

**Affirmed and Opinion filed February 1, 2001.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-99-01088-CV**

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**WILMA S. FORY, Appellant**

**V.**

**C. L. CONNER, RICHARD R. LEE,  
and MARION WARFIELD, Appellees**

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**On Appeal from the 334th District Court  
Harris County, Texas  
Trial Court Cause No. 88-51150-A**

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**OPINION**

Wilma S. Fory<sup>1</sup> appeals a summary judgment entered in favor of C. L. Conner, Richard R. Lee, and Marion Warfield<sup>2</sup> on the grounds that the releases of liens and other conditions of the personal guaranty

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<sup>1</sup> Wilma S. Fory appeals this lawsuit individually and as the independent executrix of the estate of Charles E. Fory.

<sup>2</sup> Marion Warfield is a party to this appeal both as the personal representative of the estate of Donald E. Warfield, deceased, and individually as the sole devisee under his will.

agreement Fory seeks to enforce were satisfied and that a declaratory judgment was an appropriate method for determining the parties' rights and obligations under their various contracts. We affirm.

### **Background**

In 1980, appellees formed a joint venture to purchase land for development. Conner, acting as trustee for the joint venture, purchased a tract of land owned by Hubert H. Vestal and Karen Vestal (collectively, the "Vestals") and executed two promissory notes (the "notes") as part of the purchase price. One note was payable to the Vestals, and the other note was payable to Wilma S. Fory and Charles Fory (collectively, the "Forys"). The notes were not personally signed or guaranteed by any of the joint venturers, but were secured by deed of trust and vendor's liens (the "liens") on the land. On December 31, 1984, the Vestals assigned their promissory note and the liens to a third party as collateral for an unrelated loan.

In 1985, to provide further financing for appellees' development of the land, their lender required a first lien on the property. To satisfy this requirement, appellees negotiated an agreement with the Vestals and Forys for the release of the liens in exchange for a personal guaranty of the notes by appellees. To effect this agreement, all of the parties signed a contract for release of the liens, the Vestals and Forys signed a purported partial release of the liens,<sup>3</sup> and appellees executed a personal guaranty agreement. The joint venture later defaulted on the notes, and Fory,<sup>4</sup> among other things, filed a declaratory judgment requesting a determination of her rights and appellees' obligations under her note, the contract for release of the liens, the personal guaranty agreement, and various lien releases.<sup>5</sup> Appellees filed a motion for summary judgment on several grounds, which was granted by the trial court without stating the ground(s) relied upon.

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<sup>3</sup> The purported release of the liens was partial in that it excepted liens on four tracts that had contracts for deed pending. The partial nature of the release is not material to the issues in this appeal.

<sup>4</sup> The Vestals had also sued for recovery on the personal guaranty agreement, but their claims were severed from those of the Forys when the Vestals pursued a prior appeal.

<sup>5</sup> In 1993, the Vestals and Forys signed a second purported release of the liens. Additionally, in 1996, Conner, again acting in his capacity as trustee, acquired the Vestals' note and released the liens securing it.

### **Standard of Review**

A summary judgment may be granted if the motion and summary judgment evidence show that 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. TEX. R. CIV. P. 166a(c); *Havlen v. McDougall*, 22 S.W.3d 343, 345 (Tex. 2000). In reviewing a summary judgment, we take as true all evidence favorable to the nonmovant and indulge all reasonable inferences in the nonmovant's favor. *KPMG Peat Marwick v. Harrison County Housing Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). A defendant is entitled to summary judgment on an affirmative defense if the defendant conclusively proves all the elements of the affirmative defense. *Havlen*, 22 S.W.3d at 345. Where, as here, a summary judgment order does not specify the grounds relied upon, the reviewing court must affirm if any of the grounds asserted in the motion are meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).

### **Failure of Consideration**

Fory's issue, among other things, challenges the granting of summary judgment on appellees' affirmative defense of failure of consideration of the personal guaranty agreement. That agreement provides, in part:

It being to the direct financial interests and benefits of [appellees] to [secure a] release [of] the first lien on the real property in order that development financing may be obtained, [appellees] have hereby personally guaranteed the payment of the notes in consideration of the release of said first lien by [the Vestals and Forys].

The contract for release of the liens similarly states:

[I]n order to rearrange development financing, it is beneficial to [appellees' joint venture] to obtain the release from aforesaid liens on the unsold and remaining inventory of Humble Place. . . . [appellees' joint venture] shall provide [the Vestals and Forys] with the personal guaranty of the joint venturers in Humble Place, namely C. L. Conner, Don E. Warfield and Richard R. Lee. . . . [the Vestals and Forys] shall release the remaining unsold inventory . . . from the Vendor's Lien and Deed of Trust Lien and accept the personal guaranty . . . as security for the payment of the notes *in lieu of the liens*.

Appellees' motion for summary judgment presented evidence that the liens were assigned to a third party lender as collateral for another loan prior to the Vestals' and Forys' execution of the contract for release of the liens and their purported partial release of the liens. Appellees contend that because the liens had been assigned, the Forys (and Vestals) were not the holders of the liens and thus did not have the right to release them when they signed the contract for release of the liens or the partial release of the liens. Appellees thus contend that there was a failure of the consideration set forth in the personal guaranty agreement whereby appellees would personally guarantee payment of the notes in consideration for release of the liens, because the liens were not actually released, but continued to be held by the third party to whom they had been assigned.<sup>6</sup>

Fory contends there was no such failure of consideration because the liens held by the third party lender were eventually released, *i.e.*, some ten years later. However, the contract for release of the liens provided that appellees' personal guaranty as security for payment of the notes would be given *in lieu of* the liens. Thus, an essential term of the transaction was that the personal guaranty would *replace* the security represented by the liens. From the parties' agreements and the appellees' intent to obtain current financing from a bank that required a first lien position, it is clear that the parties contemplated a contemporaneous exchange of the personal guaranty for the release of the liens. Without a release of the liens, there was no consideration to support the personal guaranty agreement. Because Fory's responses to the motion for summary judgment failed to raise a fact issue regarding whether the liens were released at or near the time the personal guaranty was executed by appellees,<sup>7</sup> her brief fails to demonstrate that

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<sup>6</sup> To whatever extent the Forys' execution of the partial release of the liens in 1985 relinquished *their* right to enforce the liens, it did not affect the third party's right to do so and thus did not enable appellees to convey a first lien to another creditor.

<sup>7</sup> Fory alternatively argues that, because the contract did not state a time for performance of the release of the liens, the personal guaranty nevertheless became effective in 1996 when the liens were eventually released. However, even if such a lengthy delay could be considered a reasonable *time* for performance, the liens were only released in 1996 by the action of Conner, acting as trustee, in obtaining the Vestals' note from a third party. Fory has cited no authority for the proposition that her obligation to effect the liens' release in 1985 could be discharged by a fortuitous release of the liens accomplished by appellees' independent efforts over ten years later. Similarly, to the extent appellees' liability under the personal guaranty agreement had not otherwise arisen by 1996, it would defy logic to conclude that their own act of reacquiring the Vestals' note and releasing the liens, *i.e.*,

summary judgment was improperly granted based on failure of consideration of the parties' agreements. Accordingly, it is unnecessary to address the remainder of Fory's issue challenging other possible grounds for summary judgment, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman  
Justice

Judgment rendered and Opinion filed February 1, 2001.

Panel consists of Justices Fowler, Edelman, and Canon.<sup>8</sup>

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to discharge part of the debt from which the personal guaranty agreement arose, would be the event triggering their liability under that agreement.

<sup>8</sup> Senior Justice Bill Cannon sitting by assignment.