No. 04-21-00024-CV
Court of Appeals of Texas, Fourth District, San Antonio

FFGGP, Inc. v. MTGLQ Inv'rs

646 S.W.3d 30 (Tex. App. 2022)
Decided Jan 12, 2022

No. 04-21-00024-CV

01-12-2022

FFGGP, INC., AS TRUSTEE OF the WINDWARD TRACE 9131 LAND TRUST, Appellant v. MTGLQ INVESTORS, LP, Rushmore Loan Management Services, LLC, and U.S. Bank National Association, as trustee of TIKI Series IV Trust, Appellees

APPELLANT ATTORNEY: Adam Poole, Justin P. Nichols, 309 W. Dewey Place, Ste. B201-540, San Antonio, TX 78212. APPELLEE ATTORNEY: Crystal G. Gibson, Barrett Daffin Frappier Turner & Engel, LLP, 4004 Beltline Road, Ste. 100, Addison, TX 75001-4320.

Opinion by: Lori I. Valenzuela, Justice

APPELLANT ATTORNEY: Adam Poole, Justin P. Nichols, 309 W. Dewey Place, Ste. B201-540, San Antonio, TX 78212.

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Sitting: Rebeca C. Martinez, Chief Justice, Irene Rios, Justice, Lori I. Valenzuela, Justice

Opinion by: Lori I. Valenzuela, Justice

In this appeal, appellant asserts appellees' claims are barred by a prior default judgment that extinguished appellee's superior real property lien. Appellees assert the default judgment was interlocutory and void. The trial court entered a final judgment declaring appellant's interest subordinate to appellees' valid, subsisting, and superior lien. We reverse and render judgment in favor of appellant.

BACKGROUND

The parties maintain competing claims to interests in real property located at 9131 Windward Trace, San Antonio, Texas 78254 (the "Property"). A review of the Property's record title is pertinent to our analysis.

The First Lien

On or about March 14, 2001, Alan W. Roy acquired the Property by General Warranty Deed. To fund his acquisition, Roy executed a Deed of Trust for the Property in favor of Kaufman and Broad Mortgage Company ("KB Mortgage"). The KB Mortgage Deed of Trust recites that Roy owed KB Mortgage $118,247.00 in
33 principal, with the debt fully payable on April 1, 2031. For ease of identification, we *33 refer to the lien created by the KB Mortgage Deed of Trust as the "First Lien":

Interest	Holder
First Lien	KB Mortgage

On or about July 1, 2005, Roy entered into a "Loan Modification Agreement." The loan modification agreement identifies Washington Mutual Bank, F.A. ("WaMu") as lender; states that it amends and supplements the March 14, 2001 Deed of Trust; and was filed of record on November 3, 2005. Thus, on November 3, 2005, the real property records reflected a singular lien held by either or both KB Mortgage and WaMu. It is undisputed that JPMorgan Chase Bank, N.A. ("JPMorgan") subsequently acquired the assets of WaMu. After JPMorgan's acquisition, the Property remained subject to the First Lien:

Interest	Holder
First Lien	KB Mortgage and/or JPMorgan

No release or assignment of the First Lien is recorded in the Deed Records of Bexar County.

The Second Lien

On or about July 17, 2007, Roy executed a Texas Home Equity Security Instrument in favor of Resmae Mortgage Corporation ("Resmae"). This instrument recites that Roy owed Resmae $138,400.00 in principal, with the debt fully payable on August 1, 2037. For ease of identification, we refer to the lien created by this instrument as the "Second Lien." After the instrument was filed of record on July 27, 2007, record title reflected the Property was subject to two liens:

Interest	Holder
First Lien	KB Mortgage and/or JPMorgan
Second Lien	Resmae

On or about September 6, 2012, by virtue of an Assignment of Deed of Trust, Resmae assigned its interest in the Second Lien to The Bank of New York Mellon, Indenture Trustee for CSMC Trust 2011-3 Mortgage-Backed Securities ("BNYM"). After the assignment was filed of record on September 13, 2012, the Property remained subject to two liens:

Interest	Holder
First Lien	KB Mortgage and/or JPMorgan
Second Lien	BNYM

On or about August 24, 2018, by virtue of an Assignment of Deed of Trust, Citicorp Trust Delaware, National Association, Not in its Individual Capacity, but Solely as Owner Trustee of CSMC 2014-RPLI Trust
34 ("Citicorp") assigned its interest in *34 the Second Lien to MTGLQ Investors, L.P. ("MTGLQ"). Notably, while this assignment was executed on August 24, 2018, it was not filed of record until April 8, 2019. Earlier in the day the assignment was recorded, Ditech Financial LLC filed an "Affidavit of Lost Assignment" that recites (1)

an assignment from BNYM to Citicorp was lost and not recorded, and (2) BNYM is no longer in business and a replacement assignment is therefore unavailable. Notwithstanding this irregularity in the record title, the parties do not dispute MTGLQ held an interest in the Second Lien no later than April 8, 2019:[1]

[1] Although appellees assert the Second Lien took a senior lien position "after paying off the original Deed of Trust," the record contains no evidence of payments extinguishing the First Lien; rather, as we have noted, there are no releases or assignments of the First Lien recorded in the Deed Records of Bexar County.

Interest	Holder
First Lien	KB Mortgage and/or JPMorgan
Second Lien	MTGLQ

The Third Lien

Since December 9, 1997, the Property has been subject to a Declaration of Protective Covenants for Stonefield Subdivision, Unit 1, Stonefield Estates Association, Inc., as amended and supplemented (the "Declaration"). In relevant part, the Declaration requires the payment of assessments to the Association and provides for the creation of a lien against the Property if the assessments are not paid. For ease of identification, we refer to the lien created by the Declaration as the "Third Lien." The Declaration expressly subordinates the Third Lien to vendor's liens or deeds of trust—as applicable here, the First Lien and Second Lien:

Interest	Holder
First Lien	KB Mortgage and/or JPMorgan
Second Lien	MTGLQ
Third Lien	Association

Roy failed to pay assessments on the Property, and on May 23, 2018, the Association recorded an Affidavit of Non-Receipt of Maintenance Assessments against the Property. On April 2, 2019, the Association foreclosed the Third Lien and sold the Property at auction. Pursuant to the sale, on April 5, 2019, the trustee executed a Trustee's Deed conveying all of Roy's right, title, and interest in the Property to Kingman Holdings, LLC, Trustee, Winward Trace 9131 Land Trust. In accord with the Declaration, the conveyance was expressly subject to any prior existing and recorded liens and encumbrances of record (i.e. the First Lien and Second Lien). By Appointment of Substitute Trustee, recorded October 31, 2019, Kingman Holdings, LLC appointed appellant FFGGP, Inc. ("FFGGP") as trustee of the land trust. Thus, on October 31, 2019, record title reflected
35 three, potentially competing interests in the Property: *35

Interest	Holder
First Lien	KB Mortgage and/or JPMorgan
Second Lien	MTGLQ
Property	FFGGP

The First Lawsuit

On November 4, 2019, appellant filed an original petition in *FFGGP, Inc. v. Kaufman and Broad Mortgage Company, JPMorgan Chase Bank, N.A., and MTGLQ Investors, LP* , Cause No. 2019CI22923, in the 438th Judicial District Court, Bexar County, Texas (the "First Lawsuit"). At the time the First Lawsuit was filed, appellant's original petition identified all apparent record owners of an interest in the Property: KB Mortgage, JPMorgan, and MTGLQ. Among other requests for relief, appellant sought to (1) quiet title to the Property in appellant's favor as the sole owner of the Property in fee simple, without any liens or other encumbrances, and (2) declare the First Lien and Second Lien, and their subsequent assignments, as void and extinguished.

After the defendants failed to answer, appellant moved for default judgment. On January 10, 2020, the trial court entered a Final Default Judgment (1) awarding the Property in fee simple to appellant; (2) declaring the First Lien void as extinguished by the judgment; and (3) declaring the Second Lien void as extinguished by the judgment. The Final Default Judgment disposed of all claims, parties, and controversies and was appealable.

The Second Lawsuit

On December 16, 2019, a Notice of Trustee's Sale was filed in the Official Public Records of Bexar County. The Notice identified MTGLQ as mortgagee; identified Rushmore Loan Management Services, LLC ("Rushmore") as the mortgage servicer; and indicated MTGLQ intended to foreclose the Second Lien on February 4, 2020. Appellant discovered the auction and, on February 3, 2020, filed the underlying proceeding (the "Second Lawsuit") against MTGLQ and Rushmore seeking (1) to enjoin the foreclosure sale and (2) declarations confirming the validity of appellant's title free and clear of the First Lien and Second Lien.

On February 3, 2020, the trial court entered a temporary restraining order purporting to restrain the sale of the Property at auction and setting a hearing for temporary injunction on May 18, 2020. On April 9, 2020, MTGLQ and Rushmore answered. On May 5, 2020, U.S. Bank National Association, as Trustee of the TIKI Series IV Trust ("U.S. Bank") intervened, pleading, "In 2017, the loan and deed of trust was transferred to [U.S. Bank]." Although U.S. Bank pled it acquired its interest in 2017, the instrument by which U.S. Bank claims it acquired its interest was executed on April 28, 2020; recites "Effective Date 11/26/2019"; and was filed of record on June 16, 2020.

The parties subsequently sought to prove the superiority of their respective title claims by cross-motions for summary judgment. On November 3, 2020, the trial court entered a judgment (1) granting appellee's motion; (2) dismissing appellant's claims with prejudice; (3) issuing a take nothing judgment as to appellant's claims; (4) declaring U.S. Bank's lien valid, subsisting and superior to appellant's; and (5) declaring the default
36 judgment in the First Lawsuit void as to U.S. Bank, its successors and assigns. This appeal followed. *36

STANDARD OF REVIEW

We review a grant of summary judgment de novo. *Nall v. Plunkett* , 404 S.W.3d 552, 555 (Tex. 2013). In a traditional motion, the party moving for summary judgment has the burden to prove there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c) ; *Nixon v. Mr. Prop. Mgmt. Co.* , 690 S.W.2d 546, 548 (Tex. 1985). When both sides move for summary judgment and the trial court grants one motion and denies the other, as here, we review both sides' summary judgment evidence, determine all questions presented, and render the judgment that the trial court should have rendered. *FM Properties Operating Co. v. City of Austin* , 22 S.W.3d 868, 872 (Tex. 2000).

ANALYSIS

Appellant's argument is simple: Under the doctrine of res judicata, the trial court's default judgment in the First Lawsuit extinguished the First Lien and Second Lien, resulting in appellant owning the Property free and clear of the liens. Appellees assert the default judgment was void and interlocutory and, therefore, the trial court in the Second Lawsuit did not err in confirming the validity of the Second Lien.

Res judicata, also known as claim preclusion, bars lawsuits that arise out of the same subject matter as a prior suit when, with the use of diligence, that subject matter could have been litigated in the prior suit. *Eagle Oil & Gas Co. v. TRO-X, L.P.* , 619 S.W.3d 699, 705–06 (Tex. 2021). The doctrine is necessary to "bring an end to litigation, prevent vexatious litigation, maintain stability of court decisions, promote judicial economy, and prevent double recovery." *Id.* (quoting *Citizens Ins. Co. of Am. v. Daccach* , 217 S.W.3d 430, 449 (Tex. 2007)). A final judgment on an action extinguishes the right to bring suit on the transaction, or series of connected transactions, out of which the action arose. *Id.* When determining whether a set of facts forms a transaction, "the determination is to be made pragmatically, 'giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a trial unit conforms to the parties' expectations or business understanding or usage.' " *Id.* (quoting *Barr v. Resolution Tr. Corp.* , 837 S.W.2d 627, 631 (Tex. 1992)).

The elements of res judicata are (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims that were raised or could have been raised in the first action. *Id.* (quoting *Daccach* , 217 S.W.3d at 449). At issue in this proceeding are the first two elements.

Is there a prior final judgment?

Appellant was first required to prove the existence of a prior final judgment on the merits by a court of competent jurisdiction. *Eagle Oil* , 619 S.W.3d at 705. For the purposes of our analysis, we divide this element into three subparts: (1) a prior final judgment (2) on the merits (3) by a court of competent jurisdiction.

Appellant attached as evidence a copy of the default judgment to its motion for summary judgment. "A default judgment can constitute a determination on the merits for res judicata purposes." *Matter of Marriage of Mouret* , 14-20-00050-CV, 2021 WL 1184190, at *3 (Tex. App.—Houston [14th Dist.] Mar. 30, 2021, no pet.) ; *see also PNS Stores, Inc. v. Rivera* , 379 S.W.3d 267, 275 (Tex. 2012) ; *McMillan v. Tally Two Inv. Group, LLC* , 03-18-00550-CV, 2019 WL 3680130, at *5–6 (Tex. App.—Austin Aug. 7, 2019, no pet.) ; *37 *Qualia v. Qualia* , 04-97-933-CV, 1998 WL 448608, at *10 (Tex. App.—San Antonio July 31, 1998, pet. denied) ; *Jones v. First Bank of Anson* , 846 S.W.2d 107, 110 (Tex. App.—Eastland 1992, no writ) ; *Mendez v. Haynes Brinkley & Co.* , 705 S.W.2d 242, 245–46 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.). Here, the Final Default Judgment (1) awards appellant judgment "against KB Mortgage, JPMorgan, and MTGLQ, as pled for in its petition"; (2) declares the First Lien and Second Lien, along with any subsequent modifications, extensions, or assignments, "void as extinguished by this judgment"; and (3) provides that it "is a final judgment which disposes of all claims, parties, and controversies and is appealable." It is undisputed the 438th Judicial District Court of Bexar County, Texas is a court of competent jurisdiction. By including the Final Default Judgment as summary judgment evidence, appellant satisfied the second and third subparts of the first element.

Contending the Final Default Judgment is interlocutory, appellees challenge the first subpart of this element. According to appellees, the Final Default Judgment is interlocutory because service on KB Mortgage in the First Lawsuit was defective as a matter of law. We need not reach the merits of appellees' contention because appellees lack standing to complain over the efficacy of service on KB Mortgage.

"Generally, a party lacks standing to assert a due process violation based on improper service of another party." *In re Guardianship of V.A.* , 390 S.W.3d 414, 418 (Tex. App.—San Antonio 2012, pet. denied) ; *Sw. Const. Receivables, Ltd. v. Regions Bank* , 162 S.W.3d 859, 864 (Tex. App.—Texarkana 2005, pet. denied). Additionally, a party "may not complain of errors which do not injuriously affect [it] or which merely affect the rights of others." *Jackson v. Fontaine's Clinics, Inc.* , 499 S.W.2d 87, 92 (Tex. 1973) ; *see In re M.C.R.* , 55 S.W.3d 104, 107 (Tex. App.—San Antonio 2001, no pet.).

The title record establishes that appellees are not successors or assigns of the First Lien (i.e. the KB Mortgage lien). In fact, appellees argue (although it is unsupported by the record) the Second Lien "took a senior lien position after paying off" the First lien. In other words, appellees concede they are not successors or assigns of the First Lien. Record title confirms appellees' concession. Because appellees are unrelated to KB Mortgage and own no interest under the First Lien, they do not maintain standing to assert a due process violation based on the alleged improper service of KB Mortgage. *See Jackson* , 499 S.W.2d at 92 ; *In re V.A.* , 390 S.W.3d at 418 ; *Sw. Constr. Receivables* , 162 S.W.3d at 864 ; *see also PNS Stores, Inc. v. Rivera* , 379 S.W.3d 267, 275 (Tex. 2012) (to render judgment void, defects in service must be "so substantial that *the defendant* was not afforded due process") (emphasis added).

Appellees are MTGLQ, MTGLQ's mortgage servicer on the Property (Rushmore), and a party claiming its interest in the Property was derived from MTGLQ (U.S. Bank). Appellees do not challenge MTGLQ's service with respect to the First Lawsuit; therefore, as to appellees, the Final Default Judgment is final. *See Farm Bureau County Mut. Ins. Co. v. Rogers* , 455 S.W.3d 161, 163 (Tex. 2015). We conclude appellant established the first element of res judicata.

Do both lawsuits involve the same parties or those in privity with them?

Appellant was next required to prove the identity of parties or those in privity with them. *Eagle Oil* , 619
38 S.W.3d at 705. Privity turns on the circumstances of *38 the case. *Getty Oil Co. v. Insurance Co. of N. Am.* , 845 S.W.2d 794, 800 (Tex. 1992) ; *see also McNeil Interests, Inc. v. Quisenberry* , 407 S.W.3d 381, 388 (Tex. App.—Houston [14th Dist.] 2013, no pet.). This element may be established, among other methods, by proof that the parties sought to be bound by the original judgment derived their claims through a party to the prior action. *Amstadt v. U.S. Brass Corp.* , 919 S.W.2d 644, 653 (Tex. 1996) (citing *Getty Oil* , 845 S.W.2d at 800). MTGLQ was a party to the First Lawsuit, and the element is clearly satisfied as to it. We turn to the remaining appellees.

The summary judgment record does not reflect any interest in the Property owned by appellee Rushmore; rather, Rushmore acted as an agent of MTGLQ with respect to the Property as MTGLQ's mortgage servicer. To be sure, Rushmore is only a party because of the unique procedural history of this case: appellant commenced suit to enjoin MTGLQ's non-judicial foreclosure, and the title record reflected Rushmore intended to proceed on the foreclosure as MTGLQ's mortgage servicer. Under the circumstances of this case, Rushmore is in privity with MTGLQ, and the element is also satisfied as to it. *See id.* ("Privity exists if the parties share an identity of interests in the basic legal right that is the subject of litigation.").

The primary issue in this appeal is whether the last appellee, U.S. Bank, is in privity with MTGLQ for res judicata purposes. According to appellees, the default judgment was void because it was obtained without the joinder of a necessary party, U.S. Bank. In support of their argument that U.S. Bank was a necessary party to the First Lawsuit, appellees point to one document—MTGLQ's assignment of its interest in the Property to U.S. Bank.[2] Although the assignment was executed on April 28, 2020 (after default judgment), it recites an effective date of November 26, 2019 (before default judgment).

2 Appellees conclude—without explanation or evidence—that the U.S. Bank assignment imparted constructive and actual notice of the existence of a superior lien held by U.S. Bank at the time appellant purchased the Property. But the U.S. Bank assignment did not impart constructive notice on appellant in April 2019 (when appellant acquired its interest in the Property) for the simple reason that it was not filed of record until June 16, 2020. *See* Tex. Prop. Code § 13.002 (imparting constructive notice of the existence of properly recorded instruments). There is also no evidence in the summary judgment record suggesting appellant had actual knowledge of the assignment; to the contrary, the record demonstrates the absence of actual knowledge in April 2019 because the U.S. Bank assignment was not executed until April 28, 2020.

Appellees argue the *effective* date, and not the *execution* date, should "control" in our res judicata analysis. Under these facts, we cannot agree. Although parties are generally free to contract as they wish, their agreement does not bind the entire world. *See First Bank v. Brumitt* , 519 S.W.3d 95, 99 (Tex. 2017) ("As a general rule, parties in Texas may contract as they wish ..."); *Rapid Settlements, Ltd. v. Green* , 294 S.W.3d 701, 706 (Tex. App.—Houston [1st Dist.] 2009, no pet.) ("It goes without saying that a contract cannot bind a nonparty.") (quoting *EEOC v. Waffle House, Inc.* , 534 U.S. 279, 294, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002)); *but see, e.g., In re Weekley Homes, L.P.* , 180 S.W.3d 127, 131–35 (Tex. 2005) (discussing specific instances where nonparties may be bound by contract).

Absent a statutory or other legal rule to the contrary, a recitation of an effective date is simply a contract term
39 like any other of the contract's terms. *Cf.* *39 *Brumitt* , 519 S.W.3d at 103, 106 ("As a general rule, the benefits and burdens of a contract belong solely to the contracting parties, and 'no person can sue upon a contract except he be a party to or in privity with it.' ... The parties' intent to create a third-party beneficiary is thus simply a contract term like any other of the contract's terms."). Although assignments are usually effective on the date they are signed, the inclusion of an effective date expresses the parties' intent to vary the default rule by durationally limiting or expanding the contract. *See Transcon. Realty Inv'rs, Inc. v. Wicks* , 442 S.W.3d 676, 680 (Tex. App.—Dallas 2014, pet. denied). Consequently, to ascertain whether an effective date is binding on a non-party or third-party, we look to general principles of contract and agency law. *See In re Weekley Homes* , 180 S.W.3d at 131–35.

Appellees cite three cases in support of their argument: *Deutsche Bank Nat'l Tr. Co. v. Burke* , 655 Fed. Appx. 251, 253–54 (5th Cir. 2016), *Wicks* , 442 S.W.3d at 680 ; and *Crowell v. Bexar Cnty.* , 351 S.W.3d 114, 117–19 (Tex. App.—San Antonio 2011, no pet.). We agree with appellant's assessment of these authorities that "retroactive assignments are not universally impermissible, but they are not *always* permissible or effective, and they cannot be made to the detriment of third persons and cannot be made to avoid claims." In *Wicks* , the antedated assignment of the lease "did not create new rights" and did not harm the complaining party. *Wicks* , 442 S.W.3d at 680. Similarly, in *Crowell* , this court stated:

> The Crowells next contend the assignments are not binding to the detriment of third parties such as themselves. The Crowells rely on two federal court opinions for the proposition that parties to a contract cannot make the contract retroactively binding to the detriment of third persons. While we do not disagree with this general rule, these federal cases are factually distinguishable from this case. In those cases, the parties attempted to create a defense to liability by antedating their agreement. Here, the assignments did not create new rights or defenses. Instead, the assignments merely transferred the existing right held by CIT—the lien on the Crowells' property.

Crowell , 351 S.W.3d at 119 (internal citations omitted). In this case, MTGLQ and U.S. Bank sought to create a new right in the Property by reviving the Second Lien after it was already extinguished by the default judgment. The backdating of the agreement did not transfer an *existing* right held by MTGLQ; it purported to

revive a lien extinguished by the default judgment. *See id.* Because MTGLQ owned no right in the Property at the time of execution, appellees could not antedate the U.S. Bank assignment to appellant's detriment. *See id.*

Albeit ineffectual to transfer an interest in the Property, the U.S. Bank assignment is a "subsequent ... assignment" expressly extinguished by the default judgment. Nevertheless, by virtue of the assignment, U.S. Bank maintains contractual privity with MTGLQ with respect to the Property. *Cf. Trial v. Dragon* , 593 S.W.3d 313, 318 (Tex. 2019) (discussing privity in the context of estoppel by deed). We conclude appellant established the second element of res judicata as to each appellee.

CONCLUSION

We hold the doctrine of res judicata prohibits appellees from claiming interests in the Property and reject
40 appellees' arguments *40 to the contrary.[3] Accordingly, we reverse the judgment of the trial court and render judgment as follows: (1) any deed of trust through which MTGLQ INVESTORS, LP may claim an interest in the Property is void as extinguished by the default judgment, including the Texas Home Equity Security Instrument identified as Document Number 20070175752 of the Bexar County Deed Records, along with any subsequent modifications, extensions, or assignments; (2) U.S. Bank's Assignment of Deed of Trust, identified as Document Number 20200128282 of the Bexar County Deed Records, is a "subsequent ... assignment" extinguished by the default judgment; (3) appellees' claims are dismissed with prejudice to the re-filing of same; and (4) appellees take nothing from appellant.

[3] Although appellant requests we render judgment confirming appellant's fee simple title free of encumbrances pursuant to the default judgment, we decline to do so. We lack jurisdiction over an appeal of the default judgment. This court is presented with a narrower issue: the application of res judicata to the parties before it.