Affirmed and Opinion filed September 23, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00589-CV

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BARRY SMITH, Appellant

V.

WINDSTAR FINANCIAL, INC., Appellee

On Appeal from the County Court at Law No. 2
Harris County, Texas
Trial Court Cause No. 680,776

O P I N I O N

Barry Smith ("Smith") appeals from the trial court's order denying his motion for summary judgment and granting the motion for summary judgment of Windstar Financial. Inc. ("Windstar"). On appeal to this Court, Smith contends that the trial court erred in (1) denying his motion for summary judgment, and (2) granting summary judgment in favor of Windstar. We affirm.

BACKGROUND

In August 1989, Smith executed a promissory note to borrow $18,500 from First State Bank, located in Liberty, Texas. The purpose of the loan was for Smith's purchase of a "rent house." During that same month, First State Bank was closed and placed in receivership. The Federal Deposit Insurance Corporation (FDIC) was appointed receiver. Subsequently, the FDIC sold Smith's note to First Financial Resolution Partners, Inc., who in turn sold it to Windstar Financial, Inc.

Smith never made any payments on the note. Windstar filed suit against Smith in April 1997, seeking to recover the monies owed under the note. Smith filed an answer to Windstar's suit, alleging that the applicable statute of limitations expired and that therefore Windstar was barred from recovering under the note. Thereafter, Smith filed a motion for summary judgment, alleging that the statute of limitations expired. Windstar filed its motion for summary judgment, alleging that (1) the applicable statute of limitations did not expire, and (2) because Smith admitted he made no payments, no genuine issue of material fact existed and that therefore it was entitled to judgment as a matter of law. The trial court overruled Smith's motion for summary judgment and granted Windstar's motion for summary judgment. In its final judgment, the trial court awarded Windstar $18,500, plus interest, costs, and reasonable attorney's fees.

STANDARD OF REVIEW

When both parties move for summary judgment and one motion is granted and the other is overruled, the appellate court should consider all questions presented to the trial court, including whether the losing party's motion should have been overruled. *Jones v. Strauss*, 745 S.W.2d 898, 900 (Tex. 1988). Each party must carry its own burden as the movant and, in response to the other party's motion, as the non-movant. *James v. Hitchcock Indep. School Dist.*, 742 S.W.2d 701, 703 (Tex.App.–Houston [1st Dist.] 1987, writ denied). To prevail, each party bears the burden of establishing that it is entitled to judgment as a matter of law. *Guynes*

v. Galveston County, 861 S.W.2d 861, 862 (Tex. 1993). When both parties move for summary judgment, this court has the authority to (1) affirm the judgment, (2) reverse the judgment and render the judgment that the trial court should have rendered, or (3) reverse the judgment and remand the case to the trial court for further proceedings. *Members Mut. Ins. Co. v. Hermann Hosp.*, 664 S.W.2d 325, 328 (Tex. 1984).

In order to sustain a summary judgment, we must determine that the pleadings and summary judgment proof establish that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *McFadden v. American United Life Ins. Co.*, 658 S.W.2d 147, 148 (Tex. 1983). We accept all proof favorable to the non-movant as true, indulge the non-movant with every reasonable inference, and resolve any doubt in the non-movant's favor. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 549 (Tex. 1985).

DISCUSSION

Smith's Motion for Summary Judgment

Smith contends that the trial court erred in denying his motion for summary judgment. In his motion for summary judgment, Smith presented one ground, to wit:

> [Smith] pleads the applicable statute of limitations, Texas Civil Practice & Remedies Code Sec. 16.004 (four years). Pleading affirmatively and in the alternative, [Smith] pleads the six year statute of limitations prescribed by 28 U.S.C.A. Sec. 2415(a), and would show that [Windstar] is barred by either statute. Even if the six year statute applied, this suit would be barred on August 12, 1995. In fact this suit was not filed until April 4, 1997, according to the papers on file with this [trial] court.

According to the Texas Supreme Court, the FDIC's successors in interest are entitled to the statute of limitations benefits of Section 1821(d)(14) of the United States Code by the common law maxim that "an assignee stands in the shoes of his assignor." *Jackson v. Thweatt*, 883 S.W.2d 171, 174 (Tex. 1994). Section 1821(d)(14) provides that any action brought by

the FDIC as a receiver shall be brought within "the 6-year period beginning on the date that claim accrues . . . ." *Id.* at 173 (quoting 12 U.S.C. § 1821(d)(14)). Consequently, as an assignee of the FDIC, Windstar was entitled to the benefit of the federal six-year statute of limitations, rather than the four-year statute of limitations imposed by state law. *See id.* at 173-75; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(3) (Vernon 1986).

Next, we must determine when Windstar's cause of action accrued for purposes of the statute of limitations. The question of when a cause of action accrues is a matter of law for the court to decide. *Moreno v. Sterling Drug*, 787 S.W.2d 348, 351 (Tex. 1990). In applying the statute of limitations, a cause of action is said to accrue when a set of facts come into existence which give a claimant a right to seek a remedy in the courts. *Robinson v. Weaver*, 550 S.W.2d 18, 19 (Tex. 1977). If "demand" is an integral part of a cause of action[1] or a condition precedent to the right to sue, the statute of limitations does not begin to run until demand is made. *Ocean Transport, Inc. v. Greycas, Inc.*, 878 S.W.2d 256, 267 (Tex.App.–Corpus Christi 1994, writ denied); *Wiman v. Tomaszewicz*, 877 S.W.2d 1, 5 (Tex.App.–Dallas 1994, no writ). Further, the action of a lender in exercising its option to accelerate payment and declare all payments of a series due may begin the period of the statute of limitations. *Swoboda v. Wilshire Credit Corp.*, 975 S.W.2d 770, 776 (Tex.App.–Corpus Christi 1998, writ denied). However, the exercise of the right of acceleration requires the lender to make a clear, positive, and unequivocal declaration in some manner of the exercise thereof, followed by affirmative action toward enforcing the declared intention. *Id.*

Contrary to Smith's contention in this case, there is nothing in the note executed by Smith that makes written demand a "condition precedent to the right to sue." Accordingly, "demand" was not an integral part of Windstar's cause of action against Smith to collect under the note. There is likewise nothing in the record to indicate that Windstar nor its assignors ever declared to Smith an intent to accelerate payment of the note. Therefore, Windstar's

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[1] *See, e.g.*, TEX. BUS. & COMM. CODE ANN. § 17.505(a) (Vernon Pamph. 1999).

cause of action, for purposes of the statute of limitations, did not accrue until the note matured. *See Swoboda*, 975 S.W.2d at 776. The maturity date is the date upon which the final installment is due. TEX. CIV. PRAC. & REM. CODE ANN. § 16.035(e) (Vernon Supp. 1999) ("If a series of notes or obligations or a note or obligation payable in installments is secured by a real property lien, the four-year limitations period does not begin to run until the maturity date of the last note, obligation, or installment."). The note required Smith to make 60 installments of $430.46, beginning on August 12, 1989. Thus, the note "matured" on July 12, 1994, the date upon which Smith's final installment was due. *See id.*; *Gregory v. Sunbelt Savings, F.S.B.*, 835 S.W.2d 155, 160 (Tex.App.–Dallas 1992, writ denied).

Under Section 1821(d)(14) of the United States Code, the six-year statute of limitations required Windstar to commence its lawsuit against Smith by July 12, 2000. *See Jackson*, 883 S.W.2d at 173. The record shows that Windstar filed its lawsuit against Smith on April 4, 1997, within the six years allowed by the applicable statute of limitations. *See id.* Accordingly, the trial court did not error in denying Smith's motion for summary judgment.

Windstar's Motion for Summary Judgment

Smith also contends that the trial court erred in granting Windstar's motion for summary judgment. The sole ground for Windstar's motion for summary judgment is that because there are no genuine issues of material fact, it is entitled to judgment as a matter of law.

None of the facts in this case are disputed. Smith admits that he executed the note to borrow $18,500. He candidly admits that he never made any payments on the note. Smith relies only upon the statute of limitations to shield himself from having to repay the loan. However, we have already determined that the applicable statute of limitations does not bar Windstar from recovering the monies owed under the terms of the note. Consequently, Smith possesses no basis in law nor fact to justify his refusal to repay the note. *See AmWest Savings Ass'n v. Shatto*, 905 S.W.2d 400, 402-05 (Tex.App.–Austin 1995, writ denied).

Because the pleadings and proof show that there is no genuine issue of material fact in this case, Windstar is entitled to judgment as a matter of law. *See Nixon*, 690 S.W.2d at 549; *McFadden*, 658 S.W.2d at 148. Smith's point of error is overruled.

The summary judgment is affirmed.

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Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed September 23, 1999.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

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