Affirmed and Opinion filed February 14, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-00692-CV

EDUARDO P. LENTINO, M.D., JORGE A. LENTINO, M.D., AND MARTA A. LENTINO, Appellants

V.

CULLEN CENTER BANK AND TRUST, N/K/A/ FROST NATIONAL BANK, Appellee

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On Appeal from the 281st District Court
Harris County, Texas
Trial Court Cause No. 91-18878-A

O P I N I O N

Appellants Eduardo P. Lentino, M.D., Jorge A. Lentino, M.D., and Marta A. Lentino appeal a post-answer default judgment rendered after a trial to the bench. Under the judgment, the court awarded appellee Cullen Center Bank and Trust, now known as Frost National Bank, actual damages of $1,817,525.42, prejudgment interest of $2,451,818.45, post judgment interest at the legal rate, and court costs against Eduardo, Jorge, and Marta,

jointly and severally.[1] In addition, the court awarded attorney's fees against Eduardo and Jorge. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This case dates from 1982 and concerns a series of defaulted loans and lawsuits. It is before the court for the second time.[2] The factual and procedural history divides roughly into the following five periods: (1) the period leading up to Eduardo and Jorge's participation in a master loan in 1984; (2) default on the 1984 loan and creation of individual notes as a result of compromise settlement agreements in 1987; (3) default, suit, and final judgment on the 1987 notes; (4) trial court proceedings and the first appeal in the present suit; and (5) the proceedings on remand.

Events leading to participation in 1984 master loan. In November 1982, Eduardo and Jorge individually executed separate promissory notes to Cullen for $150,000 to finance stock purchases in PetroBank. Cullen retained the stock as collateral. Both Eduardo and Jorge were members of the control group of PetroBank, and along with other members of the control group, they executed a buy/sell agreement. Like Eduardo and Jorge, the other members of the control group borrowed funds to finance their stock purchases. Under the buy/sell agreement, if a member of the control group defaulted on his loan, Cullen first had to offer the defaulting member's stock to the other members of the control group on a pro rata basis. The non-defaulting members then had 30 days in which to buy the stock.

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[1] We use "Bank" or "Frost" to refer to the post-merger bank, and "Cullen" to the pre-merger bank.

[2] In the previous case, this court reversed a judgment, rendered on a jury verdict, for $1,817,525.42 in actual damages, $2,500,000 in exemplary damages, attorney's fees, prejudgment interest, post judgment interest, and court costs. *Lentino v. Cullen Ctr. Bank and Trust*, 919 S.W.2d 743, 745, 747 (Tex. App.—Houston [14th Dist.] 1996, writ denied). As discussed below, this court concluded a fact issue existed regarding whether a 1984 note was usurious, and therefore the trial court had erred in granting Cullen's motion for partial summary judgment, which motion had requested the trial court to hold a subsequent compromise settlement agreement in 1987 barred the appellants' causes of action and affirmative defenses. *See id.* at 745, 747.

Eduardo and Jorge renewed their notes in 1983. In 1984, the value of PetroBank stock had fallen by more than one-third, and Cullen informed Eduardo and Jorge it would not renew the loans again without additional collateral. Eduardo, Jorge, and four other parties (members of the control group), jointly and severally, executed a new promissory note to Cullen for $2,252,250. Eduardo and Jorge executed guarantee agreements in favor of Cullen that unconditionally guaranteed payment of the $2,252,250 note. All of the stock previously pledged to secure the individual notes served as collateral for the master note. According to Cullen's credit manager, Patrick Rutledge, two PetroBank shareholders and PetroBank's attorney proposed the loan. They wanted the master loan because they were in negotiations to sell the bank and expected it to sell quickly. Cullen advanced no additional funds to Eduardo or Jorge in consideration for increasing their obligation. The loan amount was 90 percent of the outstanding balance on all the individual notes held by Cullen, which included not only the debts of the makers, but the debts of at least 38 other shareholders, who executed guarantees limited to the amount of their outstanding debt.

Default on the 1984 note and creation of individual notes through compromise settlement agreements in 1987. The 1984 note went into default, and in 1986, Cullen filed individual suits against Jorge and Eduardo for default on the 1984 note. In March, 1987, Eduardo and Jorge entered into separate compromise settlement agreements with Cullen. Under the terms of the agreements, Eduardo and Jorge agreed to execute new promissory notes totalling $148,842 for Eduardo and $171,186.29 for Jorge. The compromise settlement agreements further provided that: (1) Cullen Bank would pay Eduardo and Jorge each $10 and release them of their joint and several liability under the 1984 note and guaranty agreements in consideration for Eduardo's and Jorge's releasing the Bank from all claims against it; (2) if Eduardo or Jorge defaulted on their notes, the defaulting party could be liable for the outstanding balance on the 1984 note; and (3) Eduardo and Jorge waived all affirmative defenses and causes of action relating to the loan documents in the underlying lawsuit. If, however, Eduardo and Jorge paid their new 1987 notes in full, they would no

longer be liable for any balance still owing on the 1984 note. Because Cullen was negotiating settlements with other shareholders, the amount ultimately owing on the 1984 note would depend on the extent to which the other shareholders met their obligations.

Default, suit, and final judgment on the 1987 notes. Eduardo and Jorge subsequently defaulted on their 1987 notes, and in 1990, Cullen filed separate lawsuits to collect on these notes. The trial court entered final judgments in favor of Cullen and awarded actual damages, prejudgment interest, attorney's fees, costs of court, and postjudgment interest. During postjudgment discovery, however, Cullen allegedly discovered fraudulent transfers by Jorge, Eduardo and Marta Lentino made during the time the compromise settlement agreements were executed.

Trial court proceedings and the first appeal in the present suit. Cullen then filed the present suit, claiming fraud, fraudulent transfers, breach of contract, conspiracy, negligence, and negligent misrepresentation. The appellants responded with a general denial and asserted several affirmative defenses, including usury. The appellants also filed counterclaims alleging usury, slander of title, unreasonable collection efforts, and intentional infliction of emotional distress. As this court summarized in its previous decision:

> In June 1993, Cullen filed a motion for partial summary judgment, requesting the trial court to hold that the compromise settlement agreements barred appellants' "affirmative causes of action" which relate to the underlying loan documents. Following the appellants' response, [Cullen] filed its reply, clarifying that the compromise settlement agreement barred all of the Lentinos' claims and affirmative defenses. . . . The trial court subsequently granted [Cullen's] motion and held the compromise settlement agreements barred all of appellants' causes of action and affirmative defenses.
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> The parties proceeded to trial and at the close of evidence, the trial court directed a verdict in favor of [Cullen] as to its claims for breach of the compromise settlement agreements. The trial court also rendered judgment on the jury's verdict, which addressed other issues, and awarded $1,817,525.42 in actual damages and $2,500,000 in exemplary damages against each Jorge and Eduardo Lentino, along with attorneys' fees, prejudgment interest, postjudgment interest and costs of court.

Lentino v. Cullen Ctr. Bank and Trust, 919 S.W.2d 743, 745 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (citation omitted).

The appellants appealed, contending the trial court improperly granted Cullen's motion for partial summary judgment, in part, because a fact issue existed as to whether the 1984 note was usurious. *Id.* at 745. The appellants further argued that, if the 1984 note was usurious, the compromise settlement agreements were void because they failed to purge the usury contained in the 1984 note and no summary judgment could be based on a void instrument. *Id.*

This court sustained the appellants' point of error. The court first observed, "When a lender requires, as a condition to making a loan, that a borrower assume a third party's debt, such debt must be included in the interest computation to determine usury." *Id.* at 746 (citing *Alamo Lumber Co. v. Gold*, 661 S.W.2d 926, 928 (Tex. 1983)). The court then analyzed the summary judgment evidence:

> In this case, the summary judgment record shows that as a condition to renew appellants' 1983 notes, appellee required them to sign the 1984 note, making them jointly and severally liable with third parties for $2,252,250. The record also shows that: (1) the 1984 note had a one-year maturity; and (2) appellee did not advance additional funds to appellants other than the original $150,000 loan made in 1982. Thus, although the interest rates on the 1982 and 1983 notes are not in the record, appellants' computed interest on the 1984 note under *Alamo Lumber* would likely exceed two million dollars for one year, even though appellants never received more than $150,000 from appellee.

Id.

The court next rejected Cullen's argument that, even if a fact issue existed regarding whether the 1984 note was usurious, the 1987 compromise settlement agreements released any claims or defenses the appellants may have had for usury under the 1984 note:

> A claim or defense of usury may be compromised and released if done in good faith and if the settlement instrument is purged of the usury contained in the underlying note. *See Finn v. Alexander*, 139 Tex. 461, 163 S.W.2d 714,

> 716 (1942); [*Commerce Trust Co. v. Ramp*, 138 S.W.2d 531, 534 (Tex. 1940), *overruled on other grounds*, 561 S.W.2d 777 (Tex. 1977)]. For this to occur, there must be: (1) cancellation of the obligation tainted by the usury; and (2) the creation of a new obligation free of usury. *See Southwestern Inv. Co. v. Hockley County S. & D., Inc.*, 516 S.W.2d 136, 137 (Tex. 1974); *Ramp*, 138 S.W.2d at 534; *O'Quinn v. Beanland*, 540 S.W.2d 526, 527 (Tex. Civ. App.—San Antonio 1976, no writ). On the other hand, when the original usurious obligation transcends into the subsequent agreement, such agreement is void and unenforceable. *See Ramp*, 138 S.W.2d at 535.
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> Under the terms of the compromise settlement agreement, both Jorge and Eduardo Lentino agreed to execute new promissory notes payable to appellee. In return, appellee paid Jorge and Eduardo $10 each and agreed to release them from their joint and several liability under the 1984 note and guaranty agreements. The agreement also provided, however, that if either Jorge or Eduardo defaulted on their notes, the defaulting party, at appellee's sole option, could be liable for the entire outstanding balance on the 1984 note. Because we find that a fact issue exists as to whether the 1984 note was usurious, we are unable to determine whether the compromise settlement agreement carried forward the usury contained in the 1984 note, and thus, was void and unenforceable. Accordingly, appellants' first point of error is sustained.

Lentino, 919 S.W.2d at 747. This court reversed and remanded for a new trial. *Id.*

The proceedings on remand. During the pendency of the first appeal, Eduardo and Jorge had filed for bankruptcy, and the bankruptcy court entered an order authorizing the bankruptcy trustee, Lowell T. Cage, to proceed with the state court appeal. This court then issued an order substituting Cage as a party in place of Eduardo and Jorge. When the trial court records did not reflect Cage's participation, he filed a petition in intervention, prayed for damages against Cullen, and appeared at trial.

Eduardo, Marta, and Jorge filed numerous pretrial motions and pleadings, including Marta's motion for summary judgment based on lack of privity of contract between the Bank and Marta, joint motions to strike the Bank's petition as being filed in violation of the automatic bankruptcy stay, and a plea in abatement alleging Frost's lack of "standing" to

act as a successor to Cullen. The trial court denied Marta's motion for summary judgment. It does not appear that the court entered written rulings on the other two motions.

By the time of trial, Marta was appearing pro se. Eduardo and Jorge discharged their attorney after the case was called for trial, and the court granted counsel's motion to withdraw. Marta, Eduardo, and Jorge also announced their intention not to participate as parties in the trial. The court explained that, as a result of the appellants' not participating, the court could enter a default judgment against them. The appellants indicated they understood. The court then signed an order granting an interlocutory post-answer default judgment against Eduardo, Jorge, and Marta Lentino in their capacity as individual defendants in the case.

The Bank proceeded to present evidence on liability and damages, calling Eduardo, Jorge, and Patrick Rutledge, the Bank's credit manager. The intervenor/bankruptcy trustee appeared by counsel, who cross-examined the Bank's witnesses and introduced documentary evidence, raising the issue of usury. At the close of evidence, the Bank and the intervenor announced they had reached a settlement, under which the Bank would pay the intervenor $100,000 and would agree to cap its claims in the two bankruptcy estates of Eduardo and Jorge at $908,762.71 each. Counsel for the Bank then submitted a post-answer default judgment and final order of severance, which the court signed.

In the judgment, rendered February 29, 2000, the court found against Eduardo and Jorge on numerous causes of action, including fraudulent transfers and breach of the 1984 note and 1987 settlement agreements. The court found against Eduardo, Jorge, and Marta on the cause of action for conspiracy. Under the judgment, Eduardo, Jorge, and Marta are jointly and severally liable to the Bank for actual damages of $1,817,525.42, prejudgment interest of $2,451,818.45, post judgment interest at the legal rate, and court costs. The court also ordered Eduardo and Jorge to pay attorney's fees.

Under the order of severance, the Bank's claims against the appellants and the appellants' counterclaims against the Bank, as well as their affirmative defenses were severed into the A case, the case *sub judice*. "The claims, counterclaims, denials, and defenses by and between Plaintiff and Intervenor remain[ed] pending in the original cause No. 91-18878."

On March 3, 2000, appellants filed a request for findings of fact and conclusions of law. On March 28, 2000, they filed a notice of past due findings of facts and conclusions of law. They also filed several other post-judgment motions, including a motion to vacate the default judgment, a motion for new trial, a motion to modify, correct or reform the judgment or render JNOV, and a motion to take judicial notice. The trial court did not rule on these motions.

DISCUSSION

Introduction and Overview

The issues. Appellants present sixteen issues for review. The following issues concern the various **pretrial motions**: Issues 1 and 2 (alleging error in the trial court's not having ruled on the motion to strike the Bank's petition as being in violation of the bankruptcy stay), issue 3 (alleging error in not ruling on the plea in abatement regarding the Frost Bank's capacity to sue), and issue 9 (alleging error in denying Marta's motion for summary judgment). The following issues appear to focus primarily on appellants' **claims or affirmative defenses** other than usury: issue 6 (relating to the interlocutory post-answer default judgment to the extent discussion under that issue raises affirmative defenses), issue 10 (alleging a limitations defense), issue 11 (res judicata), issue 12 (challenging the award against Marta), issue 13 (alleging error in not taking judicial notice of documents and pleadings on file), issue 14 (alleging double recovery), issue 15 (alleging error in allowing the motion to modify correct or reform the judgment to be overruled by operation of law), and issue 16 (alleging error in ignoring the Bank's purported actual knowledge of transfers

of assets).[3] Issue 8 challenges the **severance.** The following issues **challenge entry of the default judgment**, either as being in violation of law of the case or as purportedly being based on legally insufficient evidence: issue 4 (alleging error in rendering default judgment when the evidence was legally and factually insufficient), issue 6 (challenging entry of the interlocutory post-answer default judgment to the extent appellants are arguing Bank did not prove liability), and issue 7 (alleging error in not applying law of the case). Finally, issue 5 alleges error in **the trial court's not filing findings of fact and conclusions of law**. Appellants' briefing in this court, and their decision not to participate in the trial limit the extent of our review of these issues.[4]

Inadequate briefing. In issues 10, 11, 12, and 15, appellants provide only an issue heading and reference to other issues. In issue 8, they request we take judicial notice of the statement of facts and legal arguments in a previous petition for writ of mandamus filed with this court. In issue 14, appellants allege, without record support or legal authority, that the judgment in the present case was to have no effect in the bankruptcy court. They then incorporate the facts and legal arguments under other issues.

It is not incumbent on an appellate court to perform the advocate's job for a party. *See Maranatha Temple, Inc. v. Enterprise Prods. Co.*, 893 S.W.2d 92, 106 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (holding no duty to undertake independent review of record and applicable law). An issue must be supported by argument and authorities to be properly before the court on appeal. *Knoll v. Neblett*, 966 S.W.2d 622, 639

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[3] We say "appear to," because, as discussed below, a number of the issues contain only topic headings and a reference to other issues.

[4] Following oral argument, appellants requested this court to take judicial notice of documents in the main case, which documents are certified and indicate the settlement in the main case has not yet been reduced to a final judgment. Although the documents are not dispositive of the appeal, we grant appellants' motion. *See* TEX. R. EVID. 201(d), (f) (providing judicial notice mandatory if requested by party and necessary information provided, and judicial notice may be taken at any stage of the proceedings); *Surgitek, Inc. v. Adams*, 955 S.W.2d 884, 889 n.4 (Tex. App.—Corpus Christi 1997, pet. dism'd by agr.) (taking judicial notice of documents under Rule 201(d) even though documents not dispositive of appellate determination).

(Tex. App.—Houston [14th Dist.] 1998, pet. denied). An argument that merely incorporates arguments made under other issues and does not apply the law to the facts is inadequate. *See Smith v. State*, 907 S.W.2d 522, 531 (Tex. Crim. App. 1995) (noting the inadequacy of argument consisting of one paragraph incorporating arguments made for three other points of error); *$24,180.00 v. State*, 865 S.W.2d 181, 184 n.1 (Tex. App.—Corpus Christi 1993, writ denied) (criticizing argument containing an "incorporation" statement). Similarly an argument incorporating argument from other filings in the case violates the spirit of the rule limiting the length of an appellant's brief. *See Maranatha Temple*, 893 S.W.2d at 97.

Citing *Inpetco, Inc. v. Texas Am. Bank*, appellants argue the proper remedy for inadequate briefing is not to overrule the issue, but to order rebriefing. *See* 729 S.W.2d 300, 300 (Tex. 1987) (per curiam). The rule of appellate procedure forbidding affirmance or dismissal for defects or irregularities in appellate procedure, however, does not apply when appellant sufficiently pleads some points of error, but insufficiently pleads others. *See Valdez v. Aldrich*, 892 S.W.2d 95, 96 (Tex. App.—Houston [14th Dist.] 1994, no writ) (distinguishing affirming judgment because of briefing deficiencies from exercising discretion to choose between deeming point waived and allowing amendment or rebriefing). We need not consider issues 8, 10, 11, 12, 14, and 15 because appellants did not adequately brief them.

Ramifications of Appellants' Refusing to Participate. Appellants answered the Bank's petition, but then refused to appear as parties at trial. Accordingly, if the Bank proved its cause of action, the trial court properly rendered a post-answer default judgment against appellants. *See Stoner v. Thompson*, 578 S.W.2d 679, 682 (Tex. 1979) (denominating judgment that results when party answers but does appear as "post-answer default judgment" and stating plaintiff must offer evidence and prove case as in judgment upon trial). In such a circumstance, the trial court may properly render a take-nothing judgment on the non-appearing defendant's counterclaims. *Walker v. Kleiman*, 896 S.W.2d 413, 416 (Tex. App.—Houston [1st Dist.] 1995, no writ). Additionally, a defendant with

an affirmative defense who fails to appear at trial, and offers no evidence to support the defense, effectively waives that affirmative defense. *Love v. State Bar of Texas*, 982 S.W.2d 939, 943 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

To obtain a new trial at which it may produce evidence, a defaulting party must (1) establish that its failure to file an answer or appear was not intentional or the result of conscious indifference, but was due to mistake or accident; (2) offer a meritorious defense; and (3) demonstrate that granting a new trial will not result in delay or prejudice to the plaintiff. *Craddock v. Sunshine Bus Lines*, 133 S.W.2d 124, 126 (Tex. 1939). These requirements apply when a party seeks to set aside a post-answer default judgment. *Ivey v. Carrell*, 407 S.W.2d 212, 213 (Tex. 1966).

Appellants justify their non-appearance based on (1) the trial court's not having ruled on their motion for abatement, (2) the trial court's not having addressed the scope of the order lifting the bankruptcy stay, and (3) the alleged resultant confusion on their part regarding whether any actions by them would violate the stay. Appellants cite no authority to support the proposition that deliberately refusing to participate because of purported confusion and disagreement with pretrial rulings constitutes "accident" or "mistake" such as will satisfy the first *Craddock* factor. We are aware of none. Instead, the first *Craddock* factor applies to accident or mistake, not to intentional behavior. *See Novosad v. Cunningham*, 38 S.W.3d 767, 771 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (holding appellant's failure to answer, due to an erroneous interpretation of bankruptcy law, was intentional and appellant was not entitled to relief from default judgment under *Craddock*); *see also Cortland Line Co., Inc. v. Israel*, 874 S.W.2d 178, 183 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (holding parties' failure to appear for trial based on incorrect interpretation of the law was intentional, and parties were not entitled to relief under bill of review).

By not participating at trial, appellants lost the opportunity to present evidence on their counterclaims and affirmative defenses unless they met the *Craddock* requirements.

They have not done so. It follows that we may decline to address any issues complaining of the trial court's not considering appellants' claims or affirmative defenses or evidence relating to those claims. Specifically, we may decline to address issue 6 (to the extent discussion under that issue raises affirmative defenses), issue 10, issue 11, issue 12, issue 13, issue 14, issue 15 (to the extent it related to counterclaims and affirmative defenses), and issue 16.

Based on preceding analyses, we overrule issues 6 (to the extent discussion under that issue raises affirmative defenses), 8, 10, 11, 12, 13, 14, 15, and 16.

To the extent appellants are challenging the legal sufficiency of the evidence to support the default judgment, however, those issues are properly before this court if preserved by sufficient motion in the trial court. *See Onwuteaka v. Gill*, 908 S.W.2d 276, 281 (Tex. App.—Houston [1st Dist.] 1995, no writ) (finding legal sufficiency challenge dispositive and not reaching alleged error based on denial of new trial under *Craddock*). In the discussion that follows, we therefore consider issues that arguably might relate to the legal sufficiency of the evidence to support the post-answer default judgment, as well as the pretrial issues and the trial court's failure to file findings of facts and conclusions of law.

Pretrial issues

Purported violation of the bankruptcy stay. In issue 1, appellants argue the trial court erred by expanding the language of the order lifting the automatic stay of proceedings under the United States Bankruptcy Code. *See* 11 U.S.C.A. § 362(d) (West 1993 and Supp. 2001). In issue 2, appellants argue the trial court erred by not ruling on their motion to abate the case for violation of the automatic stay provision. *See* 11 U.S.C.A. § 362(a) (West 1993 and Supp. 2001).

The 1998 order lifting the stay provided in part, "The automatic stay is lifted for Cullen Center to sue on the debt." Appellants contend Cullen's claims for various tort damages were not permitted by the language of the order. They then reason the post-answer

default judgment and final order of severance are void. *See Continental Casing Corp. v. Samedan Oil*, 751 S.W.2d 499, 501 (Tex. 1988) (stating action taken in violation of automatic stay is void, not merely voidable).

Under the Bankruptcy Code, a "debt" is "liability on a claim." 11 U.S.C.A. § 101(12) (West 1993). A "claim" is

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
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> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C.A. § 101(5) (West 1993).

Under the Bankruptcy Code, "debt" and "claim" refer to a single obligation as seen from the point of view of debtor and creditor, with the debtor having "debts" and the creditor having "claims." *See In re Jordan*, 166 B.R. 201, 202 (Bankr. D. Me 1994) (stating rule in context of rejecting argument disputed claim had not ripened into debt). We conclude Cullen's tort claims constituted a "debt" as envisioned by the order.

We overrule appellants' issues 1 and 2.

Failure to rule on plea in abatement challenging Frost Bank's capacity to sue. In issue 3 appellants argue the trial court erred by not ruling on their motion to abate, which alleged Frost had not demonstrated its "standing" to sue. In their reply brief appellants indicate they are discussing "lack of capacity," and this court construes appellants' argument to be addressed to Frost's capacity to sue, rather than its standing. *See Nootsie, Ltd. v. Williamson Cty. Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996) (explaining plaintiff has standing when personally aggrieved, regardless of whether it is acting with legal authority;

party has capacity when it has legal authority to act, regardless of whether it has justiciable interest in the controversy).

"A defendant who merely presents his plea in abatement without offering evidence to prove the grounds urged therein, waives the plea unless he can demonstrate that the plaintiff's petition establishes the grounds urged in the plea." *Bernal v. Garrison*, 818 S.W.2d 79, 82 (Tex. App.—Corpus Christi 1991, writ denied); *see also Henry S. Miller Co. v. Bynum*, 797 S.W.2d 51, 57 (Tex. App.—Houston [1st Dist.] 1990) (stating mere filing of plea in abatement, without presentment to trial court and without offer of evidence in support, usually amounts to waiver of plea), *aff'd*, 836 S.W.2d 160 (Tex. 1992); 3 MCDONALD & CARLSON, TEXAS CIVIL PRACTICE § 17.7 (2d ed. 2000) (stating normally evidence must be heard to determine most dilatory pleas because one may properly be sustained without supporting proof only when court can see from plaintiff's pleading that dilatory plea is well taken). There is nothing in the record to indicate the trial court heard appellants' plea in abatement. Appellants have not preserved this issue.

We overrule appellant's issue 3.

Denial of Marta's motion for summary judgment. In issue 9, Marta argues the trial court erred in denying her motion for summary judgment based on her lack of privity of contract with Cullen. When the trial court denies a motion for summary judgment and tries the case on its merits, the order denying the motion for summary judgment is not reviewable on appeal. *Harris County v. Dillard*, 841 S.W.2d 552, 554 (Tex. App.—Houston [1st Dist.] 1992), *rev'd on other grounds*, 883 S.W.2d 166 (Tex. 1994); *see Ackermann v. Vordenbaum*, 403 S.W.2d 362, 365 (Tex. 1966). For Marta to preserve the lack of privity issue for appeal purposes, she had to present the issue at trial. *See Johns v. Ram-Forwarding, Inc.*, 29 S.W.3d 635, 639, (Tex. App.—Houston [1st Dist.] Oct. 5, 2000, no pet.). She did not.

We overrule issue 9 to the extent it challenges the denial of Marta's motion for summary judgment.[5]

Challenge to the merits of the post-answer default judgment

In issue 4, appellants contend the trial court erred by entering a default judgment on the Bank's pleadings when appellants had a factually and legally sufficient answer and counterclaim on file. Appellants' argument in support of this issue, however, addresses only the requirements for a new trial under *Craddock*, an argument we rejected in the preceding portion of this discussion.

We overrule issue 4.

In issue 6, appellants contend the trial court erred by entering an interlocutory post-answer default judgment before hearing the Bank's liability evidence. The court, however, did hear evidence on liability before rendering the final post-answer default judgment. In addition, the argument basically addresses only appellant's counterclaims and affirmative defenses, matters which, as discussed above, appellants waived by deliberately not appearing.

Having previously overruled part of issue 6, we now overrule issue 6 in its entirety.

In issue 7, appellants argue the trial court erred in not applying the law of the case. Although much of the argument is again devoted to presenting affirmative defenses other than usury, appellants do cite to *Alamo Lumber*, on which this court's prior decision rested. *See Alamo*, 661 S.W.2d at 928, *cited in Lentino*, 919 S.W.2d at 746.

Under the "law of the case" doctrine, questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages. *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986). The doctrine applies only to questions of law and not to

[5] As discussed below, however, we interpret a portion of issue 9 to be a challenge to the legal and factual sufficiency of the evidence supporting the cause of action against Marta for civil conspiracy to fraudulently transfer property.

questions of fact. *Id.* The doctrine does not necessarily apply when either the issues or the facts presented in successive appeals are not substantially the same as those involved in the first trial. *Id.* The doctrine has limited application following a summary judgment appeal. *See id.* at 630-31. "The application of this doctrine is flexible and must always be left to the discretion of the court and determined according to the particular circumstances of the case." *Kay v. Sandler*, 704 S.W.2d 430, 433 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

The issue in the prior appeal was whether a fact issue existed about whether the 1984 note was usurious, not whether the 1984 was, in fact, usurious. In addition, the effect of the summary judgment at issue in the first appeal was to bar appellants' causes of action and affirmative defenses. *See Lentino*, 919 S.W.2d at 745. By not participating in the present trial, appellants deprived themselves of those causes of action and defenses. The law of the case doctrine is inapplicable here.

We overrule issue 7.

At several points in their brief, appellants refer to the standards of review for the legal and factual sufficiency of the evidence. For the most part, appellants do not develop these references or tie them to a particular cause of action, but place them among appellants' recitations of their own defensive proof, which their non-participation precluded them from offering. A fair reading of the discussion at the end of issue 9, however, indicates Marta intends to challenge the legal and factual sufficiency of the evidence to support the cause of action against her for conspiring with Eduardo and Jorge in the fraudulent transfer of property. *See Clark v. University of Houston*, 979 S.W.2d 707, 714 (Tex. App.—Houston [14th Dist.] 1998) (en banc) (giving fair reading to appellant's entire argument to ascertain what appellant wanted court to consider), *rev'd in part on other grounds*, 38 S.W.3d 578 (Tex. 2000). We conclude nevertheless, that Marta has not preserved the argument she presents to this court.

In this court, Marta addresses the alleged deficiency of the evidence on both the conspiracy and the fraudulent transfer components of the cause of action. She argues that one who does not know the object of the conspiracy cannot be a conspirator because a person cannot agree to the commission of an unknown wrong, thereby suggesting lack of the specific intent necessary for conspiracy. *See Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996) (stating civil conspiracy requires specific intent to agree to accomplish unlawful purpose or to accomplish lawful purpose by unlawful means).

In the post-judgment motions, however, Marta focused on the alleged deficiency of the evidence related to the fraudulent transfers. Specifically, she pointed to the lack of evidence she was a "debtor" as defined by the Uniform Fraudulent Transfer Act. *See* TEX. BUS. & COM. CODE ANN. § 24.002(6) (Vernon Supp. 2001). The only reference we find to conspiracy appears in the motion to vacate the post-answer default judgment and motion for new trial when she states:

> The Court ignored the following undisputed facts and elements: Marta A. Lentino have [sic] separated the property they have jointly acquired during their marriage, between herself and her husband and this Court should have taken judicial notice of the Separation Agreement, produced as an Exhibit attached to Marta A. Lentino's Motion for Summary Judgment, which Agreement was recorded of Public Record on 07-13-83 four years prior to the three agrements [sic] executed by Eduardo P. Lentino, M.D., under his sole and separate property capacity, with Cullen which are the basis of this lawsuit.
>
> [] Therefore, Marta A. Lentino could not conspire prior to that date, when Eduardo P. Lentino, M.D., had limited liability to Cullen [B]ank, as his indebtedness was limited to $150,000 as found by the Court of Appeals for the 14th District, Houston, Texas on 01-29-96. . . .
>
> [] Furthermore, Marta A. Lentino could not conspire to transfer assets of which she lacked ownership.

We are without a basis to conclude that the trial court was adequately apprized of the error asserted on appeal to have a reasonable opportunity to correct it. *Cf. Holland v. Hayden*, 901 S.W.2d 763, 767 (Tex. App.—Houston [14th Dist.] 1995, writ denied) (holding claims that punitive damages for gross negligence and actual damages under the DTPA could not be awarded for the same act by appellant were not preserved when motion for new trial contained several complaints that evidence was insufficient to support the jury's verdict, including the awards of DTPA damages and punitive damages, respectively, but no challenge on the grounds that both could not be included in the judgment).

We overrule issue 9 to the extent it challenges the sufficiency of the evidence to support a cause of action against Marta for conspiracy to fraudulently transfer property. We therefore have now overruled issue 9 in its entirety.

Trial Court's Failure to File Findings of Fact and Conclusions of Law

In issue 5, appellants contend the trial court erred by not entering findings of fact and conclusions of law after appellant timely requested them and timely filed a notice of past due findings of fact and conclusions of law. *See* TEX. R. CIV. P. 296; TEX. R. CIV. P. 297. If a party properly requests findings of facts and conclusions of law, the trial court has a mandatory duty to file them. *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 772 (Tex. 1989); *Puri v. Mansukhani*, 973 S.W.2d 701, 707 (Tex. App.—Houston [14th Dist.] 1998, no pet.). A court's failure to do to so is presumed harmful, unless the record affirmatively shows that the complaining party suffered no injury. *Cherne Indus.*, 763 S.W.2d at 772; *Puri*, 973 S.W.2d at 707. An appellant suffers injury if there are two or more possible grounds on which the trial court could have ruled, and the appellant is left to guess the basis for the trial court's ruling. *Zieba v. Martin*, 928 S.W.2d 782, 786 (Tex. App.—Houston [14 th Dist.] 1996, no writ). The proper remedy in that situation is to abate the appeal and direct the trial court to correct its error pursuant to Rule of Appellate Procedure 44.1. *See id.* (citing former Rule of Appellate Procedure 81(a)); *see also Cherne Indus.*, 763 S.W.2d at 773.

Despite the Bank's having pointed out that abatement is the proper remedy, appellants, in their reply brief, reiterate their demand for reversal and remand in relation to the error alleged in issue 5. We cannot grant relief appellants do not request. *Cf. Stevens v. Nat'l Educ. Ctrs., Inc.*, 11 S.W.3d 185, 186 (Tex. 2000) (denying petition for review when party did not request appropriate relief); *Molina v. Moore*, 33 S.W.3d 323, 327 (Tex. App.—Amarillo, 2000 no pet.) (stating, if appealing party chooses to seek only reversal and rendition of judgment, appellate court will not reverse and remand).

We overrule issue 5.

Because we overrule all of appellants' issues presented on appeal, we affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed February 14, 2002.
Panel consists of Justices Anderson, Hudson, and Frost.
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