AFFIRM; and Opinion Filed October 9, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00087-CV

JP MORGAN CHASE BANK, N.A., Appellant
V.
ROBINSON & HOSKINS, L.L.P., Appellee

On Appeal from the 44th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-04978

MEMORANDUM OPINION

Before Justices Lang-Miers, Brown, and Boatright
Opinion by Justice Boatright

JP Morgan Chase Bank, N.A. (the Bank) sued Robinson & Hoskins, L.L.P. for breach of contract. Robinson & Hoskins filed a motion for summary judgment, contending that the Bank filed suit after the expiration of a four-year statute of limitations period. The trial court granted that motion. On appeal, the Bank contends the correct limitations period is six years. We affirm.

Robinson & Hoskins signed a promissory note for $250,000 to the Bank's predecessor-in-interest in 2002. That agreement was modified and renewed several times; the final agreement was titled Promissory Note and was signed April of 2009 (the Note). The Note set a schedule, requiring Robinson & Hoskins to make twenty-three principal and interest payments of $2,384.13, beginning that May and continuing until the full amount of principal and accrued interest was paid when the Note matured in April of 2011. Robinson & Hoskins made its last payment in 2010; it acknowledges it defaulted on its obligation under the Note.

The Bank filed this action on April 28, 2016, alleging breach of contract. It filed a summary judgment motion based upon the debt; Robinson & Hoskins responded that the Bank's claim was barred by the four-year statute of limitations for suits on a debt. Our record does not indicate that the Bank's motion was heard by the trial court. Robinson & Hoskins filed a traditional summary judgment motion based on the affirmative defense of limitations. The Bank responded that its claim was governed by the six-year limitations period for suits on negotiable instruments; Robinson & Hoskins replied that the Note was not a negotiable instrument.

The movant for a traditional summary judgment motion must demonstrate that no genuine issue of material fact exists and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). A defendant who moves for summary judgment based on limitations must establish the defense as a matter of law. *Diaz v. Westphal*, 941 S.W.2d 96, 97–98 (Tex. 1997). We review a summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010).

The facts underlying the Robinson & Hoskins motion and this appeal are not in dispute. Robinson & Hoskins failed to make its scheduled payments on the Note after October 27, 2010. The Bank's claim accrued, at the latest, on April 24, 2011; on that date the Note matured, and all outstanding principal and accrued interest were due. The parties disagree, however, about which statute of limitations to apply to the accrual date. To resolve that question, we must determine whether the Note is a negotiable instrument. If it is, then the Bank had six years to sue Robinson & Hoskins for its default. TEX. BUS. & COM. CODE ANN. § 3.118(a) (West 2002). If it is not, then the Bank was limited to a four-year period to bring its suit. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(3) (West 2002). The negotiability of an instrument is a question of law. *Ward v. Stanford*, 443 S.W.3d 334, 343 (Tex. App.—Dallas 2014, pet. denied).

A promissory note is a negotiable instrument if it is a written unconditional promise to pay a sum certain, upon demand or at a definite time, and it is payable to order or to bearer. TEX.

BUS. & COM. CODE ANN. § 3.104(a) (West Supp. 2016). The Bank argues the Note contains a written unconditional promise by Robinson & Hoskins to pay the bearer the fixed amount of $169,573.72, by the maturity date of April 24, 2011; it does not require any action from either party other than paying the sum certain. The Bank posits further that the Note does not contemplate a revolving line of credit or multiple advances, two provisions that have been cited as barriers to negotiability. *See, e.g.*, *NAB Asset Venture III, L.P. v. John O'Brien & Assocs.*, No. 05-96-01453-CV, 1999 WL 88776, at *5 (Tex. App.—Dallas Feb. 23, 1999, pet. denied) (not designated for publication) (line-of-credit notes are not negotiable instruments); *Diversified Fin. Sys., Inc. v. Hill, Heard, O'Neal, Gilstrap & Goetz, P.C.*, 99 S.W.3d 349, 357 (Tex. App.—Fort Worth 2003, no pet.) (where multiple advances are contemplated by parties, note is not for fixed amount). Robinson & Hoskins contends the Note is not a negotiable instrument because it does not identify on the face of the Note a sum certain that is owed; rather, the principal owed after execution can be determined only by reviewing the Bank's internal records.

The requirement of a fixed sum provides commercial certainty, which serves the goal of making a negotiable instrument the functional equivalent of money. *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793, 796 (Tex. 1992). But the sum-certain requirement is not met unless one can determine from the face of the note the extent of the maker's liability. *FFP Mktg. Co., Inc. v. Long Lane Master Tr. IV*, 169 S.W.3d 402, 408 (Tex. App.—Fort Worth 2005, no pet.). At the outset, Robinson & Hoskins relies upon the Note's promise to pay "the total principal amount of $169,573.72 or so much as may be outstanding." *See Bank of Am., N.A. v. Alta Logistics, Inc.*, No. 05-13-01633-CV, 2015 WL 505373, at *3 (Tex. App.—Dallas Feb. 6, 2015, no pet.) (mem. op.) (note's inclusion of language "or so much as may be outstanding" one factor making amount due at any given time "not readily determinable"). In addition, although the Note does not contemplate additional advances, it does permit Robinson & Hoskins to pay

"all or any part of the loan evidenced by this Note at any time." *See id.* (prepayment provision another factor making amount due uncertain). And if prepayments are made, the Bank may apply them "in such order and manner as [the Bank] may from time to time determine in its sole discretion." In fact, the Bank may allocate all payments by Robinson & Hoskins among principal, interest, and any other charges at its discretion, resulting in uncertainty throughout the term of the loan as to the amount of principal owed. Robinson & Hoskins also points to language in the Note stating that "this Note is a renewal of an earlier loan or credit extension" to Robinson & Hoskins from the Bank or its affiliate, and the Note "is identified in [the Bank's] or the affiliate's internal records." It argues that once the Note was executed, the amount owing could not be ascertained without reference to other bank records.

We agree. The Note states in its Additional Terms regarding payment information, "The books and records of [the Bank] shall be prima facie evidence of all outstanding principal of and accrued but unpaid interest on the Note." A note is non-negotiable if another instrument must be examined to determine a party's rights and obligations under that note. *Ward*, 443 S.W.3d at 343 (citing TEX. BUS. & COM. CODE ANN. § 3.106(a)). Because the Note fails to identify a sum certain on its face, we conclude it is not a negotiable instrument.

Robinson & Hoskins has demonstrated as a matter of law that the four-year statute of limitations applies to the Bank's claim. Accordingly, we conclude the trial court did not err in granting summary judgment in Robinson & Hoskins's favor. We overrule the Bank's single issue and affirm the trial court's order.

/Jason Boatright/
JASON BOATRIGHT
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JP MORGAN CHASE BANK, N.A., Appellant

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Opinion delivered by Justice Boatright. Justices Lang-Miers and Brown participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Robinson & Hoskins, L.L.P. recover its costs of this appeal from appellant JP Morgan Chase Bank, N.A.

Judgment entered this 9th day of October, 2017.