No. 20-20528

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

MTGLQ INVESTORS, L.P.

Plaintiff - Appellee

v.

TINA ALEXANDER

Defendant - Appellant

On Appeal from

United States District Court for the Southern District of Texas

4:19-CV-616

BRIEF OF APPELLANT,
Tina Alexander

Respectfully submitted,

Harry E. Morse
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Appellant:

Tina Alexander is a domiciliary of Houston, Texas represented by Bohman Morse, LLC, 650 Poydras Street Suite 2710, New Orleans, Louisiana 70130

Appellee:

MTGLQ Investors, LP is a limited partnership. Its general partner is MLQ, L.L.C., a Delaware limited liability company. MTGLQ's limited partner is The Goldman Sachs Group, Inc. MTGLQ is represented by Ackerman, LLP, 2100 Ross Avenue Suite 3600, Dallas, Texas 75201.

S/Harry E. Morse

Attorney for Appellant, Tina Alexander

STATEMENT OF ORAL ARGUMENT

Defendant/Appellant Tina Alexander respectfully requests oral argument to address any questions the Court may have regarding the factual record or the law.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, as Tina Alexander appeals a final judgment of the United States District Court, Southern District of Texas.

ISSUE PRESENTED FOR REVIEW

The following issue is presented for review:

1. Whether the district court erred in granting summary judgment for MTGLQ Investors, LLP, finding that no fact issues remain with regard Ms. Alexander's defenses of quasi-estoppel and equitable estoppel, when Ms. Alexander paid to reinstate her loan and the note's then-holder, World Savings, refused her further payments.

STATEMENT OF THE CASE

1. Tina Alexander paid $106,000 to reinstate her home equity loan. World Savings took her money, but never reinstated the loan.

In 1998, Tina Alexander executed a promissory note for $296,000, payable to World Savings, and executed a deed of trust granting World Savings a security

interest in her home in Houston. ROA.15. The original loan required a monthly payment of $2,120.59. In September 2005, Ms. Alexander fell behind in her house payments. In June 2006, World Savings sent Ms. Alexander a notice of acceleration and a copy of an application for an order for foreclosure. A year later, in June 2007, Ms. Alexander filed for Chapter 13 bankruptcy. The bankruptcy filing was dismissed a month later, and World Savings was given leave to proceed with foreclosure, and in September 2007 World Savings sent another notice of acceleration and a "Reinstatement Quote" requiring $105,440.15 to reinstate the loan. ROA.268.

On September 19, 2007, Ms. Alexander confirmed in writing: if she paid the reinstatement quote, she would be good and current. ROA. 269. Roughly a week after receiving the reinstatement quote, Ms. Alexander wired $106,000 to World Savings and faxed confirmation to an employee in World Savings' foreclosure department. ROA.272-73. She then received a letter from World Savings, dated October 3, 2007, stating the funds had been "received and processed" to reinstate the loan, and that a payment of $2,561.12 was due as of October 1. ROA.278.

At this point, Ms. Alexander had reinstated her loan: World Savings had offered her a quote to reinstate the loan. Ms. Alexander had paid it. But then, for reasons unknown, World Savings acted as though it had never reinstated the loan, and stopped taking Ms. Alexander's money.

- On October 1, 2007, World Savings sent Ms. Alexander a statement that indicated $2,561.12 was due. ROA.277.
- On October 3, 2007, World Savings again told Ms. Alexander that $2,561.12 was due. ROA.278.
- On October 4, 2007, World Savings sent an escrow account disclosure statement indicating that instead, $8,768.85 was due. ROA.280.
- On October 6, 2007, World Savings sent a statement indicating that $11,350.21 was due, including $6,227.97 in "late charges / fees due." ROA.283.
- On October 15, 2007, World Savings sent a statement indicating that Ms. Alexander must make one of two payments: either $8,789.09 or $11,248.67. ROA.289
- On November 20, 2007, World Savings sent Ms. Alexander a check for $61 dollars – her overpayment on her reinstatement quote. ROA.294.
- On November 20, 2007, World Savings sent Ms. Alexander a statement: $14,182.97 due. ROA.297.
- On November 21, 2007, World Savings sent a letter: $5,414.12 due, including late charges. ROA.302.

- On December 4, 2007, World Savings sent another letter: $14,182.97 due. In this letter, World Savings noted "Any funds received that are less than the total amount due will be considered a partial payment and will be applied towards the arrearages due on your delinquent loan." ROA.307.
- On December 11, 2007, Ms. Alexander received a notice of intent to foreclose, which stated that the bank had not received her last two mortgage payments and the loan was therefore in default.

In this timeframe, Ms. Alexander was, first and foremost, trying to make payments on her note. In light of World Savings' failure to take her money and incoherent communications, she was, understandably, confused. Therefore she called and wrote (and called and wrote some more), looking for clarity. None was forthcoming. She tried to pay, but World Savings refused to take her money. On October 12, 2007, Ms. Alexander verbally authorized a $2,561.59 debit as a payment. ROA.275 – the amount due per what she received from World Savings.

World Savings refused to take her money, then, noted above, sent her another invoice for that amount and a late fee. Ms. Alexander called World Savings, then memorialized that in a letter on October 16, 2007, where she said: "I was told to ignore the statement, because World Savings was still applying all the funds from the reinstatement, and that I would be receiving an accounting of the applied funds

from the reinstatement, which would clear up all these issues." ROA.285-86. When World Savings followed up with inconsistent statement, Ms. Alexander called and wrote again on October 20, ROA.288, and again on October 29, ROA.291-92, and again on November 27, ROA.299-30, and again on November 28, ROA.304-05, and again on December 11, ROA310-11, and again on December 21, ROA.315, and again on December 27, ROA.317-19. In these letters, Ms. Alexander detailed, in depth, the inconsistent positions World Savings was taking and World Savings' literal refusal to take her money, and her futile efforts to comply.

When World Savings went to foreclose, Ms. Alexander sued to stop them, and that case went twice to this Court. World Savings (then Wachovia then Wells Fargo) were successful, but never counter-claimed. Wells Fargo (now MTGLQ) filed suit, and they moved for summary judgment, which the district court granted.

SUMMARY OF THE ARGUMENT

Ms. Alexander signed a home equity loan. She owed the home equity loan. She fell behind on the home equity loan. Then she made good: she paid $106,000 to reinstate the loan, on the assurance that her loan would be reinstated. Instead, World Savings never let her comply. They refused to take her money. They sent statements that are, cumulatively, incoherent. Instead of reinstating Ms. Alexander's home equity loan, they foreclosed on her.

Ms. Alexander's payment, and World Savings' acceptance of her payment, gives rise to equitable estoppel and quasi-estoppel as defenses, and the district court should have denied MGTLQ's summary judgment on these gorunds. Quasi-estoppel applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit." *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000). Equitable estoppel has four elements: First, a false representation or concealment of material facts made with the intent that another party act on the representation; Second, that the false representation was made by a party with knowledge of the facts; third, that the recipient of the representation did not know the real facts; and fourth, detrimental reliance. *Steubner Realty 19, Ltd. v. Cravens Rd. 88, Ltd.*, 817 S.W.2d 160, 163 (Tex. App. 1991). Promising to reinstate a loan, accepting $106,000, and then not reinstating the loan gives rise to both defenses.

In response to Ms. Alexander's equitable arguments, MTGLQ argued that it did have a reason to charge her more after her loan was reinstated: it was charging her for insurance premiums for holding the property. The district court accepted that argument. But MTGLQ's proffered explanation is plainly wrong because World Savings' documents are inconsistent not just with what World Savings told Ms. Alexander at the time – shown in her correspondence, where they promised to

reinstate the loan – but with themselves. The first statement asks for $2,561.12. Three days later, the next escrow account indicates $8,768.85 was due. Then, two days after that, another statement indicates that $11,350 is due, including the original amount and an additional $6,227.97 not in fees for insurance but in late charges – late charges incurred because World Savings would not take Ms. Alexander's money.

Ms. Alexander should be entitled to a trial on the merits on her defenses of quasi-estoppel and equitable estoppel. At that trial, the Court should fashion an equitable remedy. She owes the note, but because the failure here is World Savings' failure to take her money, she should not be charged penalties and interest at 7.5%.

STANDARD OF REVIEW

1. Review of grant of summary judgment

A grant of summary judgment is reviewed *de novo*, applying the same standard applied by the district court. *Combo Maritime, Inc. v. U.S. United Bulk Terminal, LLC*, 615 F.3d 599, 605 (5th Cir. 2010). The district court must grant summary judgment if the pleadings, discovery and disclosure materials on file, as well as any affidavits show there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. *Id,* citing Fed. R. Civ. P. 56; See also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, (1986); *Brown v. City of Houston*,

337 F.3d 539, 540-41 (5th Cir. 2003). A material fact is a fact which, under applicable law, may alter the outcome of the suit. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *Ameristar Jet Charter, Inc. v. Signal Composites, Inc.,* 271 F.3d 624, 626 (5th Cir. 2001). A dispute is genuine when a reasonable finder of fact could resolve the issue in favor of either party, based on the evidence before it. *Anderson,* 477 U.S. at 250; *TIG Ins. Co. v. Sedgwick James of Wash.,* 276 F.3d 754, 759 (5th Cir.2002). If the party moving for summary judgment demonstrates the absence of a genuine issue of material fact "the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Willis v. Roche Biomedical Labs., Inc.,* 61 F.3d 313, 315 (5th Cir.1995).

LAW AND ARGUMENT

1. Tina Alexander reinstated the loan. World Savings accepted it. They are bound to honor their reinstatement.

a. *Quasi-estoppel*

The tortured history of Ms. Alexander's home equity loan tracks closely with that of another recent, unpublished case, outlined in *Texas Capital Bank N.A. v. Zeidman*, No. 18-11114 (5th Cir. Jun 27, 2019), and the same result should follow here as there. There, the defendant, Daniel Zeidman, made a partial payment on a

loan. He and a partner had gone in on a business together, and when they separated, Mr. Zeidman paid his portion of the loan but never received a release. His former partner was delinquent and the bank, presumably fearing the former partner was illiquid, went after Mr. Zeidman instead. This Court held that quasi-estoppel "precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken. The doctrine applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit." *Zeidman*, citing *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000); *Willacy Appraisal v. Sebastian Cotton*, 555 S.W.3d 29, 48 (Tex. 2018). It "requires no showing of misrepresentation or detrimental reliance." *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236, 240 (Tex. App. 1994). "[Q]uasi-estoppel forbids a party from accepting the benefits of a transaction and then subsequently taking an inconsistent position to avoid corresponding obligations or effects. *Mexico's Indust., Inc. v. Banco Mexico Somex, S.N.C.,* 858 S.W.2d 577, 581 n. 7 (Tex.App. 1993).

This Court found Zeidman's quasi-estoppel defense survived summary judgment. He owed $1,318,058 on a note in 2010. In 2016, he contacted the bank and secured, orally, a full release for $500,000. He then paid that amount. The bank acknowledged receipt, then emailed Zeidman but never referenced that Zeidman was

released except orally. The note went into default and the bank sued Zeidman for the balance of the note. This Court held that if Zeidman could prove at trial that the bank orally agreed to accept the $500,000 payment in satisfaction of the guaranty and then actually did accept it, the bank would estopped from demanding more payment.

Likewise on point is *Lindley v. McKnight*, 349 S.W.3d 113, 131 (Tex. App. 2011). There, the plaintiff challenged the validity of shareholders' agreements that prohibited the transfer of shares. Instead, the shares were redeemed, and the plaintiff cashed the redemption check. The plaintiff could not cash the redemption check (which required that the shareholders' agreement was valid) and then argue to the Court that the agreement was invalid. The suit failed under quasi-estoppel.

The same result should follow here: When World Savings demanded $105,440.15. Ms. Alexander paid $106,000.00 on September 28, 2007. World Savings acknowledged and accepted the payment, which reinstated the loan – the bank sent her a refund for the overpayment. They cannot now complain that the loan was never reinstated. Their benefit was $106,000. Their burden was reinstating the loan. They accepted the benefit but disclaimed the burden.

Ms. Alexander's case is easier than Mr. Zeidman's because World Savings not only reinstated the loan, World Savings outlined the terms of the reinstatement in writing, not just verbally. On October 3, 2007, World Savings wrote to Ms.

Alexander: "World Savings is pleased to inform you that we have received and processed the funds to reinstate the above referenced loan. The loan is now due for the October 1, 2008 Payment in the amount of $2,561.12." ROA.278. Then they refused to take her money and sent her inconsistent statements. When World Savings offered to reinstate the loan, then took Ms. Alexander's money, they became obligated to reinstate the loan. World Savings then refused to accept Ms. Alexander's payments after they accepted the reinstatement. Quasi-estoppel stands in the way.

b. *Equitable estoppel*

Equitable estoppel requires four elements: First, a false representation or concealment of material facts made with the intent that another party act on the representation; Second, that the false representation was made by a party with knowledge of the facts; Third, that the recipient of the representation did not know the real facts; and Fourth, detrimental reliance. *Steubner Realty 19, Ltd. v. Cravens Rd. 88, Ltd.*, 817 S.W.2d 160, 163 (Tex. App. 1991).

For much the same reason Ms. Alexander has a valid quasi-estoppel defense, she has a valid equitable estoppel defense. World Savings represented to Ms. Alexander that they would take $105,440.15 to reinstate the loan. In detrimental reliance on that, Ms. Alexander paid $106,000.00, which World Savings accepted.

World Savings failed to reinstate the loan, and failed to accept Ms. Alexander's payments thereafter.

This Court reached the same conclusion in *Zeidman*, and the Texas Court of Appeals reached a like conclusion in *Stable Energy, LP v. Newberry*, 999 S.W. 2d 538, 548 (Tex. App. 1999). Anchor took over production on an oil well under an operating agreement it had not signed. It stopped paying the payees under the operating agreement. But it only took over the well because it had agreed to be the successor operator under the operating agreement; it could not benefit from the operating agreement then not be bound by its terms.

World Savings, too, should be equitably estopped. First, it misrepresented facts in telling Ms. Alexander that if she paid to reinstate her home equity loan, the loan would be reinstated. Second, World Savings surely knew that was false, proven by sending the inaccurate statements and failing to take Ms. Alexander's money. Third, Ms. Alexander did not know the real facts, or she would not have paid $106,000. Fourth, she relied on the reinstatement quote, proven by making her payment and trying to make more payments thereafter.

c. *World Savings did not increase the amount due to account for Ms. Alexander's home insurance, or for other fees.*

In response to Ms. Alexander's equitable estoppel and quasi-estoppel defenses, MTGLQ argued that the reason World Savings increased Ms. Alexander's payment from $2,561.12 to – well, that is where MTGLQ's argument fails, because it is impossible to look at what World Savings sent Ms. Alexander and determine what they increased her payment to. At first, they indicated it was $2,561.12 in a statement, post-reinstatement. Then, on October 4, that amount had increased to $8,768.85. Then two days later it was $11,350.21, which includes not amounts for insurance but late charges in the amount of $6,227.97. Nor were the amounts just steadily increasing: On November 21, World Savings told Ms. Alexander that $5,414.12 was due. Parsing the statements World Savings was sending, Ms. Alexander cannot find, and World Savings has offered, no coherent accounting for what is owed and why it is owed. And all this time, Ms. Alexander was calling World Savings, and they were telling her it was really $2,561.12 the first month, then $2,120.59. When Ms. Alexander called, she was "told to ignore the statement, because World Savings was still applying all the funds from the reinstatement, and that [she] would be receiving an accounting of the applied funds from the reinstatement, which would clear up all of these issues." ROA.233.

The inescapable conclusion is that World Savings took Ms. Alexander's money, but it never reinstated her loan. Taking her money and failing to reinstate

her loan gives rise to quasi-estoppel and equitable estoppel as defenses, and the district court improperly granted summary judgment for MTGLQ.

Conclusion

The District Court's grant of summary judgment for MTGLQ should be reversed, and this case should be remanded – not so Ms. Alexander can escape her obligation under the home equity loan, but so she can fulfill it, as reinstated, with the district court finding the proper equitable remedy for MTGLQ's breach.

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Certificate of Service

I hereby certify that on the 11th day of January, 2020, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit suing the appellate CM/ECF system, which will serve all counsel.

S/Harry E. Morse

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,588 words.

2. This brief complies with the typeface requirements of Fed. R. App, P. 32(a)(5) and the type style requirements of Fed. R. App, P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Word 2019 in Times New Roman 14.

S/Harry E. Morse