CONCUR; DISSENT and Opinion Filed March 29, 2022

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00461-CV

TEXAS CHAMPPS AMERICANA, INC., JILA DEVELOPMENT, LLC D/B/A SAL'S MART, HAMID AZARI, AND SHEILA T. INGRAM, LLC, Appellants
V.
COMERICA BANK, A TEXAS BANKING ASSOCIATION, Appellee

On Appeal from the 193rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-08857

CONCURRING AND DISSENTING OPINION

Opinion by Justice Smith

I join the majority in affirming the trial court's judgment ordering appellants take nothing as to their counterclaims against Comerica. However, because I disagree that the evidence was legally sufficient to show that Comerica was the owner and holder of the note and guarantees, I dissent from the portion of the majority opinion that affirms the trial court's judgment awarding Comerica $1,834,651.57 and attorney's fees.

Insufficient Evidence to Prove Comerica Was Holder of Note and Guarantees

To recover on a promissory note, the plaintiff must prove: (1) the existence of the note in question; (2) the defendant signed the note; (3) the plaintiff is the legal owner or holder of the note; and (4) a certain balance is due and owing on the note. *Bean v. Bluebonnet Sav. Bank FSB,* 884 S.W.2d 520, 522 (Tex. App.—Dallas 1994, no writ). "A [bank] not identified in a note [that] is seeking to enforce it as the owner or holder must prove the transfer by which [the bank] acquired the note." *Leavings v. Mills*, 175 S.W.3d 301, 309 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (op. on reh'g). The bank must prove an unbroken chain of title. *Id.* at 309–10.

Appellants argue that the evidence was legally and factually insufficient to prove that Comerica was the owner and holder of the note and guarantees because Comerica failed to prove that it acquired the note and guarantees from Sterling as a result of the merger. I do not disagree with the majority opinion's conclusion that the evidence was sufficient to show that a merger between Comerica and Sterling occurred. However, I disagree that Comerica by simply possessing copies of the loan documents and managing the loan account was sufficient to show that Comerica was the legal owner of the note and guarantees.

Comerica did not present any testimony from a bank representative that the note was acquired during the merger or that Sterling still owned the note and guarantees when the alleged merger took place. Comerica also failed to offer the merger agreement or plan of merger into evidence. According to section 10.008 of

the business organizations code, it is the plan of merger that sets out the rights, titles, and interests to be allocated to and vested in the surviving entity, not the merger itself. TEX. BUS. ORGS. CODE ANN. § 10.008(a)(2).

As the majority opinion discusses, Comerica presented the certificate of merger to the trial court, and the articles of merger were attached to the certificate. I agree the certificate of merger was sufficient to establish that the merger occurred. However, neither the certificate of merger nor the attached articles of merger address the rights, title, and interests Comerica was to acquire upon merger or provide that Comerica was to acquire all Sterling's interests. Instead, the articles reference an "Agreement and Plan of Merger," which was not attached to the certificate of merger and was not otherwise offered or admitted into evidence at trial.

Furthermore, the only bank representative Comerica called to testify was Omario Bill Martinez, Jr., Vice President Special Assets. Martinez did not testify about the merger or whether Comerica acquired the note and guarantees in the merger. Comerica could have proven it was the legal owner of the note and guarantees through testimonial evidence from a qualified witness. *See Comerica Bank v. Progressive Trade Enters.,* 544 S.W.3d 459, 461 (Tex. App.—Houston [14 Dist.] 2018 no pet.) (concluding trial court could not have disregarded uncontradicted testimony of custodian of records that Bank A acquired all loans and assets of Bank B in a merger, including the note and guarantee agreements at issue). Martinez, however, could not have testified to such information because he was not

an employee of Comerica when the merger occurred, was not assigned to the loan at issue until approximately the fourth quarter of 2017, and was not the custodian of records of the note and guarantees as contemplated by Texas Rule of Evidence 803(6).

Moreover, the copies of the note and guarantees themselves were not evidence of agreements between Comerica and appellants. Instead, on their face, they were evidence of agreements between appellants and Sterling. No loan modifications or other agreements were made with Comerica.

I also disagree that Comerica's exhibit titled, "U.S. Small Business Administration Lender's Transcript of Account" proves that Comerica is the legal owner of the note and guarantees. The transcript lists the name of the lender as Comerica, the borrower as Jila Development, and the amount of the loan as $1,705,000. It also details the payment history on the loan dating back to 2007 and shows that the last payment on the loan was made on May 11, 2016, bringing the unpaid principal balance to $1,403,328.73. However, the transcript does not (1) reflect Sterling as the initial lender; (2) reflect that Texas Champps was also a borrower; (3) show which payments were made to Sterling and which payments were made to Comerica, if any; (4) provide that Comerica acquired the loan from Sterling; or (5) detail any information about the guarantees. Thus, based on the inaccuracies and omissions in the document, the transcript is not evidence that Comerica was the legal owner and holder of the note and guarantees.

I cannot conclude that more than a scintilla of evidence existed to support the trial court's finding and conclusions that Comerica was the owner and holder of the note and guarantees. *See Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998). Comerica offered no testimony that it acquired the note and guarantees in the merger, and the certificate of merger alone is not evidence that this particular loan was owned by Sterling at the time of the merger and was acquired by Comerica as a result of the merger. Comerica failed to offer any evidence to show an unbroken chain of title. Thus, I would conclude that the evidence is legally insufficient to support the trial court's findings and conclusions that Comerica owned the note and guarantees.

Conclusion

The trial court's findings and conclusions that Comerica was the owner and holder of the note and guarantees are not supported by legally sufficient evidence. Therefore, I would reverse the trial court's judgment awarding Comerica $1,834,651.57 and awarding Comerica attorney's fees and render judgment that Comerica take nothing on its claim for breach of the promissory note and guarantees. Because the majority concludes otherwise, I dissent.

I join the majority in affirming the trial court's take-nothing judgment against appellants on their counterclaims.

/Craig Smith/
CRAIG SMITH
JUSTICE

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