NO. 04-21-00024-CV

In Court of Appeals for the Fourth District of Texas
San Antonio, Texas

FFGGP, INC., AS TRUSTEE OF THE WINDWARD TRACE 9131 LAND TRUST,

Appellant,

v.

MTGLQ INVESTORS, LP, RUSHMORE LOAN MANAGEMENT SERVICE, LLC, AND U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE OF TIKI SERIES IV TRUST,

***Appellees*.**

APPELLANT'S REPLY BRIEF

Appeal from the 166th Judicial District Court
Bexar County, Texas; No. 2020-CI-02266
The Honorable John Gabriel, Visiting

THE NICHOLS LAW FIRM, PLLC

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES **PAGE**

CONSTITUTIONS

SUMMARY OF THE ARGUMENT

The Summary Judgment Order granted relief to Appellees which the Final Default Judgment had stood as a direct bar against in violation of res judicata. In defense of this express violation, Appellees first rely on a flawed argument that the Final Default Judgment was actually interlocutory, based on their claim – for which they lack standing – that KB Mortgage's due process rights were violated because the USPS "green card" evidencing service on KB Mortgage's registered agent was somehow defective. Notwithstanding the lack of support for this argument in the record, Appellees wholly fail to acknowledge that the "Mother Hubbard" clause present in the Final Default Judgment makes the judgment final as a matter of law regardless of any evidence in the record to the contrary.

Appellees secondly argue the Final Default Judgment was void, relying entirely on their purported assignment from MTGLQ to US Bank, executed several months after the Final Default Judgment was entered, and conveniently backdated to a date prior to the Final Default Judgment. In so doing, Appellees seek the establishment of unsupportable and dangerous precedent which would effectively make all judgments in Texas conditionally void.

Should the Court find that the Final Default Judgment was final instead of interlocutory, and that it is valid instead of void, all other arguments in this appeal can only be judged in favor of FFGGP.

ARGUMENT & AUTHORITIES

I. Appellees' collateral attack on the Final Default Judgment was a violation of res judicata which the trial court erred in granting, and Appellees fail to excuse the error with their unsupportable argument that the Final Default Judgment was interlocutory or with their dangerous argument that the Final Default Judgment was void.

FFGGP obtained its Final Default Judgment on January 10, 2020. CR 439-442. Therein, the 438th district court made a final adjudication that:

> any deed of trust through which MTGLQ INVESTORS, LP may claim an interest in the Property is declared void as extinguished by this judgment. Specifically, 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, is declared void as extinguished by this judgment.
>
> This is a final judgment which disposes of all claims, parties, and controversies and is appealable. All relief not expressly granted here in DENIED.

CR 440-441. There does not appear to be any argument that Appellees' Counterclaim & Intervention in the trial court constituted a collateral attack on the Final Default Judgment. Rather, Appellees' argue that their collateral attack was not a violation of res judicata – and consequently the trial court did not err in granting summary judgment to the claims therein – because: (1) the Final Default Judgment was, in fact, interlocutory; and (2) the Final Default Judgment was void. (Appellees' Brief, at PP. 8-17.) Both arguments must fail.

A. Judgment not Interlocutory

Appellees go to great lengths to argue that the Final Default Judgment was interlocutory based on an unsupportable argument that service on KB Mortgage was defective. (Appellees' Brief, at PP. 15-17 & 21.) Appellees further argue they have standing to assert a violation of the due process rights of KB Mortgage because KB Mortgage's interest has been assigned to US Bank. (Appellees' Brief, at PP. 21-23.) Both arguments are unsupported by the record.

First, the record *does* show proper service on KB Mortgage, including an affidavit of service from the process server, USPS tracking showing delivery, and a USPS "green card" showing a date and signature. CR 425-427. As such, the argument itself is unsupported by the record, and fails on the merits.

Second, KB Mortgage's purported interest was derived from the deed of trust identified as Document Number 2001-0051669 of the Bexar County deed records. CR 440. This was *not* the same interest as the purported Home Equity Lien claimed by Appellees, and the record conclusively shows *no assignment* of KB Mortgage's purported interest to any of Appellees at any time. CR 1-499. Accordingly, even had there been some defect, none of Appellees had standing to challenge the validity of the Final Default Judgment based upon the alleged failure of due process evidenced by this "green card". *Southwest Constr. Receivables, Ltd. v. Regions Bank*, 162 S.W.3d 859, 864 (Tex. App.–Texarkana 2005, pet. denied.)

Finally, all of Appellees' arguments that the Final Default Judgment was interlocutory are mooted by Texas Supreme Court precedent – *precedent which Appellees wholly fail to even address or acknowledge*: "a judgment issued without a conventional trial is final for purposes of appeal if . . . it states with unmistakable clarity that it is a final judgment as to all claims and parties." *Farm Bureau County Mut. Ins. Co. v. Rogers*, 455 S.W.3d 161, 163 (Tex. 2015). The Final Default Judgment did state: "This is a final judgment which disposes of all claims, parties, and controversies and is appealable." CR 441. Accordingly, Appellees arguments that the Final Default Judgment was interlocutory must fail.

B. Judgment not Void

Appellees' entire argument that the Final Default Judgment is void is premised on their assertion that US Bank – and not MTGLQ – was the real party in interest at the time the Final Default Judgment was entered. (Appellees' Brief, at PP. 8-10 & 13-15.) In support of this, Appellees rely exclusively on the purported assignment from MTGLQ unto US Bank, recorded as Document Number 20200128282 of the Bexar County deed records. (Appellees' Brief, at PP. 13-15.) This assignment was executed on April 28, 2020 (more than three months after the Final Default Judgment was entered) and recorded in the public deed records of Bexar County on June 16, 2020 (more than five months after the Final Default Judgment was entered). CR 444-446.

In an audacious attempt to avoid the binding force of the Final Default Judgment, MTGLQ and US Bank purported to set the "effective date" of their assignment to November 26, 2019, prior to the Final Default Judgment. CR 444-446. *There is no other support for this purported effective date anywhere in the record.* CR 1-499. Further, Appellees fail to explain – and instead merely attempt to gloss over – the inconvenient, yet undeniable fact that, on November 26, 2019, MTGLQ, and *not US Bank*, was actively pursuing foreclosure of the purported Home Equity Lien, with such foreclosure scheduled to take place on February 4, 2020, with MTGLQ as record mortgagee. CR 443. (Appellees' Brief, at P. 2.)

In seeking to legitimize this supposed "effective date", Appellees rely on three cases: *Transcon. Realty Inv'rs, Inc. v. Wicks*, 442 S.W.3d 676 (Tex. App.–Dallas 2014, pet. denied); *Crowell v. Bexar Cty.*, 351 S.W.3d 114 (Tex. App.–San Antonio 2011, no pet.); and *Deutsche Bank Nat'l Tr. Co. v. Burke*, 655 F. App'x 251 (5th Cir. 2016) (unpublished). (Appellees' Brief, at P. 14.)

The subject of *Transcon. Realty* was a 2004 lease, the lessor of which formed a trust in May 2006, and contemporaneously assigned "all of the right, title and interest of [the lessor] in and to any and all property held by [the lessor] . . . whether now owned or hereafter acquired to himself, as trustee of the Trust." 442 S.W.3d at 677-678 (internal quotations omitted). From that point forward, the lessee paid rent pursuant to the lease to the trust instead of to the lessor directly. *Id*.

Several years later, in September 2011, the lessor executed a general warranty deed transferring the specific property under the lease to the trust, along with an "Assignment and Assumption of Lease" assigning the lessor's rights and obligations under the lease to the trust, and set an effective date at the same May 2006 date of the original assignment described above. *Id*.

The court found that,

> Although assignments are usually effective on the date on which they are signed, there is no language in the lease which would require that the assignment only be effective upon execution. Thus, [the lessor] was not prevented from executing the Assignment and Assumption of Lease with a retroactive "effective date" of May 17, 2006. [The lessor]'s assignment of the lease to the Trust did not create new rights and, indeed, [the lessor] sued on behalf of the Trust merely to enforce the lease. Appellant had agreed to the lease and paid rent to the Trust, so appellant is not harmed by the May 2006 retroactive effective date of the 2011 assignment.

Id at 680 (internal citations omitted). There, the assignment of rights was known of and acquiesced to by all relevant parties long before the retroactive assignment was made. *Id* at 678. Such is not the case here. Further, in *Transcon. Realty*, there was corroborating evidence supporting the specific effective date of the retroactive assignment. *Id*. Again, such is not the case here. Finally, *Transcon. Realty* did not include an assignment being executed after a final judgment against the assignor, or the allegation that the assignee's due process rights were infringed, as Appellees attempt to argue here.

In *Crowell*, the borrowers under a deed of trust contested the validity of a retroactive assignment of their deed of trust, executed after a tax foreclosure of the subject property, but with an effective date prior to the tax foreclosure. 351 S.W.3d at 115.

Appellees rely on *Crowell* to show that retroactive assignments *can* be permissible, and yet the court in *Crowell* actually agreed with FFGGP's position here: that "parties to a contract cannot make the contract retroactively binding to the detriment of third persons." *Id.* at 118-119. Further, and perhaps most relevant to this matter, the court in *Crowell* recognized and agreed with a federal court opinion that a "retroactive date of assignment could not be used to avoid [a] fraudulent transfer claim" *Id.* at 118 (citing *In re Tronox Inc.*, 429 B.R. 73, 99 (Bankr. S.D.N.Y. 2010)). Here, Appellees have sought to use their purported assignment for precisely this kind of purpose: to avoid claims and the binding force of a final judgment as to those claims.

Finally, Appellees look to *Deutsche Bank* to support their retroactive assignment. But the court in *Deutsche Bank* merely determined that there was no language *in the deed of trust itself* which would universally prohibit it from being assigned retroactively. 655 F. App'x at 254. And again, the assignment in *Deutsche Bank* was not executed after a final judgment with a retroactive date prior to such judgment, along with the allegation that such judgment was therefore void. *See id*.

Appellees cited authorities ultimately serve to support FFGGP's position in this matter: 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. *See Crowell* at 118-119.

Further, and most importantly, this Court must not ratify Appellees' arguments, as doing so would set an extremely dangerous precedent. The facts in this matter are simple: on January 10, 2020, FFGGP obtained a final judgment against MTGLQ regarding MTGLQ's interest in the Property. CR 439-442. On April 28, 2020, MTGLQ executed a purported assignment of its interest in the Property to US Bank, which was recorded on June 16, 2020, and which claimed to set the effective date of assignment to November 26, 2019. CR 444-446. Appellees point to nothing in the record other than this purported assignment to support their alleged retroactive date, and the record actually shows MTGLQ continuing to act as mortgagee during the time of the alleged retroactive date. CR 443.

Should the Court find the Final Default Judgment to be void under these facts, then what judgment in the State of Texas is safe, much less final? Indeed, none could be – as all a judgment debtor need do is assign his or her interest away, at any time, and simply set a retroactive date in the assignment to some time prior to the judgment. *That's it*. And just like that, any judgment in Texas is void. Such a precedent is patently untenable, and must be rejected as a matter of public policy.

Because the Final Default Judgment is final and valid, Appellees' Counterclaim and Intervention – which sought to relitigate the claims subject to the Final Default Judgment, and which sought a judgment to which the Final Default Judgment stood as a bar against – constituted an impermissible collateral attack on the judgment in violation of res judicata, and the trial court erred in granting summary judgment in favor of Appellees. *See Browning v Prostok*, 165, S.W.3d 336, 346 (Tex. 2005); see also *Engelman Irrigation Dist. v. Shields Bros.*, 514 S.W.3d 746, 750 (Tex. 2017). FFGGP respectfully urges the Court to reverse the trial court's Summary Judgment Order and render judgment in FFGGP's favor.

II. Because the Final Default Judgment was both final and valid, and because FFGGP's requested relief was the only requested relief in the trial court which was in harmony with the Final Default Judgment, the only judgment which can issue in this matter is one in favor of FFGGP.

FFGGP sought declaratory relief in the trial court which was in harmony with the Final Default Judgment. Compare CR 10 with CR 439-442. In arguing against this simple truth, Appellees attempt – once again – to mischaracterize[1] and relitigate the facts and claims already disposed of by the Final Default Judgment. (Appellees' Brief, at PP. 23-25.)

[1] Contrary to Appellees' fanciful narrative in pages 23-25 of their brief, FFGGP's claims in the original proceeding were not premised on any theory of lien priority; but rather were based on the Constitutional violation of the Home Equity Lien for being of a value in excess of 80% of the Property's value when it was created in 2007 (CR 413-419) thus making it a "constitutionally noncompliant homestead lien [which was] absolutely void." See TEX. CONST. ART. XVI, § 50(a)(6)(B); see also *Wood v HSBC Bank, USA, N.A.*, 505 S.W.3d 542, 545 (Tex. 2016). While meritorious, neither this claim, nor Appellees' competing claims, were properly before the trial court in this matter, nor are they properly before this Court on appeal.

FFGGP sought summary judgment from the trial court as to its harmonious claims, and as to those in Appellees' impermissible collateral attack. CR 298-446. The *only* judgment that can issue in this matter without running "squarely against principles of res judicata that are essential to a rational and functioning judicial system" is a judgment which grants this relief sought by FFGGP. *Engelman Irrigation Dist. v. Shields Bros.*, 514 S.W.3d 746, 750, (Tex. 2017) (internal quotations omitted).

Appellees' argument against summary judgment in FFGGP's favor is wholly reliant on a finding that the Final Default Judgment is void. (Appellees' Brief, at P. 24.) As more fully set forth above, it is inescapable that the Final Default Judgment is both final and valid. Accordingly, Appellees' arguments must fail, and the trial court erred in not granting summary judgment in favor of FFGGP, erred in not declaring Appellees' alleged rights pursuant to the Home Equity Lien unenforceable, and erred in not dismissing all claims brought by Appellees with prejudice.

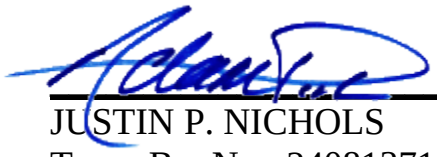
FFGGP respectfully urges the Court to reverse the trial court's Summary Judgment Order, render judgment in FFGGP's favor, declare Appellees' alleged rights pursuant to the Home Equity Lien void and unenforceable, and dismiss all claims asserted by Appellees with prejudice.

CONCLUSION AND PRAYER

For the foregoing reasons, FFGGP respectfully prays the Court reverse the trial court's Summary Judgment Order and render judgment in favor of FFGGP, granting its requests for declaratory judgment, and dismissing Appellees' claims with prejudice. FFGGP further prays for all other relief, at law or equity, specific or general, to which it may show itself to be justly entitled.

Respectfully submitted,

THE NICHOLS LAW FIRM, PLLC



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CERTIFICATION

Pursuant to TEX. R. APP. P. 9.4(i)(3), I certify there are 2,722 words in this document.

ADAM POOLE

CERTIFICATE OF SERVICE

I certify a true and correct copy of the foregoing Appellant's Brief and appendix was forwarded in accordance with TEX. R. APP. P. 9.5 to the parties listed below on June 15, 2021.

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