



In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00878-CV

BRANCH BANKING AND TRUST COMPANY, Appellant/Cross-Appellee

V.

**SWIG PARTNERS GP, LLC, WOO YOUNG CHUNG, KUN YOUNG KIM,
KYU YOUNG KIM, STEVEN LEE, HUN KYU LEE, EDWIN PAK,
HYUK KEUN KWUN, SHI CHUI KUM, WOON CHUL CHUNG, NAM SUN PAEK,
YOO SANG CHO, HWAN HURH, HAK SON AHN, HAROLD K. SHIN,
HYO WON BANG, EDWARD KIM, SUN KYUM CHA A/K/A STEPHEN CHA,
KWANG H. KIM, JANG Y. LEE, JIM HEE CHA, SUNG CHOOI LEE, JAMES LEE,
JIN K. CHING, KWANG JAE LEE, MARY CHU DIERLAM, CHONG WON KIM,**

Appellees

SWIG PARTNERS LP, Appellee/Cross-Appellant

**On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-14-03427**

MEMORANDUM OPINION

Before Justices Francis, Myers, and Whitehill
Opinion by Justice Francis

In this suit arising out of a foreclosure, Branch Banking and Trust Company appeals the trial court's take-nothing judgment on its deficiency claims based on application of the statute of limitations. In two issues, BB&T contends the trial court erred in (1) concluding BB&T did not exercise diligence in effecting service on appellees and (2) failing to apply the six-year statute of limitations for contract claims under the Federal Financial Institutions Reform, Recovery, and Enforcement Act. SWIG Partners LP brings five cross-issues contending the trial court erred in

rendering a take-nothing judgment on its counterclaims because the evidence showed it did not owe BB&T a debt at the time of the foreclosure and the note and deed of trust were unenforceable. We conclude the record shows BB&T exercised diligence in service as a matter of law. Accordingly, we reverse that portion of the trial court's judgment and remand BB&T's claims for further proceedings. We affirm the remainder of the trial court's judgment.

Appellees are the borrower and guarantors on a note made payable to Colonial Bank f/k/a Colonial Bank, N.A. (the SWIG loan). The note was secured by a deed of trust on real property. On August 14, 2009, the FDIC was appointed receiver for Colonial Bank. On the same day, the FDIC transferred the note, deed of trust, and guaranties to BB&T as part of an asset acquisition.

On April 3, 2012, BB&T foreclosed on the SWIG loan and purchased the property at the foreclosure sale. BB&T asserts the purchase price was less than the amount due on the note, leaving a deficiency. On March 28, 2014, six days before the two-year anniversary of the foreclosure, BB&T filed this suit against appellees seeking to recover the deficiency. Citations were issued by the district clerk on April 3, 2014 and delivered to a process server on April 4. Both SWIG Partners GP, LLC and SWIG Partners LP were served the same day the process server received the citations. By April 23, ten more of the thirty named defendants had been served. All defendants answered on April 25.

In their original answer, appellees asserted a general denial, a request for accounting, and various affirmative defenses including limitations. On May 7, appellees filed an amended answer in which they omitted three of the guarantors named as defendants. On May 9, BB&T filed a motion for substitute service on one of the guarantors, Harold K. Shin. The trial court granted BB&T's request. The court's order included a finding that "despite [BB&T's] due

diligence, [BB&T's] attempts to serve Shin have not been successful and that the substitute service authorized herein is reasonably calculated to give Shin notice of the lawsuit.”

BB&T filed motions for substitute service on the two remaining guarantors on May 21 and June 3. The trial court granted both motions. In each order, the trial court made the same finding that BB&T had exercised due diligence in attempting to serve the subject defendants. BB&T ultimately nonsuited its claims against the two guarantors because one left the country and the other passed away.

On November 11, SWIG Partners LP filed counterclaims against BB&T asserting causes of action for trespass to try title, slander of title, action to quiet title and remove cloud on title, breach of contract, and wrongful foreclosure. SWIG brought the counterclaims contending it learned during discovery that somehow it had paid off the loan in full two years before it stopped making payments.

The trial court conducted a bench trial and rendered a take-nothing judgment on all claims asserted by both parties. In its findings of fact and conclusions of law, the court made no findings regarding the substance of BB&T's claims, but determined the claims failed because it did not timely bring its action to recover the deficiency. Although BB&T filed suit less than two years after the foreclosure sale, the court concluded BB&T failed to demonstrate diligence in serving citation on the defendants after the limitations period expired. Specifically, the court found that BB&T “did not present evidence regarding efforts that were made to serve the Defendants . . . and to explain every lapse in effort or period of delay.” With respect to SWIG's counterclaims, the trial court determined they failed on the merits. Both sides timely appealed.

In its first issue, BB&T contends the trial court erred in concluding the record did not show it exercised diligence in serving the defendants in this case. At trial, the court took judicial notice of its register of action which showed the following:

Suit Filed	03/28/2014
Citations Issued	04/03/2014
Service on SWIG Partners GP, LLC	04/04/2014
Service on SWIG Partners, LP	04/04/2014
Service on Kun Young Kim	04/09/2014
Service on Mary Chu Dierlam	04/09/2014
Service on Hun Kyu Lee	04/15/2014
Service on Woon Chul Chung	04/15/2014
Service on Hak Son Ahn	04/16/2014
Service on Jin K. Chung	04/16/2014
Service on Sun Kyum Cha	04/22/2014
Service on Shi Chui Kim	04/23/2014
Service on Edward Kim	04/23/2014
Service on Hwan Hurh	04/23/2014
All Defendants Answered	04/25/2014
Defendant's Amended Answer	05/07/2014
Motion for Substitute Service on H. Shin	05/09/2014
Motion for Substitute Service Granted	05/12/2014
Motion for Substitute Service on Kaim	05/21/2014
Motion for Substitute Service Granted	05/22/2014
Motion for Substitute Service on D. Shin	06/03/2014
Motion for Substitute Service Granted	06/04/2014

Assuming the two-year limitations period applies in this case¹, it is undisputed BB&T filed suit within the limitations period, but effected service after the two-year period expired. If service is diligently effected after limitations has expired, the date of service will relate back to the date suit was filed. *See Grant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990). “Texas courts have consistently held that lack of diligence may be shown based on unexplained lapses of time between the filing of the suit, issuance of the citation, and service of process.” *See Boyattia v. Hinojosa*, 18 S.W.3d 729, 733 (Tex. App.—Dallas 2000, pet. denied). But, the passage of time alone may not be determinative of the issue of diligence. *Id.* at 734. Instead we look at whether a party’s actions manifested a “bona fide” intention to have process served. *Id.*

¹ Section 51.003 of the Texas Property Code requires that “any action to recover [a] deficiency must be brought within two years of the foreclosure sale.” *See* TEX. PROP. CODE ANN. § 51.003(a) (West 2014).

The record in this case shows BB&T filed suit within two years after its claims accrued, obtained citations within four business days of the filing, and served the two defendant partnerships the next day. Twelve of the thirty named defendants were served within three weeks after citations were issued. All the defendants then made an appearance obviating the need for further service of process. *See* TEX. R. CIV. P. 120. The longest period of time without service on a defendant before all the defendants answered was four business days. The time between the date suit was filed and the date all defendants filed their original answer was twenty-eight days. When three of the defendants were omitted from the defendants' amended answer, BB&T moved for substitute service.² In granting BB&T's motions for substitute service, the trial court repeatedly found BB&T had diligently attempted service on each of the subject defendants. We conclude this record demonstrates a bona fide intention by BB&T to have process served and diligence in effecting service as a matter of law.

Despite the fact that BB&T served some of the defendants with process, including the two partnerships, within days after suit was filed, the court concluded limitations barred BB&T's claims against *all* the defendants based on a failure to show diligence in service.³ The trial court appears to have focused on the fact that BB&T did not provide any evidence of its efforts to effect service outside the dates of service reflected in the record. Because BB&T relied solely on the court's record, the trial court concluded BB&T failed to "explain every lapse in effort or period of delay." However, the record upon which BB&T relied did not demonstrate any lapse in effort or period of delay requiring explanation. The dates of service alone were sufficient to show a bona fide intention to have process served. BB&T promptly provided its process server

² This fact is included in our discussion as relevant to the issue of diligence and is not intended to suggest substitute service on the three omitted defendants was required after they had made an appearance in the case.

³ Because we conclude the statute of limitations does not bar BB&T's claims against any of the defendants, it is unnecessary for us to address the trial court's failure to distinguish among the defendants for purposes of applying the statute of limitations.

with citations, and service began immediately. To the extent some defendants were not served before they filed their answer, we must take into consideration that over thirty defendants were named and process was served consistently until all the defendants answered three weeks after service began. BB&T was permitted to give its process server a reasonable amount of time to accomplish service and the record does not reflect any significant period of delay or inaction that BB&T would have been obligated to recognize and act upon to correct. *See id.* at 734.

We conclude the trial court erred in rendering a take-nothing judgment against BB&T based on the statute of limitations. We sustain BB&T's first issue. Our resolution of the first issue makes it unnecessary for us to address BB&T's second issue.

In its cross-appeal, SWIG brings five issues contending the trial court erred in rendering a take-nothing judgment on its counterclaims against BB&T because the evidence is legally and factually insufficient to support the trial court's findings against it. "A party challenging the legal sufficiency of an adverse finding on an issue on which that party had the burden of proof at trial must demonstrate on appeal that the evidence conclusively established, as a matter of law, all vital facts in support of the issue." *Dallas Cnty. Constable Precinct No. 5 v. Garden City Boxing Club, Inc.*, 219 S.W.3d 613, 616 (Tex. App.—Dallas 2007, no pet.) (citing *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex.2001)). We first examine the record for evidence that supports the adverse finding, crediting favorable evidence if a reasonable fact-finder could, while disregarding all evidence to the contrary, unless a reasonable fact-finder could not. *Dow Chem. Co.*, 46 S.W.3d at 241. Only if there is no evidence to support the adverse finding do we then examine the entire record to determine if the contrary proposition is established as a matter of law. *Dow Chem. Co.*, 46 S.W.3d at 241. The issue will be sustained only if the contrary proposition is conclusively established. *Id.* When a party attacks the factual sufficiency of an adverse finding, we must consider and weigh all of the evidence and will set aside a finding only

if the evidence is so weak or the finding so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Id.* at 242. In a bench trial, the trial judge passes on the witnesses' credibility and the weight to be given their testimony. *See Bocquet v. Herring*, 972 S.W.2d 19, 22 (Tex. 1998). The judge can reject or accept any witnesses' testimony in whole or in part. *Id.*

In its first issue, SWIG challenges the trial court's findings that the foreclosure was proper and SWIG was not entitled to relief on its claims because SWIG contends the evidence established SWIG did not owe a debt to BB&T when the foreclosure sale was held. In making this argument, SWIG relies heavily on an entry in Colonial's account records from May 2010 purportedly showing the loan with a zero dollar balance.⁴ At trial, however, BB&T presented the testimony of David Hendricks, a senior vice president in BB&T's Acquired Asset Group, Problem Loan Administration, in which he explained the entry showing the loan had been "paid off" was a result of transferring the loan from Colonial's account system to BB&T's system in 2010. The transfer of the loan resulted in Colonial Bank's records showing the loan as having a zero dollar balance. Hendricks specifically testified the entry relied on by SWIG did not mean SWIG had repaid the loan and SWIG presented no evidence it had done so. Indeed, the record shows that SWIG acknowledged the debt and made payments on the loan after the date of the purported payoff. Although SWIG attempts to discredit Hendricks's testimony and the account records, the trial court, as the trier of fact, was free to accept BB&T's explanation for the account entry.

SWIG also asserts no evidence proves the amount owed on the loan at the time of the foreclosure because BB&T's account records were incomplete. Specifically, the records did not

⁴ The account records are contained in BB&T's trial exhibit 59. Although SWIG references and relies on exhibit 59 throughout its brief, SWIG also contends the exhibit was never admitted into evidence. The record shows the exhibit was admitted into evidence as a business record.

include the details of the payment history during the time the loan was owned by Colonial. SWIG's counsel and two of the guarantors in this case have made the same argument in this Court against the same bank before to no avail. *See Cha v. Branch Banking & Trust Co.*, No. 05-14-00926-CV, 2015 WL 5013700, at *3 (Tex. App.—Dallas Aug. 25, 2015, pet. denied) (mem. op.). Hendricks testified regarding the total amount due on the SWIG loan at the time of the foreclosure and provided documentary evidence to support his testimony. A bank officer's testimony is sufficient to prove the amount owed on a note and the bank is not required to provide the complete loan history. *See id.*; *see also, Towncreek Industr., LLC v. Wells Fargo Bank, N.A.*, No. 02-15-00393-CV, 2016 WL 6305257, at *5 (Tex. App.—Fort Worth Oct. 27, 2016, no pet.) (mem. op.). SWIG provided no evidence that the balance testified to by Hendricks was incorrect.

In its second issue, SWIG contends the trial court erred in rendering a take-nothing judgment on its claims because BB&T did not establish it had an enforceable contract with SWIG. SWIG argues the note and deed of trust on which BB&T foreclosed were unenforceable because they do not define the terms "Default" and "Outside Completion Date." Instead, the note and deed of trust reference an unsigned construction loan agreement to establish the definitions of those terms. An unsigned document may be incorporated into a signed contract when the signed contract plainly refers to the unsigned document. *See Bob Montgomery Chevrolet, Inc. v. Dent Zone Cos.*, 409 S.W.3d 181, 189 (Tex. App.—Dallas 2013, no pet.). SWIG makes no argument the reference language used in the note and deed of trust was insufficient to show the parties intended to incorporate the construction loan agreement's definitions of "Default" and "Outside Completion Date." Although BB&T did not produce the construction loan agreement, SWIG does not dispute that the agreement clearly referred to by the note and deed of trust existed at the time the note and deed of trust were signed. Because the

note and deed of trust incorporated specific definitions to which SWIG agreed, the documents are enforceable.

To the extent SWIG argues BB&T could not prove SWIG was in default at the time of the foreclosure because it did not produce a copy of the construction loan agreement defining the term “Default,” SWIG misplaces the burden of proof. SWIG had the burden to show its failure to make payments on the loan for an extended period of time and failure to pay the outstanding balance due on the note’s maturity date, as required by the terms of the note, did not constitute events of default. *See Farkas v. Aurora Loan Servs.*, No. 05-15-01225-CV, 2017 WL 2334235, at *5 (Tex. App.—Dallas May 30, 2017, pet. filed) (plaintiff must show foreclosing lender failed to comply with either statutory or contractual conditions governing foreclosure); *Cf. Alcorn v. Washington Mut. Bank, F.A.*, 111 S.W.3d 264, 266–67 (Tex. App.—Texarkana 2003, no pet.) (items not produced by bank that relate only to spurious claim of no default will not defeat judgment on note). SWIG’s reliance on the account entry that the loan was paid off is, as discussed above, unavailing.

Finally, SWIG contends BB&T must be able to prove the definition of “Outside Completion Date” because the definition of that term determines the date the note changed from a variable to fixed interest rate and, therefore, affects the calculation of interest due on the loan. While the calculation of the amount of interest owed by SWIG may impact BB&T’s deficiency claim, it has no bearing on SWIG’s claims for wrongful foreclosure. *See Cadle Co. Regency Homes, Inc.*, 21 S.W.3d 670, 678–80 (Tex. App.—Austin 2000, pet. denied). The record shows SWIG was in default on the principal amount owed under the note. This alone would allow BB&T to properly foreclose on the note and deed of trust. A bank’s inability to establish the interest rate called for in the note does not defeat its right to collect on the note in default. *Id.*

In its remaining issues, SWIG contends it was entitled to judgment, damages, and an award of attorney's fees on its claims for breach of contract and trespass to try title. The arguments made by SWIG in support of these issues are the same ones it asserts in its first two issues; that the evidence shows it paid the loan in full prior to the foreclosure, BB&T's account records are incomplete, and BB&T did not have an enforceable contract. We have already concluded these arguments are without merit. The evidence is both legally and factually sufficient to support the trial court's judgment on SWIG's claims. Accordingly, we resolve all SWIG's issues against it.

Based on the foregoing, we reverse the trial court's judgment to the extent it orders BB&T take nothing by its claims and we remand those claims for further proceedings. We affirm the trial court's judgment in all other respects.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

BRANCH BANKING AND TRUST
COMPANY, Appellant/ Cross-Appellee

No. 05-15-00878-CV V.

SWIG PARTNERS GP, LLC, WOO YOUNG
CHUNG, KUN YOUNG KIM, KYU
YOUNG KIM, STEVEN LEE, HUN KYU
LEE, EDWIN PAK, HYUK KEUN KWUN,
SHI CHUI KUM, WOON CHUL CHUNG,
NAM SUN PAEK, YOO SANG CHO,
HWAN HURH, HAK SON AHN,
HAROLD K. SHIN, HYO WON BANG,
EDWARD KIM, SUN KYUM CHA A/K/A
STEPHEN CHA, KWANG H. KIM, JANG
Y. LEE, JIM HEE CHA, SUNG CHOOI
LEE, JAMES LEE, JIN K. CHING,
KWANG JAE LEE, MARY CHU
DIERLAM, CHONG WON KIM, Appellees
SWIG PARTNERS LP, Appellee/Cross-
Appellant

On Appeal from the 134th Judicial District
Court, Dallas County, Texas
Trial Court Cause No. DC-14-03427.
Opinion delivered by Justice Francis.
Justices Myers and Whitehill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** that portion of the trial court's judgment ordering that BRANCH BANKING AND TRUST COMPANY take nothing by its claims. In all other respects, the trial court's judgment is **AFFIRMED**. We **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellant BRANCH BANKING AND TRUST COMPANY recover its costs of this appeal from appellees SWIG PARTNERS GP, LLC, SWIG PARTNERS LP, WOO YOUNG CHUNG, KUN YOUNG KIM, KYU YOUNG KIM, STEVEN LEE, HUN KYU LEE, EDWIN PAK, HYUK KEUN KWUN, SHI CHUI KUM, WOON CHUL CHUNG,

NAM SUN PAEK, YOO SANG CHO, HWAN HURH, HAK SON AHN, HAROLD K. SHIN,
HYO WON BANG, EDWARD KIM, SUN KYUM CHA A/K/A STEPHEN CHA, KWANG H.
KIM, JANG Y. LEE, JIM HEE CHA, SUNG CHOOI LEE, JAMES LEE, JIN K. CHING,
KWANG JAE LEE, MARY CHU DIERLAM, CHONG WON KIM.

Judgment entered December 13, 2017.