Affirmed and Opinion filed October 18, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00034-CV

MELVIN G. HARRIS and HELENA M. HARRIS, Appellants

V.

HARBOUR TITLE COMPANY, Appellee

On Appeal from the 281st District Court
Harris County, Texas
Trial Court Cause No. 96-60898

O P I N I O N

This case appears before us on remand for consideration on the merits.[1] The appellants, Melvin G. Harris and Helena M. Harris, appeal from a take-nothing summary judgment entered against them in favor of the appellee, Harbour Title Company. Finding no error in the judgment, we affirm.

The appellants owned two unimproved lots, Lot 3 and Lot 5, in the Dolphin Point Subdivision of Seabrook in Harris County, Texas. In November of 1995, the appellants were

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[1] See Lehmann v. Har-Con Corp., 39 S.W.3d 191 (Tex. 2001).

approached by Tim Rice and Rice Development, Inc., who were interested in buying Lot 3 for use in building a "spec home." In order to allow Rice and the corporation to obtain 100% construction financing for the house, the appellants agreed to transfer title on Lot 5 to Rice so that both lots could be used as collateral. It was agreed that once the purchase and construction financing were paid off, Rice would transfer title on Lot 5 back to the appellants.

According to the appellants, when they arrived at Harbour Title Company for the closing, there were no documents protecting their beneficial interest in Lot 5 pending pay-off of the new financing. Mr. Harris requested a postponement of the closing to obtain proper documents from an attorney, but Ms.Chandler (the closing agent with Harbour Title Company) stated she would prepare a document for their signature that would be recorded and protect their interests in Lot 5. The parties executed the closing documents, including the side letter agreement provided by Ms. Chandler. The appellants later discovered, and the appellee does not dispute, that the side letter agreement was never recorded.

Tim Rice and Rice Development, Inc. eventually defaulted on all of the financing, including financing covering Lot 5, and the properties were sold at foreclosure. The appellants filed suit against Rice, Rice Development, Inc., the mortgage company and Harbour Title Company for fraud, misrepresentations, negligence and breach of contract, seeking to set aside the deeds, or in the alternative, recover the value of the properties. Following entry of defaults and nonsuits as to the other defendants, Harbour Title filed for summary judgment, which the trial court granted.

Harbour Title's Motion for Summary Judgment

Harbour Title's motion for summary judgment alleged that as a matter of law the Harrises' suffered no damages that were caused by Harbour Title. According to Harbour Title, any damages were caused by the foreclosure itself, which was a risk inherent in the agreement the appellants reached with Rice and Rice Development.

In response to the summary judgment motion, the appellants alleged that because Harbour Title failed to record their side letter agreement with Rice and Rice Development, they were unable to 1) receive notice of the foreclosure sale, or 2) participate in the surplus funds generated from the foreclosure sale. Their response did not, however, present any legal authority showing their entitlement to notice of foreclosure had the side agreement been recorded, or that they would have been entitled to participate in any foreclosure surplus.

In one point of error, the appellants argue the trial court erred in granting summary judgment in that 1) they would not have signed the closing documents had they known that the side agreement provided by Ms. Chandler did not protect their interests, and 2) they would have exercised some option to prevent foreclosure had they received notice. Due to Ms. Chandler's actions and failures, appellants contend, they were unaware of the foreclosure and lost title to Lot 5. Essentially, it is the appellants' position on appeal that they would not have closed on the deal had they known Ms. Chandler's assurances of title protection were false.

Standard of Review

Summary judgment is proper, if the defendant as the movant, disproves at least one element of each of the plaintiff's claims or establishes all elements of an affirmative defense to each claim. *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). The movant has the burden of showing there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548 (Tex. 1985). In deciding whether there is a disputed material fact issue precluding summary judgment, proof favorable to the non-movant is taken as true and the court must indulge every reasonable inference and resolve any doubt in favor of the non-movant. *Id.* at 548-49.

It is further well-established that the non-movant must expressly present to the trial court any reason that would defeat the movant's right to summary judgment in a written

answer or response to the motion. *McConnell v. Southside Independent School District*, 858 S.W.2d 337, 341 (Tex. 1993). If the non-movant fails to present an issue to the trial court, he may not later raise that new ground as error on appeal. *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 679 (Tex. 1979).

Here, the appellants argued in the district court that their damages were the inability to receive foreclosure surplus funds; on appeal, however, they now contend that their damages were loss of title to Lot 5. Stated differently, appellants complained at trial of an inability to recover surplus proceeds following foreclosure; on appeal, they now complain they never would have transferred title in the first place.

Disposition

The grounds and argument raised by the appellants in opposing the summary judgment motion at trial are not the same grounds and arguments they raise on appeal. Under such circumstances, we cannot review the merits of their arguments on appeal. *Clear Creek Basin Authority* at 679.

As to the grounds appellants did assert in the trial court, Texas law is clear that a junior or inferior lienholder (as the appellants would have been as to Lot 5) is not entitled to notice of a foreclosure by a senior or first lienholder. *See Jones v. Bank United of Texas*, 51 S.W.3d 341, 344 (Tex. App.— Houston [1st Dist.] 2001, no pet. h.). A junior lienholder's lien is not extinguished by foreclosure of the first lien if the foreclosure sale nets proceeds in excess of the first lien claim. *Diversified Mortgage Investors v. Lloyd D. Blaylock Gen. Contractor, Inc.*, 576 S.W.2d 794, 808 (Tex. 1978). However, the junior lienholder claimant must show the existence of net surplus proceeds following foreclosure. *Id.* Here, even assuming the appellants had presented this issue on appeal, they did not establish in the district court that there were *net* surplus proceeds from the foreclosure to which they would have been entitled. Their summary judgment documents reflect gross indebtedness figures, which do not detail foreclosure costs and other offsets such as accrued interest, fees, and

attorney's fees. In the absence of net surplus following foreclosure under a first lien, a junior lien is extinguished as a matter of law. *Jones* at 344; *see also Arnold v. Eaton*, 910 S.W.2d 181, 184 (Tex. App. – Eastland 1995, no writ). The appellants did not raise a genuine issue of material fact as to damages under their arguments presented to the district court.

The appellants' point of error is overruled, and the judgment is affirmed.

/s/ Scott Brister
Chief Justice

Judgment rendered and Opinion filed October 18, 2001.

Panel consists of Chief Justice Brister and Justices Edelman and Seymore.

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