

Affirmed and Opinion filed January 6, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-00816 -CV

DONALD M. WHITE, Appellant

V.

RAMPART CAPITAL CORPORATION, Appellee

**On Appeal from the 333rd District Court
Harris County, Texas
Trial Court Cause No. 96-03995A**

OPINION

In this debt collection case, Donald M. White appeals a judgment entered in favor of Rampart Capital Corporation (“Rampart”) on the grounds that: (1) Rampart failed to offer proof on the correct balance due on the promissory note; (2) Rampart failed to offer proof of a default on the promissory note; (3) attorney’s fees should not have been awarded when no evidence was presented as to why such fees should be awarded; and (4) summary judgment should not have been granted on defenses which were raised but no evidence was presented to refute. We affirm.

Background

On August 1, 1990, White signed a one year, \$320,000 promissory note payable to City National Bank (the “note”). City National Bank was placed into the receivership of the Federal Deposit Insurance Corporation (“FDIC”) on August 16 of that year. In November of 1995, the FDIC sold the note to Rampart. On January 26, 1996, Rampart brought suit against White to enforce the note and later filed a motion for summary judgment on its claims.

White’s summary judgment response argued that Rampart’s motion asserting the balance due on the note was incorrect, Rampart had failed to satisfy the conditions precedent to recovery, and Rampart’s demands were usurious. The trial court granted a partial summary judgment stating, among other things, that Rampart was the owner and holder of the note, there were no limitations on Rampart’s ownership of the note, and White had no usury defense. However, the trial court denied summary judgment as to the balance due on the note.

On April 24, 1997, after a bench trial, the trial court entered an interlocutory judgment awarding Rampart the amount due on the note, based on compound interest, and attorney’s fees.¹ White filed a motion to modify the judgment and requested entry of a take-nothing judgment because the note called for simple interest but the record did not contain evidence of simple interest calculations.² Rampart subsequently filed a notice of revised calculations using simple interest. On March 24, 1998, the trial court entered a final judgment awarding Rampart the amount reflected in its simple interest calculations as well as attorney’s fees.

The parties did not request, and the trial court did not enter, findings of fact and conclusions of law.

¹ An interlocutory judgment was initially entered because claims for fraudulent transfer were also pending in the suit. Rampart filed a motion to sever the fraudulent transfer claims and finalize the interlocutory judgment on May 2, 1997. The motion was granted, and a severance order and final judgment were signed on March 24, 1998.

² Compound interest calculates interest based on both the outstanding principal balance and previously accrued but unpaid interest; simple interest calculates interest based only on the outstanding principal balance without adding any previously accrued interest. *See* BLACK’S LAW DICTIONARY 729-30 (5th ed. 1979).

Balance Due on Note

White's first point of error argues that the trial court erred in not granting him a take-nothing judgment because Rampart failed to prove the *correct* balance due on the promissory note in that the only admitted evidence concerning the balance due reflected improper compound interest calculations.

To recover on a promissory note, a plaintiff must prove: (1) the note in question; (2) that the party sued signed the note; (3) that the plaintiff is the owner or holder of the note; and (4) that a certain balance is due and owing on the note. *See Geiselman v. Cramer Fin. Group, Inc.*, 965 S.W.2d 532, 536 (Tex. App.–Houston [14th Dist.] 1997, no writ). In an action by the holder of a note against the maker, where execution of the note has not been denied under oath, the introduction of the note into evidence makes a prima facie case for the holder. *See Clark v. Dedina*, 658 S.W.2d 293, 296 (Tex. App.–Houston [1st Dist.] 1983, writ dism'd).

This point of error does not challenge the partial summary judgment, but only the later judgment on the balance computed with simple interest. At trial, the promissory note, a schedule of payments made by White on it, and an amortization schedule for the note were entered into evidence. In addition, Rampart's vice-president, J.H. Carpenter, testified that \$429,949 was currently due and owing on the note. An interlocutory judgment was originally entered by the trial court awarding Rampart the balance due on the note based on compound interest. White filed a motion to modify the judgment to deny recovery for lack of evidence of the correct balance. After a hearing on the motion to modify, Rampart withdrew its claim for compound interest and tendered revised calculations based on simple interest. There is no indication in the record that White objected to these revised calculations or their submission to the court.³ Subsequently, the trial court modified the judgment to reflect a note balance based on simple interest. On appeal, White does not contend that the trial court's modified

³ The record indicates that an oral hearing on White's motion to modify the judgment was scheduled for August 15, 1997. Rampart's notice of revised calculations filed on August 18, 1997, also references a previous hearing on that motion. However, our record does not contain a reporter's record from that hearing.

calculation is erroneous but only that it lacked authority to award recovery based on simple interest because of the lack of evidence *at trial* of a balance calculated using simple interest.

A correction in the computation of the amount due on a promissory note to reflect the correct interest *rate* is within the discretion of the trial court and does not require a new trial. *See McLemore v. Pacific Southwest Bank, FSB*, 872 S.W.2d 286, 290-91 (Tex. App.–Texarkana 1994, writ *dism'd* by *agr.*). We believe the same reasoning applies to the trial court's authority to correct the *method* of calculating interest.⁴ Given an amount of principal, interest rate, and method of calculating interest, the resulting simple interest calculation is reached arithmetically as a matter of law, and requires no additional factual information for which evidence is necessary or subject to dispute. *See id.* Therefore, White's first point of error demonstrates no error by the trial court and is overruled.

Default on Note

White's second point of error argues that the trial court erred in not granting him a take-nothing judgment because Rampart presented no evidence that White defaulted on the promissory note.

The note requires payments to be made on demand or, if none is given, to be made monthly beginning September 1, 1990. The note also specifies that default will occur if payments are not made in the amount due. At trial, Rampart offered into evidence a schedule reflecting the payments White made on the note. This schedule reflects that White made payments from August 31, 1990, to October 4, 1993, and that White paid a total of \$87,358.04. The schedule reflects no payments by White after October 4, 1993. White stipulated at trial that this schedule includes all the payments he made on the note. Because the evidence thus showed that White ceased to make monthly payments on the note before it

⁴ This is also analogous to the authority of a trial court to assess liquidated damages in a default judgment if the amount can be accurately calculated by referring to the allegations in the petition and the instrument in writing. *See Arnold v. Allen Ctr. Co. No. 2*, 747 S.W.2d 17, 19 (Tex. App.–Houston [14th Dist.] 1988, writ denied).

was repaid in full, the evidence also established that he defaulted on the note. Therefore, White's second point of error is overruled.

Attorney's Fees

White's third point of error argues that the trial court erred in awarding Rampart attorney's fees because Rampart presented no evidence that a demand was made, as required for recovery of such fees by section 38.002 of the Texas Civil Practice and Remedies Code.

In the note, the section entitled "Attorney's Fees" states that "[i]f [Rampart] hire[s] a lawyer to collect this note, [White] must pay his or her fee, plus court costs (except where prohibited by law)." Because Rampart sought attorney's fees under the note, because the note does not require a demand, and because White has not challenged the evidence to support Rampart's entitlement to attorney's fees under the note, any lack of evidence to prove a demand provides White no basis for relief. Accordingly, the third point of error is overruled.

Affirmative Defenses

White's fourth point of error argues that Rampart was not entitled to summary judgment on White's affirmative defenses of limitations of ownership rights and usury because Rampart failed to present evidence to refute those defenses. A summary judgment may be granted if the summary judgment evidence shows that, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or response. *See* TEX. R. CIV. P. 166a(c). However, if a non-movant relies on an affirmative defense to defeat a claim on which the movant seeks summary judgment, the non-movant must come forward with summary judgment evidence sufficient to raise an issue of fact on each element of the defense to avoid summary judgment. *See Baptist Mem'l Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 947 (Tex. 1998); *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984).

In this case, to rely on the affirmative defenses of limitations of ownership or usury to avoid Rampart's summary judgment on the note, it was White's burden to produce evidence sufficient to raise a fact issue on each element of those defenses. Neither White's summary

judgment response nor his brief sets forth the elements of these affirmative defenses or summary judgment evidence sufficient to raise a fact issue on each element of either defense.

However, although Rampart's summary judgment motion did not seek to negate any of White's affirmative defenses, the trial court's interlocutory partial summary judgment order affirmatively recites that there are no limitations on Rampart's ownership rights of the note and that White has no usury defense or counterclaim. Although these recitations are improper, they do not render the subsequent final judgment awarding Rampart recovery on the note erroneous, and White has not asked that the summary judgment be modified to delete them. Therefore, White's fourth point of error provides no basis for relief and is overruled, and the judgment of the trial court is affirmed.

Richard H. Edelman
Justice

Judgment rendered and Opinion filed January 6, 2000.

Panel consists of Justices Amidei, Edelman, and Frost (J. Amidei not participating).

Do not publish — TEX. R. APP. P. 47.3(b).