Conseco Finance Servicing Corp. v. Lynd

2002 | Cited 0 times | Court of Appeals of Texas | January 23, 2002

AFFIRMED; Opinion Filed January 23, 2002

OPINION

Justice Francis

Conseco Finance Servicing Corporation appeals the trial court's take-nothing judgment on its claim for breach of a retail installment contract against David Scot Lynd. Conseco complains that the trial court failed to make findings of fact and conclusions of law. Also, Conseco raises several legal and factual sufficiency complaints with respect to the judgment. We conclude Conseco's issues are without merit and affirm the trial court's judgment.

In May 1997, Lynd purchased two jet skis from Action Suzuki. Under the Retail Installment Contract and Security Agreement signed by Lynd, Lynd was to pay Action Suzuki $222.28 a month for sixty months. Pursuant to the agreement, Lynd granted Action Suzuki a security interest in the collateral. In the lower-left corner, the contract contained a boxed-in area, which provided: Execution and Assignment: This Contract and Security Agreement is executed by the Seller and assigned to Green Tree Financial Servicing Corporation, 332 Minnesota Street, St. Paul, MN 55101, the Assignee, phone 1-800-241-3040. This assignment is made under the terms of a separate agreement. The language was followed by the seller's signature and was dated.

Two and a half years later, Conseco sued Lynd, alleging it was holder of the retail installment contract and alleging Lynd had defaulted on the contract by failing to make monthly payments. Following a brief bench trial, the trial judge made oral findings and rendered a take-nothing judgment against Conseco. Although Conseco filed a timely request for findings of fact and conclusions of law and a timely notice of past due findings, the trial judge made no written findings of fact and conclusions of law. Conseco appealed.

In the second and third issues, Conseco argues Green Tree Financial Servicing Corporation (Green Tree) established its breach of contract claim as a matter of law or, alternatively, Green Tree established its claim by the great weight and preponderance of the evidence. Initially, we note that Conseco, not Green Tree, brought this lawsuit against Lynd. Thus, the question in this appeal is whether Conseco, not Green Tree, established its claim as a matter of law or, alternatively, by the great weight and preponderance of the evidence.

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When the party with the burden of proof challenges the legal sufficiency to support the judge's failure to find in its favor, that party must show that no evidence supports the failure to find and the evidence establishes the desired finding as a matter of law. Honeycutt v. Billingsley, 992 S.W.2d 570, 577 (Tex. App.-Houston [1st Dist.] 1999, pet. denied). A party attempting to overcome an adverse fact finding as a matter of law must surmount two hurdles. Id. First, the reviewing court must examine the record for evidence supporting the finding, while ignoring all evidence to the contrary. Dow Chem. Co. v. Francis, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam). Second, if there is no evidence to support the finding, the reviewing court will then examine the entire record to determine if the contrary proposition is established as a matter of law. Id. The point of error should be sustained only if the contrary proposition is conclusively established. Id.

In a factual sufficiency review, we consider and weigh all of the evidence and can set aside a verdict only if the "failure to find" is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. See id. We cannot reverse merely because we conclude that a preponderance of the evidence supports an affirmative answer, nor can we substitute our opinion for that of the trier of fact and determine that we would reach a different conclusion. Honeycutt, 992 S.W.2d at 578. The factfinder is the sole judge of the credibility of the witnesses and weight to be given their testimony and resolves any inconsistencies in the testimony. McGalliard v. Kuhlman, 722 S.W.2d 694, 697 (Tex. 1986); Leyva v. Pacheco, 162 Tex. 638, 358 S.W.2d 547, 549 (1962). Finally, the uncontradicted testimony of an interested witness cannot be considered as doing more than raising an issue of fact unless that testimony is clear, direct, and positive, and there are no circumstances in evidence tending to discredit or impeach such testimony. McGalliard, 722 S.W.2d at 697.

In order to establish liability, Conseco had to show: (1) the retail installment agreement; (2) that Lynd signed the agreement; (3) that Conseco was the legal owner and holder of the agreement; and (4) that a certain balance was due and owing on the agreement. See Transit Enters., Inc. v. Addicks Tire & Auto Supply, Inc., 725 S.W.2d 459, 462 (Tex. App.-Houston [1st Dist.] 1987, no writ).

The dispositive issue here concerns the third element: whether Conseco was the legal owner and holder of the agreement. To establish ownership, Conseco had to prove that Action Suzuki assigned the contract to Green Tree and that Conseco ultimately obtained the contract from Green Tree. After reviewing the record in this case, we conclude Conseco cannot meet its burden to conclusively establish it is the owner and holder of the contract nor can it show that the trial court's failure to so find is against the great weight and preponderance of the evidence.

Conseco called one witness at trial to prove its claim: Rod Shrum. Shrum testified he was employed by Conseco as assistant vice president/district sales manager. Conseco's lawyer asked Shrum whether, as district sales manager and assistant vice president, he had "any knowledge of the facts underlying this case?" Shrum stated, "No, sir." Shrum was then asked, "In fact, you are just a custodian of records," to which Shrum replied, "Yes, sir." The retail installment contract was admitted through Shrum. The following testimony was elicited regarding the contract: [CONSECO'S

ATTORNEY]: Okay. Now, down in the lower left- hand corner, where it says Execution and Agreement -

[SHRUM]: Yes.

[CONSECO'S ATTORNEY]: - could you please tell me if that contract has been assigned by the original contracting party?

[SHRUM]: Yes, sir.

[CONSECO'S ATTORNEY]: And who was it assigned to?

[SHRUM]: Well, the seller looks like the dealer that they purchased the units from, but it's assigned to Conseco Financial Servicing Corporation.

[CONSECO'S ATTORNEY]: And when you say Conseco Financial Servicing Corporation, it actually says Greentree [sic] Financial Servicing Corporation on the contract.

[SHRUM]: I'm sorry. Yes, it does.

[CONSECO'S ATTORNEY]: How is Greentree [sic] related to Conseco?

[SHRUM]: Conseco purchased Greentree, I believe, in June 1998.

[CONSECO'S ATTORNEY]: Okay. And it purchased substantially all of the assets and liabilities of the company?

[SHRUM]: Yes, sir.

[CONSECO'S ATTORNEY]: And wasn't it, in fact, basically a merger?

[SHRUM]: Yes, sir.

[CONSECO'S ATTORNEY]: Okay. And from the records in Conseco's file, can you tell me whether or not Conseco is now the owner and holder of this contract?

[SHRUM]: Yes, sir.

In contrast to the above testimony, Shrum testified on cross-examination that Conseco purchased Green Tree and "assumed all liabilities and assets," as opposed to "substantially all." He testified repeatedly that Conseco "obtained" Green Tree, although he gave contradictory testimony as to the

date and had no documents to show the exact date of the purchase. Variously, Shrum testified that Conseco purchased Green Tree in June 1998 or, "as much as [he] could recollect . . . somewhere around" October 1999.

He could not "say for sure" whether the company was still Green Tree in January 1999, testifying, "I don't know when - you know, there is a period of time to where the purchase was made, but there was a period in time to where everything got switched over to the Conseco name."

Reviewing this evidence, it is clear that Shrum's testimony was less than consistent on several issues. Shrum testified that Conseco assumed "substantially all" of Green Tree's assets and liabilities as part of a merger. From this testimony, one could reasonably conclude that some assets and liabilities were not assumed and that the Lynd contract could have been among the unassumed assets and liabilities. Later, Shrum testified Conseco purchased all of Green Tree's assets and liabilities, but again, his testimony was contradictory even as to the date. Although Shrum testified he knew whether Conseco was owner of the note, he was never asked the relevant question of what that knowledge was nor did he provide that information. In fact, Shrum specifically testified that he had no knowledge of the facts of this case and was, in fact, just custodian of the records produced at trial. We note that this is not a case where Shrum's position alone would indicate personal knowledge of the company's financial business. Shrum testified he worked in the sales division of a company employing more than 12,500 people. Under these circumstances, we cannot conclude that Conseco conclusively established it was the owner and holder of the contract.

Moreover, we conclude the trial court's failure to find that Conseco owned the note is not against the great weight and preponderance of the evidence. In assessing what weight to give Shrum's testimony, the trial court was entitled to consider Shrum's testimony that he was merely a "custodian" of the records and had no knowledge of the facts of the underlying case.

Moreover, the trial court was entitled to consider the conflicting evidence presented by Conseco regarding its relationship with Green Tree in assessing Shrum's credibility. There was no documentary proof offered to show the relationship between Green Tree and Conseco. While such proof ordinarily may not be required, without proof that Conseco was owner of the note or unequivocal testimony that Conseco purchased all of Green Tree's assets, we cannot say the failure to find ownership is against the great weight and preponderance of the evidence. The second and third issues have no merit.

Having so concluded, we also conclude the first issue is without merit. Conseco argues it is entitled to reversal because the trial judge, who is no longer the presiding judge of the 44th Judicial District Court, failed to make findings of fact and conclusions of law although properly requested to do so. We agree that the trial judge in this case should have made findings of fact and conclusions of law when properly requested and his failure to do so constitutes error. See F.D.I.C. v. Morris, 782 S.W.2d 521, 523 (Tex. App.-Dallas 1989, no writ). However, reversal is not required if the record before the

appellate court affirmatively shows the complaining party suffered no harm. Id. During oral argument, Conseco conceded that if this Court determined that Conseco had failed to prove that it owned the contract, it could not be harmed by the trial court's failure to make findings of fact and conclusions of law. Our disposition of these issues makes it unnecessary to consider Conseco's remaining issues. See Tex. R. App. P. 47.1.

We affirm the trial court's judgment.

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