Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00077-CV

Maria Jilma **URIBE** and Jose Carlos Uribe,
Appellants

v.

CARRINGTON MORTGAGE SERVICES, LLC, Servicer and Attorney-in-Fact for Wells Fargo Bank, N.A., as Trustee for Carrington Mortgage Loan Trust, Series 2006-NC4 Asset Backed Pass Through Certificates, as Assignee and Successor to New Century Mortgage Corporation,
Appellee

From the 73rd Judicial District Court, Bexar County, Texas
Trial Court No. 2014-CI-18492
Honorable Renée Yanta, Judge Presiding[1]

Opinion by: Liza A. Rodriguez, Justice

Sitting: Luz Elena D. Chapa, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: May 20, 2020

AFFIRMED

This is the second appeal to this court from a summary judgment entered in the underlying cause. After the cause was remanded following the first appeal, the trial court granted a second summary judgment in favor of appellee Carrington Mortgage Services, LLC, Servicer and Attorney-in-Fact for Wells Fargo Bank, N.A., as Trustee for Carrington Mortgage Loan Trust,

[1] The Honorable Renée Yanta signed the order granting the summary judgment. The Honorable Peter Sakai signed the order denying the supplemental motion for new trial.

Series 2006–NC4 Asset Backed Pass Through Certificates (the "Trust"), as Assignee and Successor to New Century Mortgage Corporation. The trial court also denied appellants Maria Jilma and Juan Carlos Uribe's supplemental motion for new trial. In this appeal, the Uribes contend the trial court erred by: (1) granting the summary judgment because they raised a genuine issue of material fact regarding whether Mr. Uribe's signature was forged on the security instrument;[2] and (2) denying their supplemental motion for new trial asserting newly discovered evidence. We affirm the trial court's judgment.

BACKGROUND

In our first opinion, this court summarized the background of the underlying case, in pertinent part, as follows:

> On November 25, 2014, the Uribes filed the underlying lawsuit to prevent the appellee from foreclosing on their home. The appellee obtained an order allowing the foreclosure in a separate lawsuit. In their petition, the Uribes alleged the appellee failed to produce a valid chain of title showing the transfer of the [Uribe's] note and security instrument to the Trust. The Uribes also alleged the appellee committed fraud by filing fraudulent documents in the deed records.
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> On August 13, 2015, the appellee moved for summary judgment asserting it was entitled to proceed with its non-judicial foreclosure as a matter of law. As evidence to support its motion, the appellee attached the note, the security instrument, the assignment of the note and security instrument, and a limited power of attorney.
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> On October 12, 2015, the Uribes filed a response again challenging the chain of title and asserting Mr. Uribe's signature on the security instrument was forged. Mr. Uribe's affidavit was attached to the response. In his affidavit, Mr. Uribe states, "Moreover, after reviewing my alleged signature on the Security Agreement, I am sure it is not mine and that someone forged my signature upon this instrument."
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> On November 20, 2015, the trial court held a hearing. … At the conclusion of the hearing, the trial court signed a final judgment granting the appellee's motion.

[2] The security instrument is commonly referred to as a deed of trust.

Uribe v. Carrington Mortgage Services, LLC, No. 04-16-00060-CV, 2017 WL 603648, at *1–2 (Tex. App.—San Antonio Feb. 15, 2017, no pet.) (mem. op.) ("*Uribe I*").

In *Uribe I*, we first noted the Uribes only had standing to challenge the assignment of their note and security instrument to the Trust "on a ground that renders the assignment void." *Id*. at *3. We then rejected several issues the Uribes raised arguing the summary judgment evidence did not establish the Trust's status as the owner and holder of the Uribes' note and security agreement, noting several of the arguments might make the assignment voidable, but not void. *Id*. at 2–3. With regard to the Uribes' contention on appeal that Mr. Uribe's signature was forged, we held Mr. Uribe's affidavit stating his signature was forged "raised a genuine issue of material fact as to whether the security instrument relied upon by the appellee to establish its right to foreclose was forged and therefore void." *Id*. at 4–5. In a footnote in the opinion, however, we noted the law relating to the effect of a notarized signature. *Id*. at *4 n.2. Because the appellee did not raise any argument based on that law in its motion for summary judgment, however, we further noted we could not consider that law on appeal. *Id*. Based on the fact issue raised regarding whether Mr. Uribe's signature was forged, we remanded the cause to the trial court "for further proceedings consistent with [our] opinion." *Id.* at *5.

On remand, the appellee filed a no evidence and traditional motion for summary judgment. The Uribes filed a response again asserting the security instrument was void because Mr. Uribe's signature was forged. The Uribes attached their affidavits to their response to support their assertion. The trial court signed an order granting summary judgment on November 14, 2018.

On December 14, 2018, the Uribes filed a timely motion for new trial. Although the Uribes alluded to newly discovered evidence in their motion, no evidence was attached to their motion. The motion for new trial was never set for a hearing and was overruled by operation of law on January 28, 2019. The Uribes filed their notice of appeal on February 11, 2019.

On February 13, 2019, the Uribes filed a supplemental motion for new trial attaching the evidence they argued was newly discovered and which they further argued established the assignment of their note and security instrument to Wells Fargo as trustee of the Trust was void. The appellee filed a motion to strike the supplemental motion for new trial because it was untimely filed. On February 25, 2019, the trial court held a hearing. At the conclusion of the hearing, the trial court denied the appellee's motion to strike and also denied the supplemental motion for new trial. The Uribes appeal challenging both the order granting the summary judgment and the order denying their supplemental motion for new trial

NEWLY DISCOVERED EVIDENCE

In their first issue, the Uribes contend the trial court erred in granting summary judgment in favor of appellee because newly discovered evidence established the assignment of the note and security instrument to Wells Fargo as trustee of the Trust was void. In support of their argument, the Uribes rely on evidence attached to their supplemental motion for new trial. Although the Uribes attempt to frame their issue to avoid expressly stating they are challenging the trial court's order denying their supplemental motion for new trial, they must establish the trial court abused its discretion in denying their supplemental motion for new trial to prevail on the issue presented. *See Minihan v. O'Neill*, No. 04-18-00847-CV, 2020 WL 444381, at *5 (Tex. App.—San Antonio Jan. 29, 2020, no pet.) (mem. op.) ("The burden on a party seeking a new trial based on newly-discovered evidence is to show that '(1) the evidence has come to his knowledge since the trial; (2) it was not owing to the want of due diligence that it did not come sooner; (3) it is not cumulative; and (4) it is so material that it would probably produce a different result if a new trial were granted.'") (quoting *GJR Mgmt. Holdings, L.P. v. Jack Raus, Ltd.*, 126 S.W.3d 257, 260 (Tex. App.—San Antonio 2003, pet. denied)). This is especially true because the Uribes' "newly discovered evidence" is attached only to their supplemental motion for new trial.

A motion for new trial must be filed within thirty days after the judgment complained of is signed. TEX. R. CIV. P. 329b(a). "One or more amended motions for new trial may be filed without leave of court before any preceding motion for new trial filed by the movant is overruled and within thirty days after the judgment or other order complained of is signed." *Id.* 329b(b). Supplemental motions for new trial are subject to the same filing deadlines as amended motions for new trial. *See Lopez v. Ford Motor Co.*, No. 04-08-00091-CV, 2009 WL 636517, at *2 (Tex. App.—San Antonio Mar. 11, 2009, no pet.) (mem. op.).

In this case, the summary judgment was signed by the trial court on November 14, 2018. The Uribes timely filed a motion for new trial on December 14, 2018, which was thirty days after the judgment was signed. The motion for new trial was overruled by operation of law on January 28, 2019. The Uribes filed their supplemental motion for new trial on February 13, 2019, which was more than thirty days after the judgment was signed and also after their motion for new trial was overruled by operation of law. Accordingly, the supplemental motion for new trial was untimely filed. Nevertheless, the trial court denied the supplemental motion for new trial on February 25, 2019, which was two days before the trial court's plenary power expired. *See* TEX. R. CIV. P. 329b(e).

In *Moritz v. Preiss*, 121 S.W.3d 715, 719–21 (Tex. 2003), the Texas Supreme Court addressed whether a court of appeals can properly consider whether a trial court abused its discretion in denying an untimely filed amended motion for new trial. The court held a "trial court may, at its discretion, consider the grounds raised in an untimely motion and grant a new trial under its inherent authority before the court loses plenary power." *Id*. at 720. However, the court further held, "A trial court's order overruling an untimely new trial motion cannot be the basis of appellate review, even if the trial court acts within its plenary power." *Id*. Restating its holding, the court emphasized, "to give full effect to our procedural rules that limit the time to file new trial

motions, today we hold that an untimely amended motion for new trial does not preserve issues for appellate review, even if the trial court considers and denies the untimely motion within its plenary power period." *Id*. at 720–21; *see also One Thousand Four Hundred Thirty-Seven Dollars ($1,437.00) in United States Currency v. State*, 587 S.W.3d 422, 430 (Tex. App.—San Antonio 2019, no pet.) (quoting *Moritz*); *Lopez,* 2009 WL 636517, at *2 (same). Therefore, because we cannot consider whether the trial court abused its discretion in denying the Uribes' untimely filed supplemental motion for new trial, their first issue is overruled.

FORGERY

In their second issue, the Uribes contend the trial court erred in granting the summary judgment because they raised a genuine issue of material fact as to whether Mr. Uribe's signature on the security instrument was forged. As previously noted, the appellee filed both a no evidence and traditional motion for summary judgment.

A. Standard of Review

We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). "When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). "If a party moves for summary judgment on both traditional and no-evidence grounds, as the [appellee] did here, we first consider the no-evidence motion." *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 45 (Tex. 2017).

A trial court must grant a no-evidence motion for summary judgment unless the nonmovant produces evidence raising a genuine issue of material fact. TEX. R. CIV. P. 166a(i). "A genuine issue of material fact exists if more than a scintilla of evidence establishing the existence of the challenged element is produced." *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004).

"Less than a scintilla of evidence exists when the evidence is so weak as to do no more than create a mere surmise or suspicion of a fact." *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003) (internal quotation marks omitted).

B. Governing Law and Burden of Proof

As we noted in *Uribe I*, "[a] forged security instrument or deed of trust is void ab initio, a nullity, and passes no title." *Uribe*, 2017 WL 603648, at *4 (internal quotation marks omitted). In this case, however, the summary judgment evidence undisputedly established Mr. Uribe's signature on the security instrument was notarized.

"The law is settled that a certificate of acknowledgment is prima facie evidence that [the signer] appeared before the notary and executed the [document] in question for the purposes and consideration therein expressed." *Bell v. Sharif-Munir-Davidson Dev. Corp.*, 738 S.W.2d 326, 330 (Tex. App.—Dallas 1987, writ denied); *see also Pulido v. Gonzalez*, No. 01-12-00100-CV, 2013 WL 4680415, at *4 (Tex. App.—Houston [1st Dist.] Aug. 29, 2013, no pet.) (same). "There is a decided judicial tendency to view with suspicion and distrust attempts to discredit certificates of acknowledgment." *Ruiz v. Stewart Mineral Corp.*, 202 S.W.3d 242, 248 (Tex. App.—Tyler 2006, pet. denied). As this court acknowledged in our prior opinion, "[c]lear and unmistakable proof that either the [signer] did not appear before the notary or that the notary practiced some fraud or imposition upon the [signer] is necessary to overcome the validity of a certificate of acknowledgment." *Uribe*, 2017 WL 603648, at *4 n.2 (internal quotation marks omitted); *see also Ruiz*, 202 S.W.3d at 248 ("To impeach a certificate [of acknowledgment], the evidence must be clear, cogent, and convincing beyond reasonable controversy."). Accordingly, in order to raise a genuine issue of material fact that Mr. Uribe's signature was forged, the Uribes were required to produce more than a scintilla of evidence establishing one of the two foregoing requirements necessary to overcome the validity of the notarization/certificate of acknowledgment.

C. Analysis

In response to the appellee's no evidence motion, the Uribes only produced their affidavits stating Mr. Uribe's signature on the security instrument was forged.[3] The affidavits, however, did not raise a fact issue as to whether Mr. Uribe failed to appear before the notary or the notary practiced some fraud or imposition upon Mr. Uribe. *See Uribe*, 2017 WL 603648, at *4 n.2 (setting forth applicable burden of proof); *cf. Edwards v. Fed. Nat'l Mortgage Ass'n*, 545 S.W.3d 169, 179 (Tex. App.—El Paso 2017, pet. denied) (noting "bare opinions that a signature is a forgery" are "conclusory and cannot create a genuine issue of material fact of forgery"). Accordingly, because the Uribes failed to produce more than a scintilla of evidence establishing one of the two requirements necessary to overcome the validity of the notarization of Mr. Uribe's signature on the security instrument, the trial court did not err in granting the summary judgment.

The Uribes' second issue is overruled.

CONCLUSION

The trial court's summary judgment is affirmed.

Liza A. Rodriguez, Justice

[3] Mr. Uribe's affidavit stated, "after reviewing my alleged signature on the [security instrument], I am sure it is not mine and it seems someone forged my signature upon this instrument. I do not execute my signature in that manner and I have no records that I ever signed the document in question. Furthermore, I do not recall being requested to sign this document." Mrs. Uribe's affidavit stated, "the signature that appears [on the security instrument] being attributed to Mr. Uribe is not his signature. I am very familiar with his signature because not only have I been married to him for 25 years, I am also his business partner. I have observed his signature countless times and the one contained on this instrument is not his."