IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2401

Summary Calendar

CENTURY SAVINGS AND LOAN ASSOCIATION,

Plaintiff,

RESOLUTION TRUST CORPORATION as receiver for Century Savings and Loan Association,

Plaintiff-Appellee,

v.

HIRAM EASTLAND and TRAVIS WARD,

Defendants,

TRAVIS WARD,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-91-3722)

(April 21, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Defendant-appellant Travis Ward (Ward) appeals from a summary judgment entered against him as guarantor of a promissory

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

note in a collection case. Finding no error, we affirm the judgment of the district court.

I. Background

A. The Acquisition

On May 4, 1984, Hiram Eastland (Eastland) acquired a tract of land located in Galveston County, Texas (the "property"). Eastland and Ward purportedly entered into a letter agreement on or about October 8, 1984 (the "letter agreement"), whereby Eastland agreed to share proportionately with Ward any future profits upon the sale of the property. This letter agreement was not recorded in the real property records of Galveston County. On October 12, 1984, Eastland executed a Real Estate Lien Note (the "note") payable to Century Savings and Loan Association (Century) in the original principal amount of $670,000. Eastland also executed a deed of trust in favor of Century to secure the indebtedness. As additional security for the loan, Ward executed a Note Guaranty Agreement on the same date (the "guaranty"), unconditionally guaranteeing any indebtedness under the note. The guaranty recited that Ward had "an equitable interest in the property securing the repayment of said note."

B. Default and Foreclosure

Two and one-half years later, in May of 1987, Century, Eastland, and Ward entered into an agreement to extend the maturity date of the note and the lien to September 23, 1988. However, Eastland defaulted upon subsequent payments, and the property was posted for foreclosure.

On August 19, 1989, Century was declared insolvent by the Office of Thrift Supervision and placed into receivership. The Resolution Trust Corporation (RTC) was appointed receiver for the failed institution, succeeding to all of Century's rights, powers and privileges, and the parties do not dispute that the RTC became the owner and holder of the instruments at issue.

Demand was made upon Eastland as maker and Ward as guarantor on several occasions after default, and, on October 6, 1989, the substitute trustee under the deed of trust sent Eastland and Ward a final demand letter notifying them that the property had been posted for a November 7, 1989, foreclosure sale. Receiving no response to its letter, the RTC went forward with foreclosure of the property on November 7, 1989. The property was sold to the RTC, as highest bidder, for $518,700. The proceeds of the foreclosure were applied to the outstanding balance under the note, as reduced by payments, offsets, and credits, resulting in a deficiency of $224,953.34.

C. The Instant Litigation

The RTC then filed suit against Eastland and Ward in the United States District Court for the Southern District of Texas on December 17, 1991, to collect the deficiency. Ward answered on January 27, 1992, admitting the authenticity of the documents attached to the RTC's complaint, Eastland's execution of the loan documents, his execution of the guaranty agreement, and the RTC receivership. He denied the remainder of the allegations and asserted as an affirmative defense that the RTC had failed to

give proper notice of the foreclosure sale. Further, Ward asserted a "counter-claim" against his co-defendant, Eastland.

Before any significant discovery was conducted, Ward filed a motion for summary judgment against the RTC, asserting that any claim against him was barred by the RTC's failure to bid or sell the property for its fair market value at foreclosure. Ward asserted that Eastland, as his co-owner and by virtue of the letter agreement, had undertaken a duty to him to sell the property for fair market value. He claimed that the interest had been established and was known to Century at the time it acquired the lien on the property, and Century necessarily took its lien subject to the obligation to Ward. Consequently, he argued, the RTC, as Century's successor, had an affirmative obligation to him to sell the property for fair market value. The RTC's failure to do so, he concluded, had damaged him in an amount exceeding the deficiency sought against him.

The RTC responded that judgment should be entered in its favor, adducing summary judgment evidence to show that all conditions precedent had been met to establish Ward and Eastland's liability for the deficiency remaining under the note, and responding to Ward's motion by demonstrating that his purported interest in the property was not cognizable as a matter of law. The district court conducted a hearing on these motions, denied Ward's motion, and granted that of the RTC. As a result, it awarded the RTC judgment in the amount of $362,817.52 -- representing the deficiency, accrued pre-judgment interest, and

attorneys' fees -- against both Ward and Eastland. Only Ward appealed from this judgment; Eastland also defended the lawsuit, but has not pursued an appeal, and accordingly, his defenses are not before this court.

II. Analysis

A. Standard of Review

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). When the non-moving party bears the burden of proof at trial, the moving party need only point to the absence of any fact issue in the record, and the evidentiary burden shifts to the non-moving party to show with "significant probative" evidence that there exists a triable issue of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); In re Municipal Bond Reporting Antitrust Litig., 672 F.2d 436, 440 (5th Cir. 1982). We review a summary judgment de novo, applying the same criteria employed by the district court in the first instance. Federal Deposit Ins. Corp. v. Dawson, 4 F.3d 1303, 1306 (5th Cir. 1993); Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir.), cert. denied, 113 S. Ct. 462 (1992).

B. The RTC's Burden

The RTC bore the burden at trial of demonstrating its entitlement to a deficiency judgment and that the deficiency had been properly computed. In its summary judgment papers, it

included authenticated copies of the promissory note, Ward's unconditional guaranty, the deed of trust, extension and renewal agreement, demand letters, notices of posting, substitute trustee's deed, and an affidavit proving attorneys' fees. The substitute trustee's deed recited each of the conditions precedent necessary to establish that the foreclosure complied with the terms of the deed of trust, and, absent some showing of a specific defect, those recitations are presumed to be correct. Houston First Am. Sav. v. Musick, 650 S.W.2d 764, 767-68 (Tex. 1983). It is not contested in this appeal that there was any impropriety with the foreclosure sale, except for an inadequate price, as discussed below.

C. Ward's Burden

Fundamentally, Ward's claim is that the RTC owed him a duty to sell the property at fair market value, failed to do so, and, as a result, he is entitled to offset the deficiency judgment it seeks against him. In this regard, we observe that Ward, in his summary judgment papers, did not seek to rescind the foreclosure sale on any basis, but rather requested that he "be granted summary judgment and that Plaintiff RTC take nothing against [him]." Although, as Ward admits, his claim is "novel," we construe Ward's defense as a claim that the foreclosure sale price was grossly inadequate, an affirmative defense under Texas law. To sustain a claim for inadequate consideration, a debtor must also show that there were defects or irregularities with the foreclosure procedure which "caused or contributed to cause the

property to be sold for a grossly inadequate price." American Sav. & Loan Ass'n v. Musick, 531 S.W.2d 581, 587 (Tex. 1975); Nautical Landings Marina, Inc. v. First Nat'l Bank, 791 S.W.2d 293, 298-99 (Tex. App.--Corpus Christi 1990, writ denied); Delley v. Unknown Stockholders of the Brotherly and Sisterly Club of Christ, Inc., 509 S.W.2d 709, 718 (Tex. Civ. App.--Tyler 1974, writ ref'd n.r.e.).

Ward had the burden of proving his affirmative defense of inadequate consideration as a reason for denying recovery to the RTC. See Tarrant Sav. Ass'n v. Lucky Homes, Inc., 390 S.W.2d 473, 474 (Tex. 1965); Resolution Trust Corp. v. Westridge Court Joint Venture, 815 S.W.2d 327, 331 (Tex. App.--Houston [1st Dist.] 1991, writ denied). Since it is a "matter constituting avoidance or an affirmative defense," the Federal Rules of Civil Procedure require that it be pled in Ward's answer in order to be relied upon at trial. FED. R. CIV. P. 8(c); see also Morgan Guar. Trust Co. v. Blum, 649 F.2d 342, 345 (5th Cir. Unit B 1981); Funding Sys. Leasing Corp. v. Pugh, 530 F.2d 91, 95 (5th Cir. 1976). Ward's answer filed on January 27, 1992 (the "answer"), wholly fails to set forth allegations of inadequate consideration. In fact, the only affirmative defense alleged in the answer is an allegation that the notice of foreclosure allegedly and improperly came from Century, which had been closed by that time, a defense which was apparently later abandoned. There is a reference in the docket sheet that the district court "rec[eive]d Exhibits A through G to be attached to Ward's First

Amended Answer," but there is no evidence in the record on appeal that any amended answer was filed. Consequently, the operative pleading was Ward's January 1992 answer, which lacks the affirmative defense upon which Ward relies. Accordingly, we deem it to have been waived. Blum, 649 F.2d at 345.

Moreover, there is simply no summary judgment evidence in this record from which we could find in favor of Ward. Critical to his defense is the alleged October 4 agreement, which, as the RTC points out, is not contained in the record before us. Without it, we cannot determine the terms of creation or nature of his purported interest in the property at issue. Further, and as Ward himself points out, there is no summary judgment evidence of fair market value as of the date of sale. Ward has therefore wholly failed to meet his summary judgment burden of introducing evidence to the trial court which would create an issue of fact as to this defense. As noted above, several documents were apparently received by the district court, but never filed of record. Those documents are not before us and could not be considered by this court because they apparently never became part of the trial court record. Steinle v Warren, 765 F.2d 95, 100 (7th Cir. 1985) (Affidavit which was delivered to the trial judge's chambers, but never filed in the district court never became part of the district court record, "let alone part of the record on appeal to th[e] [c]ourt of appeals."); cf. United States v. Hatch, 926 F.2d 387, 395 (5th Cir.) (holding that documents not presented to, and considered by, the district court

were not properly included in the record on appeal), cert. denied, 111 S. Ct. 126, and cert. denied, 111 S. Ct. 2239 (1991). We can only speculate as to whether the October 4 agreement was part of these documents and cannot determine whether the district judge ever laid eyes upon them. It is the appellant's burden to insure that all documents necessary to his ability to show reversible error in the court below are made part of the record on appeal. FED. R. APP. P. 10 & 11(a); see also Business Forms Finishing Serv., Inc. v. Carson, 463 F.2d 966, 967 (7th Cir. 1971). Ward's failure to place this critical evidence before this court leaves us no alternative but to affirm the judgment of the district court. Lakedreams v. Taylor, 932 F.2d 1103, 1108-09 (5th Cir. 1991) (holding that copyright infringement defendant's failure to include in appellate record exhibits demonstrating actionable similarities between his work and the plaintiff's rendered court of appeals unable to find district court's determination of infringement to be clearly erroneous); cf. Richardson v. Henry, 902 F.2d 414, 416 (5th Cir.) (Appellant's failure to include transcript of the testimony that supported his challenge to the district court's findings resulted in dismissal of the portion of the appeal contesting the sufficiency of the evidence.), cert. denied, 498 U.S. 901 (1990), and cert. denied, 498 U.S. 1069 (1991); see also 16 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3956 (1977 & Supp. 1993) ("Failure to provide a sufficient record to support informed review of

district court findings may lead to affirmance for inability to show error.").

III. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court. Appellees' motion to dismiss this appeal is DENIED as moot.