to the jury. To the extent Vicente's factual assertions regarding the lack of execution by Lorina, lack of proper written power of attorney, or failure to appear before a notary were never put in issue, tried, and determined, or were not undisputed, a failure to disprove any of those alleged requirements is not preserved for appellate review. Therefore, these contentions present nothing for our review and are overruled.

Sufficiency of the Evidence of Authority

In support of contention (3), Vicente asserts that: (i) his, Lorina's, and Raymundo's testimony all established that Raymundo did not have Vicente's authority to sign the agreement; (ii) Raymundo signed it at the request of only the holder of the note at that time, Gibraltar Savings Association; and (iii) there was no evidence that Raymundo had authority to act for Vicente or Lorina.

An appellant attacking the legal sufficiency of an adverse finding on an issue on which he has the burden of proof must demonstrate on appeal that the evidence established the finding he sought as a matter of law. *See Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690

(Tex.1989). In conducting such a review, the court must first examine the record for evidence that supports the finding made, while ignoring all evidence to the contrary. *See Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 940 (Tex. 1991). If there is no evidence to support the finding, the reviewing court must then examine the entire record to determine if the contrary proposition is established as a matter of law. *See id*.[5]

In this case, the trial exhibits include a disclosure statement filed by Vicente in 1995 in his bankruptcy proceeding. The disclosure statement includes a representation that the original interest rate on the note was 8.75%, "but that rate was increased to 12.75% when Mr. Velasquez assumed the obligation on or about October 4, 1983." Such an unqualified representation by Vicente that the rate had been so increased supports an inference that the increase was validly agreed to at the time of the assumption and thus that Raymundo had Vicente's authority to then sign the agreement on his behalf. Because this disclosure statement is some evidence of Raymundo's authority, we cannot say that there is no evidence to support the jury's finding that Raymundo was acting as attorney in fact for Vicente in signing the agreement. Therefore, we overrule Vicente's challenge to the sufficiency of the evidence to support this finding.

Burden of Proof

Vicente's second point of error argues that the trial court improperly placed the burden of proof on him in jury question one asking whether Raymundo acted as his attorney in fact.

Under Rules 265, 266, and 269, the party having the burden of proof on the whole case has the right to open and close the evidence and final argument. *See* TEX. R. CIV. P. 265, 266, 269. For purposes of these rules, the burden of proof on the whole case is determined from

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[5] This standard does not mention the possibility that, in reaching its finding, the trier of fact merely disbelieved the uncontroverted evidence that establishes the contrary proposition as a matter of law. Although we have found no case in which the Texas Supreme Court has considered the issue, Texas courts of appeals have differed on it. *See generally* W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L. J. 351, 482-83 (1998). However, if the trier of fact may disbelieve uncontroverted evidence, legal sufficiency challenges to the evidence on issues on which the challenging party has the burden of proof would be negated. Because such a challenge has been recognized by the Texas Supreme Court, we infer that it is not thereby negated.

the pleadings and rests upon the party against whom judgment must be entered under the pleadings if neither side introduced any evidence. *See Walker v. Money*, 120 S.W.2d 428, 431 (Tex. 1938).[6]

After citing this rule as being controlling of this point of error, Vicente's brief summarily asserts that if Chase had offered no evidence that Raymundo was acting as attorney in fact for Vicente in signing the agreement, Vicente "would have unquestionably been successful." However, the relevant inquiry does not evaluate a lack of evidence from one party, but from both. More importantly, Vicente's brief provides no authority or analysis to support a conclusion that he would have been successful if no evidence had been offered. Instead, it reverts to the contention, rejected above, that Raymundo's lack of authority was proven conclusively.

When this case was submitted to the jury, Vicente was seeking damages for overpayments on the note and mental anguish from the foreclosure, and Chase was seeking damages for the balance Vicente allegedly still owed on the note. Depending on its answers to the three liability questions, the jury could have awarded damages to either party. An award of damages to Vicente was conditioned on a negative answer to all of the three liability questions whereas an award of damages to Chase was conditioned on an affirmative answer to any of those questions. The charge assigned the burden of proof to Vicente on the first liability question and to Chase on the second and third questions. In that each question affected both parties' ability to recover, and Vicente had the burden of proof for only one of the three questions, we find no basis to conclude that placing the burden of proof on him for the first question was an abuse of discretion. Therefore, Vicente's second point of error is overruled.

Cross-Points

Chase asserts two cross-points of error challenging the damages and attorney's fees awarded to Vicente. However, except for just cause, an appellate court may not grant more

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[6] We note that this standard is somewhat circular in that the determination of the party against whom judgment must be entered under the pleadings if neither side introduces any evidence itself depends on which party has the burden of proof.

favorable relief to a party who files no notice of appeal than did the trial court. *See* TEX. R. APP. P. 25.1(c). Because the record in this case contains no notice of appeal filed by Chase, the complaints asserted in Chase's cross-points present nothing for our review. Accordingly, its cross-points are overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed February 3, 2000.
Panel consists of Justices Amidei, Edelman, and Wittig.
Do not publish — TEX. R. APP. P. 47.3(b).