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Court of Appeals of Texas,
Houston (1st Dist.).

Donald Ray LEAVINGS, Appellant

v.

Jim MILLS, Individually and d/b/a Multimortgage
Bancorp, Appellees.

No. 01-03-00047-CV.

April 29, 2004.

Background: In action on a note, possessor moved for summary judgment to foreclose lien on maker's property securing note. The 400th District Court, Fort Bend County, entered summary judgment for possessor. Maker appealed.

Holding: The Court of Appeals, Evelyn V. Keyes, J., held that genuine issue of material fact existed as to whether possessor was holder of note entitled to enforce it, which precluded summary judgment.

Reversed and remanded.

[\[1\]](#) Appeal and Error 934(1)

[30k934\(1\) Most Cited Cases](#)

In deciding whether a disputed material fact issue exists that precludes summary judgment, reviewing court accepts as true evidence favorable to the non-movant and indulges every reasonable inference and resolve any doubts in the non-movant's favor. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\)](#).

[\[2\]](#) Appeal and Error 852

[30k852 Most Cited Cases](#)

Where trial court fails to state specific grounds for its ruling granting summary judgment, reviewing court will affirm if any of theories advanced by movant in summary judgment motion are meritorious. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\)](#).

[\[3\]](#) Judgment 185.3(15)


[228k185.3\(15\) Most Cited Cases](#)

To prevail on summary judgment motion to foreclose lien securing note, possessor of note is required to prove (1) the note in question, (2) that the party sued signed the note, (3) that possessor is the owner or holder of the note, and (4) that a certain balance is due and owing on the note. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\)](#).

[\[4\]](#) Bills and Notes 209

[56k209 Most Cited Cases](#)

When an instrument is payable to an identifiable person, the "holder" is the person in possession if he is the identified person.

[\[5\]](#) Bills and Notes 443(1)

[56k443\(1\) Most Cited Cases](#)

A holder of an instrument is a person entitled to enforce an instrument.

[\[6\]](#) Judgment 185.3(15)

[228k185.3\(15\) Most Cited Cases](#)

Genuine issue of material fact existed as to whether possessor of note was "holder" who was entitled to enforce note and foreclose lien on maker's property securing note, which precluded summary judgment in action on note; affidavits and note itself failed to establish possessor's chain of title as either holder or owner of note and term under which possessor purchased note. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\)](#).

[\[7\]](#) Judgment 185.1(4)

[228k185.1\(4\) Most Cited Cases](#)

A conclusory affidavit is not competent summary judgment proof. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\)](#).

On Appeal from the 400th District Court, Fort Bend County, Texas, Trial Court Cause No. 99990.

J.W. Beverly, Dow Golub Berg & Beverly, LLP, Houston, TX, for Donald Ray Leavings.

Lester R. Buzbee III, Humble, TX, for Jim Mills.

Panel consists of Justices TAFT, KEYES, and BLAND.

OPINION

EVELYN V. KEYES, Justice.

*1 Appellant, Donald Ray Leavings (Leavings), challenges the trial court's rendition of summary judgment in favor of appellees, Jim Mills, individually and d/b/a Multimortgage Bancorp (collectively Mills), in a suit for (1) removal of an encumbrance on property owned by Leavings resulting from Mills' enforcement of a trust deed pursuant to a note granting a security interest in the property; (2) declaratory judgment; (3) deceptive trade practices violations; and (4) usury. In three issues, appellant contends the trial court erred in rendering summary judgment and awarding Mills the right to foreclose on Leavings' property because Mills failed to establish as a matter of law that he was the owner or holder of the note and entitled to recover the amount due on the note. We reverse and remand.

Background

In November 1984, John E. Leavings and his wife Evelyn Fay Leavings, both elderly and now deceased, entered into a home improvement contract with Solar Marketing Corporation. The contract called for the installation of a home improvement solar heating system. The Leavings executed a note entitled "Contract for Labor and Materials and Trust Deed" in which they agreed to pay Solar Marketing for the heating system pursuant to the terms of a note to be executed upon completion of the work in the amount of \$8,495 at 16.5% interest per annum, payable in 120 installments of \$146.82 each (the Note). [FN1] The Leavings also executed a "Retail Installment Contract Truth in Lending Disclosures" form that same day. Both the Note and the Truth in Lending Disclosures stated that Solar Marketing retained a security interest in the tank, pipes, and valves of the solar water heating system, and the Note granted Solar Marketing a mechanic's and materialman's lien on the Leavings' home. The reverse side of the Note contained an assignment of the Note from Solar Marketing Corporation to Briercroft Service Corporation.

In 1987, after repeated problems with the heating system, the Leavings ceased making payments on the

Note. In October 1987, they received a letter from a law firm representing Briercroft Service Corporation which noted that Briercroft had entered into a Settlement Agreement with the Texas Attorney General regarding Briercroft's alleged derivative liability resulting from its loan customers' transactions with Solar Marketing Corporation. Briercroft extended the terms of the Settlement Agreement to the Leavings, but they refused the offer and sent a counteroffer to Briercroft. Briercroft ignored the counteroffer, and the Leavings did not further pursue it.

In March 1989, the Leavings received a letter from Briercroft advising them that the Note was in default, demanding past due payments and interest, and threatening to foreclose on their home. The Leavings' attorney responded, and Briercroft did not further pursue its demand at that time.

In May 1997, Evelyn Fay Leavings received a letter from "Trustees of Texas," signed by James Mills, claiming that the Note had fully matured, demanding payment in the amount of \$21,196, and threatening to foreclose. After receiving the letter, Evelyn Fay Leavings filed suit against Mills as substitute trustee and other substitute trustees to enjoin the threatened foreclosure. [FN2] The trial court granted a temporary injunction on June 6, 1997 to prevent foreclosure. In February 1998, Mills filed a counterclaim seeking an order of possession and foreclosure, and claiming that he was the owner and holder of the Note executed by the Leavings, which he had purchased from the receiver of Briercroft Savings Association.

*2 On June 26, 2002, Mills filed a motion for summary judgment that forms the basis of this appeal. In the motion, Mills stated that he was the owner and holder of the Note dated November 15, 1984, which was secured by a lien on the Leavings' real property. Mills stated that the Leavings' obligation "was held by the Briercroft Saving and Loan Association [*sic*] which was eventually taken over by the FSLIC and OTS who sold the note through the RTC." Mills claimed the Note was due in full on February 10, 1995 and the amount due on the note as of June 21, 2002 was \$73,572.63.

In support of his motion, Mills attached, as Exhibit 1, his affidavit attesting that he was the owner and holder of the Note and verifying his affidavit exhibits A F, including the Note, the Truth in Lending Disclosures, the assignment of the Note from Solar Marketing to Briercroft Service Corporation, and other documents which Mills attested were "true and correct copies of all signed documents from (builder) [*sic*] to final owner, JAMES C. MILLS."

Exhibit 1 to Mills' affidavit is a "Transfer and Assignment Agreement" dated October 23, 1995 between Briercroft Service Corporation and Old

Republic Insured Financial Acceptance Corporation which assigns the Leavings' Note from Briercroft Service Corporation, as owner and holder of the Note, to Old Republic, as Purchaser, pursuant to "that certain Loan Sale Agreement dated October 23, 1995," and "pursuant to the terms and conditions of said Loan Sale Agreement." The Transfer and Assignment Agreement from Briercroft Service Corporation to Old Republic is signed by Jon G. Moyer for Briercroft Service Corporation. However, the referenced October 23, 1995 Loan Sale Agreement is not attached. Therefore, we are unable to determine the terms and conditions under which the assignment of the Note to Old Republic was made.

Exhibit 3 to the motion for summary judgment, the affidavit of Daniel Bell, resolution specialist for the Federal Deposit Insurance Corporation (FDIC) as successor to the Resolution Trust Corporation (RTC), attests that Jon G. Moyer had full authority to execute "the attached copy of the Transfer and Assignment Agreement recorded in the public real estate records of Fort Bend County, Texas." The Bell affidavit then identifies the October 23, 1995 Loan Sale Agreement as an agreement between Briercroft Service Corporation and the RTC as Receiver for Beacon Federal Savings Association as sellers and Old Republic as purchaser, and states that the Loan Sale Agreement is "permanently recorded with the Resolution Trust Corporation as RTC Master Contract Nos. 37624 (Beacon) & 37625 (Briercroft) and stored as Case # DOSSWF SA 5615." Once again, however, the Loan Sale Agreement is not attached, so that the record includes none of the terms and conditions under which the Leavings' Note was sold by Briercroft Service Corporation and the RTC to Old Republic.

In his own affidavit, Mills testifies that he is the owner of Multimortgage Bancorp and that Exhibit 2 to his motion for summary judgment, the affidavit of Jo Comstock, the records keeper of Old Republic, "attests the sale and assignment" of the Note to him. He further attests that "[t]he note was fully due and payable on February 10, 1995." However, no transfer of the Note to Mills or Multimortgage Bancorp is referenced in the Comstock affidavit. The affidavit, dated January 24, 2002, merely states, "The document attached to this affidavit is a true and correct copy of the Loan Sale Agreement of October 23, 1995 between Briercroft Service Corporation and the Resolution Trust Corporation as Receiver for Beacon Federal Savings Association as sellers and Old Republic Insured Financial Acceptance Corporation as purchaser, that is a permanent part of the files and records of Old Republic Insured Financial Acceptance Corporation." Again, no document is attached to the Comstock affidavit. The only reference to Mills in the Comstock Affidavit is the statement, "I am fully aware that this affidavit will become a permanent part of the records of

James C. Mills and MultiMortgage BanCorp and as such will be used as an exhibit in a Court of Law."

*3 The summary judgment evidence concludes with the fee affidavit of Mills's attorney, Lester R. Busbee, III.

On August 5, 2002, the trial court heard and granted Mills' motion for summary judgment. The trial court sustained the Leavings' objections to one of Mills' affidavits, but denied the Leavings' motion to file a supplemental response. On October 1, 2002, the trial court signed the final summary judgment ordering that Mills was entitled to foreclose his lien on the Leavings' property as owner and holder of the Note executed by the Leavings; awarding Mills a judgment against the Estate of Evelyn Fay Leavings in the amount of \$73,572.63; and awarding Mills \$25,000 in attorney's fees. This appeal followed.

Discussion

Standard of Review

[1] A party moving for summary judgment has the burden of proving that 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). In deciding whether a disputed material fact issue exists, we accept as true evidence favorable to the non-movant and indulge every reasonable inference and resolve any doubts in the non-movant's favor. Id. at 548-49.

[2] In its order granting summary judgment for Mills, the trial court did not state the specific grounds for its ruling. Therefore, we will affirm if any of the theories advanced in Mills' summary judgment motion is meritorious. Carr v. Brasher, 776 S.W.2d 567, 569 (Tex.1989).

Owner or Holder of Note

In his first issue presented, appellant argues that the summary judgment proof fails to establish that Mills is the owner or holder of the Note.

[3] To prevail on his summary judgment motion, Mills was required to prove (1) the Note in question, (2) that the party sued (the Leavings) signed the Note, (3) that Mills is the owner or holder of the Note, and (4) that a certain balance is due and owing on the Note. SMS Financial, LLC v. ABCO Homes, Inc., 167 F.3d 235, 238 (5th Cir.1999); Bean v. Blue Bonnett Savings Bank, 884 S.W.2d 520, 522 (Tex.App.-Dallas 1994, no writ); Clark v. Dedina, 658 S.W.2d 293, 295 (Tex.App.-Houston [1st Dist.] 1983, writ dismissed). The parties do not dispute that Mills established the first and second elements. Rather, appellant contends

that Mills failed to prove that he was the owner or holder of the Note, a prerequisite to establishing his entitlement to damages and his right to foreclose on the Leavings' property. We agree.

[4][5] A holder, as used in this context, is "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." Tex. Bus. & Comm.Code Ann. § 1.201(21) (Vernon Supp.2004); SMS Financial, 167 F.3d at 238. Negotiation is the "transfer of possession of an instrument ... by a person other than the issuer to a person who thereby becomes its holder." Tex. Bus. & Comm.Code Ann. § 3.201(a) (Vernon 2004); SMS Financial, 167 F.3d at 238. "[I]f an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder." Tex. Bus. & Comm.Code Ann. § 3.201(b); SMS Financial, 167 F.3d at 238. When an instrument is payable to an identifiable person, the "holder" is the person in possession if he is the identified person. SMS Financial, 167 F.3d at 238. A holder of an instrument is a "[p]erson entitled to enforce" an instrument. *Id.* Thus to prove his entitlement to summary judgment on the Note, Mills had to prove up a chain of title to the Note. He did not.

*4 [6] While Mills presented summary judgment proof establishing that the Leavings executed both the Note and the Truth in Lending Disclosures on November 14, 1985 and that Solar Marketing transferred the Note that same day to Briercroft Service Corporation, he has presented no legally sufficient evidence of the Note's subsequent history.

While we accept as true the uncontroverted testimony of Daniel Bell that the Leavings' Note was included in a "Transfer and Assignment Agreement" from Briercroft Services to Old Republic which was signed by Jon G. Moyer for Briercroft Service and that agreement was included in a "Loan Sale Agreement dated October 23, 1995, subject to the terms and conditions of the Loan Sale Agreement," the Bell affidavit presented no evidence of what the terms and conditions of the Loan Sale Agreement were. Similarly, while we accept as true the statement in the Comstock affidavit that *at one time* a true and correct copy of the October 23, 1995 Loan Sale Agreement between Briercroft Service Corporation and the RTC as Receiver for Old Republic was attached to that affidavit, no such attachment was filed with this Court. Since the Loan Sale Agreement is not included in the summary judgment record, there is no evidence as to the terms and conditions under which Old Republic acquired the Note; hence, there is no proof of the terms and conditions that may have attached when Mills subsequently acquired it.

[7] Even more importantly, although Mills represents

in his affidavit that the Comstock affidavit proves his own purchase of the Leavings' Note from Old Republic, the Comstock affidavit contains no such statement; Comstock merely acknowledges her understanding that her affidavit will become part of Mills' records and will be used as an exhibit in a court of law. Therefore, Mills has failed to establish that he is the holder of the Leavings' Note, and thereby entitled to recover on the Note. Moreover, although Mills testified that he was the owner of the Note, his affidavit testimony was conclusory and not substantiated by any other summary judgment evidence. A conclusory affidavit is not competent summary judgment proof. See Texas Division-Tranter, Inc. v. Carrozza, 876 S.W.2d 312, 314 (Tex.1994); Brownlee v. Brownlee, 665 S.W.2d 111, 112 (Tex.1984). Thus, there is neither competent summary judgment proof that Mills is the holder of the Leavings Note nor competent proof that Mills is the owner of the Note. Mills has therefore failed to establish his right to recover on the Note; much less, the terms and conditions under which he is entitled to recover. [FN3] We hold that Mills has failed to establish his entitlement to summary judgment.

We sustain appellant's first point of error. Given this disposition, we need not address appellant's remaining points of error.

Conclusion

We reverse and remand for further proceedings.

FN1. The record also includes a "Completion Certificate for Property Improvement Loan Work Done or Materials Delivered," dated December 10, 1984, and signed by the Leavings, confirming completion of the work.

FN2. Mrs. Leavings subsequently died and her son, Donald Ray Leavings, appeared in the trial court as Independent Executor of the Estate of Evelyn Leavings.

FN3. Even though the summary judgment record fails to demonstrate the transfer of the Note to Mills, it is apparent from the face of the record that, whenever he purchased it and under whatever terms it was purchased, it was overdue when he obtained it. The Note was sold to Old Republic on October 23, 1995, after it was due; therefore, it was necessarily overdue when Mills himself purchased it some time after that. A person who, like Mills, knows at the time of purchase of a note that the note is overdue, does not qualify as a holder in due course; therefore, although such

a person may still recover on the indebtedness, he takes the note subject to any claims or defenses available to the obligor, including those defenses available at common law against enforcement of a contract. See *World Help v. Leisure Lifestyles, Inc.* 977 S.W.2d 662, 679-80 (Tex.App.-Fort Worth 1998, pet. denied); see also Tex. Bus. & Comm.Code Ann. § 3.306 (Vernon 2004) (a person taking an instrument, other than a person having rights of a holder in due course, takes subject to claims against the instrument, including claims for rescission).

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