Reversed and Rendered and Opinion filed June 21, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-01085-CV

FEDERAL FINANCIAL CO., Appellant

V.

JOHN Y. GOBER, III AND SARA ELIZABETH GOBER, Appellees

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 95-CV-0274

O P I N I O N

This is an appeal from a take nothing judgment rendered against appellant, Federal Financial Co. ("the Bank"). Appellees, John Y. and Sara Elizabeth Gober, obtained this favorable result after the trial court granted their bill of review which sought to set aside a 1995 deficiency judgment in favor of the Bank. Because we agree with the Bank's argument that the trial court erred in granting the Gobers' bill of review, we reverse and render.

I. Background and Procedural History

On February 8, 1995, Federal Financial foreclosed on a piece of rental property owned by the Gobers. Exactly one month later, the Bank filed a lawsuit against the Gobers seeking the deficiency between the foreclosure price and the amount owed by the Gobers at the time of foreclosure—$9,537.92. The Gobers filed a general denial and an affirmative defense. The affirmative defense argued that the Gobers were entitled to an offset under the Property Code because the price at the foreclosure sale was below the property's fair market value.[1] In July, 1995, the Bank moved for summary judgment. The Gobers filed neither a response nor their own summary judgment motion. On August 21, 1995, the court granted the Bank's motion for summary judgment and assessed damages at $9,537.92, plus attorney's fees,[2] interests and costs, including costs should the Gobers decide to appeal. The Gobers timely filed a motion for new trial but the record does not reflect that they ever sought a hearing, and they never perfected an appeal. Then on July 24, 1996—almost one year later—the Gobers filed a motion to vacate interlocutory summary judgment.

The Gobers filed a bill of review November 14, 1997. This bill was denied July 9, 1998. Claiming they did not receive notice of the court's ruling on their bill of review until after the time to appeal expired, the Gobers filed a second bill of review October 28, 1998. The court granted the Gobers' second bill of review and set the case for trial. After a bench trial, the court found no deficiency existed in 1995 because the fair market value deficiency of over $13,000.00 exceeded the amount owed by the Gobers. *See* TEX. PROP. CODE ANN. § 51.003(c) (Vernon 1995). This appeal followed.

II. Discussion

A bill of review is an equitable action brought by a party to a previous suit who

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[1] *See* TEX. PROP. CODE ANN. § 51.003(c) (Vernon 1995). According to testimony introduced at the trial following the bill of review, only Mr. Gober and the Bank appeared at the foreclosure sale.

[2] The Bank attached an affidavit to its summary judgment motion on the issue of attorney's fees.

seeks to set aside a judgment that is no longer subject to a motion for new trial or appealable. *Caldwell v. Barnes*, 975 S.W.2d 535, 537 (Tex. 1998). Its purpose is to cure manifest injustice. *French v. Brown*, 424 S.W.2d 893, 895 (Tex. 1967). To prevail on a bill of review, the party seeking relief must allege (1) a meritorious defense to the cause of action that supports the judgment; (2) which he was prevented from asserting by the fraud, accident, or wrongful act by the opposing party; (3) unmixed with any fault or negligence of his own.[3] *Ortega v. First RepublicBank*, 792 S.W.2d 452, 453 (Tex. 1990).

Here, the Gobers contend that the original summary judgment order was not a final judgment because it did not dispose of all claims. We disagree. A party may prevail on a traditional summary judgment, even in the face of a defensive pleading, provided it establishes that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. In other words, provided the Bank met its burden, the Gobers were required to either raise a fact issue to rebut the Bank's summary judgment evidence[4] or raise a fact issue on their defensive pleading. *See, e.g., Brownlee v. Brownlee*, 665 S.W.2d 111 (Tex. 1984) (stating rule that, where party admits opponent's cause of action but raises affirmative defense, it is that party's burden to come forward with summary judgment evidence on each element of defense); *see also American Petrofina, Inc. v. Allen*, 887 S.W.2d 829, 830 (Tex. 1994) (stating mere pleading or responding to summary judgment does not satisfy burden of coming forward with evidence sufficient to prevent

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[3] A bill of review is improper relief for a party who intentionally fails to appear at trial. *Cortland Line Co. v. Israel*, 874 S.W.2d 178, 183 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (reinstating original default judgment where party failed to appear at trial of which it had notice). It is likewise improper relief for a party who intentionally fails to file an appeal. *Wadkins v. Diversified Contractors, Inc.*, 734 S.W.2d 142, 144 (Tex. App.—Houston [1st Dist.] 1987, no writ (holding that requirement that appellant show failure to appeal was unmixed with his own negligence may not be satisfied by showing failure to appeal was wilful). Given the fact that the Gobers' attorney timely filed a motion for new trial, it is difficult to escape the conclusion that they intentionally failed to file an appeal where the law imputes their attorney's decision (or negligence) to them. *See Transworld Fin. Servs. v. Briscoe*, 722 S.W.2d 407, 408 (Tex. 1987).

[4] The Gobers concede that, in the absence of a defense, the Bank was entitled to summary judgment. Accordingly, to avoid summary judgment, *they* bore the burden of coming forward with evidence on their defensive issue.

summary judgment). In *Brownlee*, the father admitted the existence of a valid alimony and child support agreement, but, in opposition to the wife's motion for summary judgment, alleged the affirmative defense of modification. *See* 665 S.W.2d at 112. The court reasoned that, "[i]f this had been a trial on the merits and the only thing to which Michael testified was that his obligation had been modified, the trial court would have been required to instruct a verdict against him." *Id.* The same reasoning applies in this case. The Gobers admit the existence of the contract and the fact of their nonpayment. Nevertheless, they raised the affirmative defense that, under the Property Code, they were entitled to an offset because the Bank bought the house at foreclosure for an amount below the property's fair market value. Because this was an affirmative defense, they were required to come forward with some evidence on each element of that defense to avoid summary judgment.[5] *See id.* at 112. Their failure to do so left nothing for a fact finder to decide. *See id.*

Finally, the Gobers contend that, because the law on "Mother Hubbard" clauses was in a state of flux at the time the original final judgment was granted, their failure to file an appeal should not be seen as fault precluding relief by way of a bill of review. That argument, however, misses the mark. *Har-Con* does state "that the inclusion of a Mother Hubbard clause . . . does not indicate that a judgment rendered without a conventional trial is final for purposes of appeal." *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 203–04 (Tex. 2001). Nevertheless, an otherwise final judgment with Mother Hubbard language does not render a judgment interlocutory, as the Gobers implicitly argue. *See id.* at 204. Here, the original final judgment disposed of all claims by the parties, *viz.*, the Bank's entitlement to a deficiency judgment and its entitlement to attorney's fees. Moreover, because the

[5] The Gobers argue that placing a burden on the non-movant is tantamount to permitting a default summary judgment where the non-movant does not answer. It is not. A default summary judgment would occur where the trial court granted summary judgment, even though the movant failed to establish its entitlement to the same. Here, the Bank established—and the Gobers concede—that, in the absence of an affirmative defense, the Bank was entitled to summary judgment. Because it would not have been the Bank's burden to negate the Gobers' affirmative defense at trial, it was not its burden to do so at summary judgment.

Gobers did not present any summary judgment proof in support of their summary judgment, the trial court's order was proper. *See Brownlee,* 665 S.W.2d at 112. But even if the order granted more relief than was proper, the order would then be only reversible, not interlocutory. *See Har-Con*, 39 S.W.3d at 204. Accordingly, the take-nothing judgment is reversed, the order granting the Gobers' bill of review is vacated, and the original final judgment in cause number 95-CV-0274 granting summary judgment in favor of the Bank is reinstated.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed June 21, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.

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