Affirmed in Part and Reversed and Remanded in Part and Opinion filed March 1, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00495-CV

THE PERMANENT GROUP, INC., Appellant

V.

JOHN AND DONNA PASSMORE, Appellees

On Appeal from the 268th District Court
Fort Bend County, Texas
Trial Court Cause No. 104,296A

O P I N I O N

This is an appeal of a summary judgment in favor of appellees John and Donna Passmore in a breach of contract dispute with appellant, The Permanent Group, Inc. This court must decide whether a defendant, sued for breach of an installment contract, is entitled on the facts of this record to summary judgment based on the statute of limitations as set forth in TEX. CIV. PRAC. & REM. CODE ANN. § 16.004 (Vernon Supp. 2000). Because the plaintiff produced evidence that it did not accelerate the note on the contract until September

8, 1997, we reverse in part and affirm in part the summary judgment granted by the trial court.

FACTUAL BACKGROUND

The Permanent Group, Inc. claims to be the owner and holder of a contract for sale on real property located in Sugar Land, Texas. The contract for sale was executed on June 9, 1988, between John and Donna Passmore, as buyers, and Joseph and Bobbie Bogar, as sellers. The contract was subsequently assigned to The Permanent Group. Gilbert Ramirez, a real estate agent, is the sole shareholder and president of The Permanent Group.

The contract for sale was in the original, principal amount of $415,000. The contract provided that the Passmores would pay $15,000 down with the balance to be paid in monthly installments over a thirty-year period. Paragraph seven of the contract provides that if the buyer defaults in the promptly remitting monthly payments, or violates any other of the buyer's obligations, the seller may declare the entire unpaid deferred principal amount and interest immediately due and enforce collection. The sellers offered the Passmores owner financing through a wraparound promissory note. The Passmores never obtained their own appraisal and, at their request, reviewed the Bogars' property appraisal that estimated the market value to be $415,000. The Bogars' appraisal was made by professional, independent appraisers. Before signing the contact, Donna Passmore, a lawyer, went with Mr. Ramirez to Merit Bank, the underlying note holder, so that she could discuss the transaction with a bank officer. Only after Mrs. Passmore talked to a bank officer did the Passmores sign the contract.

The Passmores stated that in early 1992, they discovered that the underlying note held by Merit Bank was a five-year note and not a thirty-year note as they had expected. Further, the Passmores discovered that a balloon payment of approximately $250,000 was due March 31, 1992. The Passmores were not signatories or parties to the underlying note and did not assume the maker's indebtedness. When the Passmores contacted The Permanent Group's sole owner, Mr. Gilbert Ramirez, about the balloon payment, he allegedly stated that he

could not make such a payment. Instead, Ramirez offered to allow the Passmores to purchase the house outright for $375,000 - $400,000. In July 1992, the Passmores vacated the property, claiming that the contract had been breached by The Permanent Group's failure to pay the taxes on the property and by not paying the underlying note.

PROCEDURAL BACKGROUND

On September 8, 1997, The Permanent Group sent a notice of acceleration of the contract for sale. Then, on April 23, 1998, The Permanent Group filed the present lawsuit alleging breach of contract against the Passmores. The Passmores filed a motion for summary judgment alleging that Ramirez's act of refusing to pay the $250,000 underlying debt and instead offering to sell the Passmores the house for $375,000 - $400,000 amounted to an acceleration of the note. Therefore, they argued, the statute of limitations had run by the time The Permanent Group brought suit in 1998.

In its response to the summary judgment motion, The Permanent Group submitted the affidavit of Mr. Ramirez stating that he had never made a demand for the accelerated payment of the debt until September 8, 1997. The response also included a notice of acceleration, dated September 8, 1997. The Passmores filed a reply to The Permanent Group's response. In the reply, the Passmores ostensibly argued failure of consideration and rescission as summary judgment grounds; however, these grounds were not asserted in their motion for summary judgment. The trial court granted the Passmore's motion for summary judgment. The trial court then severed the Passmore's claims against The Permanent Group and abated these claims pending the outcome of this appeal.

STANDARD OF REVIEW

The proper inquiry on appeal is whether the defendants, in seeking summary judgment, fulfilled their initial burden (1) to establish as a matter of law that there remained no genuine issue of material fact as to one or more essential elements of the plaintiff's cause

of action or (2) to establish their affirmative defense to the plaintiff's cause of action as a matter of law. *See Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant must be taken as true. *See Nixon*, 690 S.W.2d at 549. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in his favor. *Id.* Once the movant establishes an affirmative defense which would bar the suit as a matter of law, the non-movant must then produce summary judgment proof raising a fact issue in avoidance of the affirmative defense. *Gonzalez v. City of Harlingen*, 814 S.W.2d 109, 112 (Tex. App.—Corpus Christi 1991, writ denied).

Under Texas law, a person must bring suit on a debt no later than four years after the day the cause of action accrues. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(3) (Vernon Supp. 2000). The question of when a cause of action accrues is a question of law for the court to decide. *Moreno v. Sterling Drug*, 787 S.W.2d 348, 351 (Tex. 1990).

FAILURE OF CONSIDERATION AND RESCISSION

As a preliminary matter, we must determine whether we can address failure of consideration and rescission as summary judgment grounds. In the motion for summary judgment, the Passmores raised the statute of limitations as their sole ground for relief. Failure of consideration and rescission were first raised in the Passmores' reply brief to The Permanent Group's summary judgment response. We have previously held that raising a new ground or cause of action in a reply brief in a summary judgment response is not sufficient to comply with Rule 166a(c) of the Texas Rules of Civil Procedure. *Guest v. Cochran*, 993 S.W.2d 397, 403 (Tex. App.–Houston [14th Dist.] 1999, no pet.). A movant's reply is not a motion expressly presenting an independent cause of action or ground for summary judgment. *Id.* Accordingly, the sole basis upon which the trial court could have granted summary judgment is the Passmores' statute of limitations defense.

STATUTE OF LIMITATIONS

Appellant contends that the trial court erred in granting the Passmores' motion for summary judgment because acceleration of the note occurred on September 8, 1997, and not in 1992 as the Passmores claimed. Therefore, appellant's suit for deficiency on the note was not barred, as a matter of law, by the applicable four-year statute of limitations.

In their motion for summary judgment, the Passmores allege that Mr. Ramirez's request for $375,000 - $400,000 amounted to an acceleration of the note. However, in its response to the Passmores' motion, appellant presented the affidavit of Mr. Ramirez in which he stated that he never made a demand for the accelerated payment of the debt until September 8, 1997. This statement was corroborated by the notice of acceleration which was dated September 8, 1997. Indulging all reasonable inferences in favor of The Permanent Group, as we must, we hold this summary judgment proof raises a material fact issue as to when the note was accelerated. Finding that the Passmores have failed to show the absence of a genuine issue of material fact as to their affirmative defense of limitations, we hold that the summary judgment, as entered by the trial court, cannot stand. Nevertheless, we do find that any payments owed by appellees as of April 22, 1994, are barred by the statutory four-year limitations period. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(3) (Vernon Supp. 2000). Accordingly, we affirm the lower court's grant of summary judgment as to all payments owed by the Passmores to The Permanent Group predating April 23, 1994. As to all payments due and payable on or after April 23, 1994, we reverse and remand the trial court's grant of summary judgment for further proceedings consistent with this opinion.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed March 1, 2001.

Panel consists of Justices Anderson, Frost, and Amidei.[1]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Former Justice Maurice Amidei sitting by assignment.