IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40193

United States Court of Appeals
Fifth Circuit
FILED
February 21, 2018
Lyle W. Cayce
Clerk

GLORIA CASTRELLON,

Plaintiff – Appellee,

v.

OCWEN LOAN SERVICING, L.L.C.; DEUTSCHE BANK NATIONAL TRUST, as Trustee for Soundview Home Loan Trust,

Defendants – Appellants

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:15-CV-74

Before KING, ELROD, and GRAVES, Circuit Judges.

PER CURIAM:*

Plaintiff–Appellee Gloria Castrellon sued Defendants–Appellants Ocwen Loan Servicing, L.L.C., and Deutsche Bank National Trust, alleging that they violated various Texas consumer protection laws during the foreclosure of her home. The parties quickly began to negotiate a settlement agreement. Under that agreement, Castrellon would dismiss her claims in exchange for a loan modification. Castrellon executed the agreement, but the

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

defendants never did. Instead, they subsequently made another settlement offer on less advantageous terms to Castrellon. Castrellon then filed a motion to enforce the first settlement agreement, which the district court granted. On appeal, the defendants claim that there was a mutual mistake of material fact that renders the settlement agreement unenforceable. Contrary to what the defendants claim the parties believed, Castrellon lacked the authority to agree to the loan modification because only her ex-husband had signed the loan agreement. They also claim that the ex-husband's consent is a condition precedent and that performance is impracticable because he has not yet consented. We hold that a genuine dispute of material fact exists on the defendants' mutual mistake claim. As such, we VACATE the district court's judgment and REMAND for further proceedings consistent with this opinion.

I.

In 2006, plaintiff Gloria Castrellon's then-husband Jesus Castrellon executed a promissory note to purchase a house.[1] Gloria was not a party to the note. On the day Jesus signed the note, Gloria and Jesus both executed the deed of trust, which Deutsche Bank later acquired. Jesus and Gloria divorced nine years later. The divorce decree awarded the house to Gloria as her "sole and separate property" and "divested [Jesus] of all right, title, interest, and claim in and to that property." It also ordered Gloria to pay and indemnify Jesus for failure to pay any "encumbrances, ad valorem taxes, liens, assessments, or other charges due or to become due on the" house.

Gloria sued the defendants in state court for alleged violations of various Texas consumer protection laws arising out of the foreclosure of her home. The defendants removed to federal court. The parties soon began to negotiate a

[1] For the remainder of the opinion, we refer to Gloria and Jesus Castrellon by their first names for clarity.

settlement. In April 2015, defense counsel circulated a draft settlement agreement along with a proposed loan modification. Notably, defense counsel also attached the exhibits to the loan modification to that email, including the promissory note signed only by Jesus. In that email, the defendants' counsel asked plaintiff's counsel, "Please provide these to your borrower for execution so we can get this matter settled." In May 2015, Gloria's counsel returned the executed agreement, and Gloria made her first payment under the modification. Due to some minor errors in the documents, defense counsel requested that Gloria execute the documents again, telling Gloria's counsel, "We need these documents signed ASAP." After Gloria executed the documents, defense counsel filed a joint notice of settlement informing the district court that the parties would dismiss the case after they had "finalized the settlement documents and satisfied the requirements contained" therein.

The defendants, however, never signed the settlement agreement after receiving it from Gloria. On May 20, 2015, defense counsel requested the divorce decree. Defense counsel wrote, "Since Jesus Castrellon is on the Note, and not Gloria, we need a copy of the Settlement Agreement in the divorce to see if the property was conveyed by Jesus to Gloria." Then, on July 8, 2015, defense counsel emailed a new loan modification offer. He advised that a "new broker's price opinion has increased the home's value thus reducing the discount" and "propose[d] to complete the modification" by "approach[ing] Mr. Castrellon and see[ing] if he will sign the modification and then allow Ms. Castrellon to assume the loan per the divorce decree."

Gloria filed a motion to enforce the May 2015 settlement agreement and a separate motion seeking leave to amend her complaint to assert only a claim for breach of that agreement. The defendants filed responses to both motions. In opposing the motion to enforce, they argued, among other things, that the settlement agreement was unenforceable under the doctrines of mutual

mistake and impossibility. The district court granted the motions simultaneously. Despite the defendants' arguments to the contrary, the district court concluded that Jesus's consent was not a missing essential term of the agreement. According to the district court, the defendants had "conflate[d] the issue of whether a settlement agreement was reached in this case, with what may ultimately be required to effectuate the terms of that settlement agreement." Defendants then filed an unsuccessful motion to alter or amend the judgment. They now appeal.

II.

The district court treated the motion to enforce as a motion for summary judgment on Gloria's breach of contract claim. We review the grant of a motion for summary judgment de novo, applying the same standard as the district court. *Voinche v. FBI*, 999 F.2d 962, 963 (5th Cir. 1993) (per curiam). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In making that determination, "we view the facts and draw reasonable inferences in the light most favorable to the nonmoving party." *Duncan v. Wal-Mart La., L.L.C.*, 863 F.3d 406, 409 (5th Cir. 2017).

III.

The defendants argue that the settlement agreement is unenforceable due to a mutual mistake of material fact. They claim that the parties believed "that they possessed the necessary authority and capacity to effectuate a modification." According to the defendants, that belief was mistaken because only Jesus signed the note and only he could agree to modify it. That mistake led the parties to omit a material term from the settlement agreement: a condition that Jesus agree to the modification. In response, Gloria contends that defendants knew this all along and merely invented their mutual mistake argument as a pretext to withdraw from the agreement when the price of the

house increased. Although it is a close question whether the defendants have complied with their obligation at summary judgment to "come forward with specific facts indicating a genuine issue for trial," we ultimately conclude that there remains a genuine dispute of material fact on the defendant's mutual mistake defense. *See Vela v. City of Houston*, 276 F.3d 659, 666 (5th Cir. 2001) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

Because our jurisdiction depends on diversity of the parties, we apply Texas law. *See RSR Corp. v. Int'l Ins. Co.*, 612 F.3d 851, 857 (5th Cir. 2010). Under Texas law, "[a] party seeking to avoid a contract on the grounds of mutual mistake must show (1) a mistake of fact, (2) held mutually by the parties, (3) which materially affects the agreed-upon exchange." *Bolle, Inc. v. Am. Greetings Corp.*, 109 S.W.3d 827, 835 (Tex. App.—Dallas 2003, pet. denied). Mutual mistake is an affirmative defense. *See First Bank of Deer Park v. Harris County*, 804 S.W.2d 588, 593 (Tex. App.—Houston [1st Dist.] 1991, no writ); *Durham v. Uvalde Rock Asphalt Co.*, 599 S.W.2d 866, 869 (Tex. Civ. App.—San Antonio 1980, no writ). Under Texas law, the defendants bear the burden of proving mutual mistake. *See de Monet v. PERA*, 877 S.W.2d 352, 357 (Tex. App.—Dallas 1994, no writ). Thus, in response to Gloria's motion for summary judgment, they bore the burden of "present[ing] admissible evidence legally sufficient to sustain a finding" for them on each element of their mutual mistake defense. *Exxon Corp. v. Oxxford Clothes, Inc.*, 109 F.3d 1070, 1074–75 (5th Cir. 1997); *cf. Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984) ("If the party opposing a summary judgment relies on an affirmative defense, he must come forward with summary judgment evidence sufficient to raise an issue of fact on each element of the defense to avoid summary judgment.").

As an initial matter, there is evidence in the record to suggest that all parties knew that only Jesus had signed the note. First, Gloria's complaint and the defendants' notice of removal both state that only Jesus signed the note.

Second, the note is an exhibit to the loan modification agreement, which defendants emailed to Gloria with all exhibits. Only Jesus's name would have appeared on that note.

The subsequent emails from defense counsel are the first communications in the record to mention Jesus. In the first email, defense counsel requested the divorce decree in order to ensure that "the property was conveyed by Jesus to Gloria." Defense counsel's next email made a new loan modification offer—which represented less of a discount for Gloria—and proposed to approach Jesus to "sign the modification and then allow [Gloria] to assume the loan per the divorce decree." These emails do suggest that the need for Jesus's consent was not an insuperable obstacle to settlement and that defendants believed that the divorce decree required him to allow Gloria to assume the loan. But, at this stage, we are required to "view the facts and draw reasonable inferences in the light most favorable to" the defendants. *Duncan*, 863 F.3d at 409. The emails also support an inference that the need for Jesus's consent only occurred to the parties after Gloria had signed the settlement agreement. That is the inference we are required to draw at this stage.

The settlement agreement itself may also support the defendants' case. The settlement does not mention Jesus or provide for securing his consent. It identifies Gloria as the "Borrower," even though only Jesus signed the note. The settlement also states that it does not change the terms of any of the loan documents except as expressly provided. The loan modification likewise identifies Gloria as the "Borrower" and does not mention Jesus. And it provides that it does not alter the original loan documents "[e]xcept as expressly modified."

Even if the parties knew that only Jesus signed the note, it is unclear how the district court could possibly enforce the settlement agreement. The agreement does not provide for securing Jesus's consent—or even mention him.

It is unclear what would happen if Jesus refused, and his refusal could leave Gloria empty-handed. Gloria asserts that Jesus could be ordered to execute the modification but cites no legal authority for that assertion. The only potential contractual basis for requiring the parties to seek Jesus's consent is the settlement agreement's "further assurances" provision.[2] Neither party cites this provision, and it is not clear if it could be read to require them to seek out Jesus's consent. Even if that provision required the parties to seek out Jesus's consent, it does not require Jesus (a non-party) to agree to the modification. *See Rapid Settlements, Ltd. v. Green*, 294 S.W.3d 701, 706 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

Of course, the mere fact that the agreement may ultimately leave Gloria empty-handed does not compel the conclusion that there was a mutual mistake in this case. *See Williams v. Glash*, 789 S.W.2d 261, 265 (Tex. 1990) (fact that injured tort victim may have entered into an "unfair bargain" by signing a release of unknown injuries did not automatically establish mutual mistake; rather, it had to be shown through objective evidence of the parties' intent that the "release set[] out a bargain that was never made" (emphasis removed)). Nonetheless, it does support an inference that the parties mistakenly believed they could modify the loan agreement without Jesus—an inference that we are required to draw at this juncture. *See Duncan*, 863 F.3d at 409.

Because we find a genuine dispute of material fact as to the defendants' affirmative defense of mutual mistake of material fact, we decline to address

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[2] That provision states: "The Parties agree to do all acts and things and to make, execute, acknowledge and deliver such written documents, instructions and/or instruments in such form as shall from time to time be reasonably required to carry out the terms and provisions of this Agreement, including but not limited to, the execution, filing or recording of any reporting documents, affidavits, deeds or agreements. The Parties further agree to give reasonable cooperation and assistance to any other party or parties hereto in order to enable such other Party or Parties to secure the intended benefits of this Agreement."

their impracticability argument. *Cf. Shamloo v. Miss. State Bd. of Trs. of Insts. of Higher Learning*, 620 F.2d 516, 524 (5th Cir. 1980) ("[C]ases are to be decided on the narrowest legal grounds available.").

IV.

The defendants also assert that Jesus's consent to the loan modification is a condition precedent to their performance under the settlement agreement. Because Jesus has not agreed to any modification, the defendants maintain that the settlement agreement is unenforceable as a matter of law. *See Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex. 1976) ("Conditions precedent to an obligation to perform are those acts or events, which occur subsequently to the making of a contract, that must occur before there is a right to immediate performance and before there is a breach of contractual duty."). The defendants failed to make this argument to the district court, so we deem it forfeited on appeal. *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 339–40 (5th Cir. 2005). Even if it were not forfeited, the defendants have not pointed to anything in the language of the agreement to support this argument. *See Solar Applications Eng'g, Inc. v. T.A. Operating Corp.*, 327 S.W.3d 104, 109 (Tex. 2010).

V.

The defendants further contend that the district court erred by simultaneously granting Gloria's motion for leave to amend the complaint and to enforce the settlement agreement. Their point is well-taken. "Like any other breach of contract claim, a claim for breach of settlement agreement is subject to the established procedures of pleading and proof." *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 663 (Tex. 2009). By granting the motions simultaneously, the district court denied defendants the opportunity to conduct discovery and develop evidentiary support for their affirmative defenses. On remand, the defendants should be permitted to conduct discovery tailored to their defenses.

Gloria should likewise be permitted to conduct discovery to substantiate her claim that the defendants were aware that only Jesus signed the note and used him as a pretext for reneging when the home's value increased.[3]

VI.

For the foregoing reasons, we VACATE the district court's judgment and REMAND for further proceedings consistent with this opinion.

[3] We are mindful of the costs that additional discovery and litigation related to enforcement of the settlement will impose on the parties in this already three-year-old lawsuit. We are confident that the district court on remand will exercise its authority to tailor discovery to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1), (2); *see also Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) ("Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery.").