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 (Cite as: 735 S.W.2d 474)

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Supreme Court of Texas.  
 Noma STEPHENS, Petitioner,  
 v.  
 NATIONAL MORTGAGE CORPORATION OF  
 AMERICA, Respondent.

No. C-6226.  
 July 15, 1987.  
 Rehearing Denied Sept. 23, 1987.

Mortgagor, who owned mobile home, brought action for conversion against mortgagee, as result of mortgagee's application of personal property portion of insurance check, paid to mortgagor for fire damage and assigned to mortgagee, to pay off installment contract on home. The 70th District Court, Ector County, Tyron D. Lewis, J., granted partial summary judgment on issue of conversion and entered judgment awarding actual and exemplary damages in favor of mortgagor and mortgagee appealed. The Court of Appeals, Osborn, C.J., [723 S.W.2d 759](#), reversed and mortgagor appealed. The Supreme Court, Robertson, J., held that genuine issue of material fact whether mortgagee agreed to return \$10,000 of insurance check proceeds to mortgagor precluded grant of summary judgment.

Reversed and remanded.

On motion for rehearing, Gonzalez, J., filed dissenting opinion.

West Headnotes

**Judgment 228**  **181(33)**

[228](#) Judgment

[228V](#) On Motion or Summary Proceeding

[228k181](#) Grounds for Summary Judgment

[228k181\(15\)](#) Particular Cases

[228k181\(33\)](#) k. Tort Cases in General.

[Most Cited Cases](#)

Genuine issue of material fact regarding whether

mortgagee who held mortgage on destroyed mobile home had agreed to accept check in amount of \$27,000 which had been issued jointly to mortgagor and mortgagee, and which represented settlement of claim for destruction of mobile home and mortgagor's personal property, and to return \$10,000 to mortgagor precluded grant of summary judgment to either mortgagor or mortgagee.

\***474** David Gilles, Austin, for petitioner.

Jack C. Spillman and Roy L. Stacy, Calhoun, Gump Spillman & Stacy, Dallas, for respondent.

ROBERTSON, Justice.

This case involves the propriety of a summary judgment. In 1981, Noma Stephens purchased a mobile home from a dealer, and as part of the purchase price, entered into an installment contract and security agreement. The dealer subsequently assigned the mortgage to National Mortgage Corporation, who remained the holder until the dates in question. Stephens and her sons lived in the mobile home until November 17, 1982, when a fire caused extensive damage to both the home and to Stephens' personal possessions. The home was rendered uninhabitable by the destruction so Stephens lived with relatives in the area, then eventually moved to Oklahoma.

The insurance company which insured the mobile home tendered a check for \$27,273 to Stephens. Of that sum, \$17,273 was for the loss of the home, while \$10,000 was for the loss of personal effects. The check was made out jointly to Stephens and National so Stephens phoned National to determine what should be done. Stephens testified that Ms. Woodbury, an employee of National, assured her that if she would endorse the check and forward it, National would reimburse her the \$10,000 which reflected her personal property recovery. National denied that any such statement was ever made by their employee. When Stephens sent the check she also enclosed a letter which referred to National's alleged agreement to return the proceeds relating to the personal loss and described the hardships the family was enduring.

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National received the check and applied \$25,079.65 to the sum left owing on the home, leaving a balance from the insurance check of only \$2,194.35 which National mailed to Stephens. Stephens thereafter brought suit for conversion for the proceeds of the insurance check representing her personal property which National used to pay off the mortgage. Finding no issue of fact, the trial court rendered a partial \*475 summary judgment against National for conversion and proceeded to a jury trial on several other issues. The jury found that National had acted willfully and maliciously in converting the \$7,805.65 and awarded \$125,000 in exemplary damages. The jury further found that National failed to transfer title to Stephens within a reasonable time which was a producing cause of the reduction of value of the mobile home in the amount of \$2,500.

The court of appeals reversed and rendered judgment that no conversion existed. [723 S.W.2d 759](#). That court held that the funds involved herein were not specifically designated chattels which were subject to being converted. Having concluded that the exemplary damages were not excessive, the court nevertheless overturned the exemplary damage award because no independent tort was left to support such a finding. We reverse and remand.

As liability in this case rests on a summary judgment, we must resolve all doubts in favor of the nonmovant and view all evidence in the light most favorable to it. [Nixon v. Mr. Property Management, 690 S.W.2d 546 \(Tex.1985\)](#). Stephens' unsworn motion for summary judgment incorporated by reference all of the pleadings, depositions and affidavits before the trial court. In these materials Stephens alleged that National Mortgage had deprived her of the rightful possession of \$10,000 by breaching oral agreements to return that sum. National Mortgage responded by presenting the sworn affidavit of its representative who spoke with Stephens. This representative swore "I never told Norma Stephens that National Mortgage would send her a check for \$10,000 when it received the check from the insurance company." Here the summary judgment proof in the record clearly presents a genuine issue of material fact as to whether there was any agreement for the return of \$10,000. Because we hold that the summary judgment in this case was improper, we need not dispose of the other issues reached by the court of appeals.

Therefore, we reverse the judgment of the court of appeals and remand the cause for trial on the merits.

ON MOTION FOR REHEARING GONZALEZ, Justice, dissenting.

For the reasons stated in the Court of Appeals opinion, I note my dissent. I would grant the motion for rehearing and affirm the judgment of the Court of Appeals.

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