

CAUSE NO. 2021-77947

BYRONICA CONLEY,

Plaintiff,

v.

**ALL ABOUT HOMES, LLC and
FIRST AMERICAN NATIONAL, LLC,**

Defendant.

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IN THE DISTRICT COURT

152ND JUDICIAL DISTRICT

HARRIS COUNTY, TEXAS

**DEFENDANT FIRST AMERICAN NATIONAL, LLC'S
MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, First American National, LLC (“First American” or “Defendant”), Defendant in the above-styled and numbered cause, and pursuant to the Texas Rules of Civil Procedure files this Traditional Motion for Summary Judgment in response to Plaintiff’s claims asserted in her Original Petition (“Petition”). In support thereof, Defendant First American would respectfully show the Court the following:

I. SUMMARY

1. This is a foreclosure matter. Byronica Conley (“Plaintiff”) obtained a first mortgage and a second mortgage purchase money loan on December 17, 2001 in order to purchase the Property made subject of this suit. Plaintiff experienced financial difficulties and stopped making her required monthly mortgage payments on the second loan. As a result of Plaintiff’s failure to cure her default, the Property was sold at foreclosure sale on July 6, 2021. Plaintiff thereafter filed this lawsuit in an effort to delay her eviction following the foreclosure sale of the Property. Plaintiff asserts claims against Defendants for: (1) breach of contract; (2) declaratory judgment; (3) wrongful foreclosure; and (4) attorney’s fees. Defendant First American asserts that each of

Plaintiff's claims fail and Defendant First American is entitled to summary judgment dismissing Plaintiff's claims with prejudice.

II. FACTS

2. Plaintiff Byronica Conley is the obligor on a certain Second Note and mortgagor of the Second Deed of Trust. Defendant First American is the mortgagee (as that term is defined under §51.0001(4) of the Texas Property Code) of a certain loan agreement encumbering the real property commonly known at 12310 Wilde Laurel Lane, Houston, Texas 77014 ("Property") and more particularly described as follows:

LOT 20, BLOCK 3, LAUREL OAKS, SECTION 1, ACCORDING TO MAP OR PLAT THEREOF RECORDED IN VOLUME 331, PAGE 2, OF THE MAP RECORDS OF HARRIS COUNTY, TEXAS.

3. On or about December 17, 2001, Plaintiff executed the Second Note ("Note") in the amount of \$22,900.00.¹ The Note obligated Plaintiff to make payments beginning February 1, 2002 and continuing each month thereafter until the Note matures. *Id.*

4. In conjunction with the Note, Plaintiff executed a (second) Purchase Money Deed of Trust ("Deed of Trust")² (the Note and Deed of Trust are collectively referred to as the "Loan Agreement") granting a security interest in the Property. First American is the beneficiary of the Deed of Trust by assignment.³

5. Plaintiff failed to make the timely required payments on the Loan Agreement.⁴ Failure to make timely payments constitutes a default under the terms of the Note and Deed of Trust. *Id.* According to Defendant First American's records, the loan is in default and due for the

¹ See Exhibit A and A-1

² See Exhibit A and A-2.

³ See Exhibit A and A-3.

⁴ See Exhibit A.

March 1, 2008 payment.⁵ Due to her failure to make payments, Plaintiff was served with notice of default and provided an opportunity to cure the default.⁶

6. Plaintiff failed to cure the default within the provided time. As a result of Plaintiff's failure to cure the default, counsel for First American's mortgage servicer sent Plaintiff Notice of Acceleration and Notice of [Substitute] Trustee's Sale.⁷ On July 6, 2021, Defendant All About Homes, LLC purchased the Property at the foreclosure sale.⁸ Plaintiff filed this lawsuit on November 30, 2021 to delay her removal from the Property.

III. SUMMARY JUDGMENT EVIDENCE

7. In support of this motion, Defendant First American relies on the following summary judgment evidence and unfiled discovery products which are incorporated herein by reference as if fully stated:

Exhibit A: Affidavit of Mortgage Servicer;

Exhibit A-1: Note;

Exhibit A-2: Deed of Trust;

Exhibit A-3: Affidavit of Assignment;

Exhibit A-4: Notice of Default;

Exhibit A-5: Notice of Acceleration and Notice of [Substitute] Trustee's Sale; and

Exhibit A-6: Substitute Trustee's Deed.

⁵ See Exhibit A.

⁶ See Exhibits A and A-4.

⁷ See Exhibits A and A-5.

⁸ See Exhibits A and A-6.

IV. ARGUMENTS AND AUTHORITIES

8. Defendant First American incorporates the preceding paragraphs as if fully stated herein. Defendant First American moves for summary judgment on the claims asserted by Plaintiff in her Petition.

A. SUMMARY JUDGMENT STANDARD

9. Traditional Motion for Summary Judgment. To succeed on a traditional motion for summary judgment movant must show there is no genuine issue of material fact and that it is entitled to summary judgment as a matter of law. See Tex. R. Civ. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844 (Tex. 2009); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). To meet this burden, the movant must conclusively prove all essential elements of its claim. *MMP, Ltd. v. Jones*, 710 S.W.2d 59 (Tex. 1986). A matter is conclusively established if reasonable people could not differ on the conclusion to be drawn from the evidence. *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005). If the movant establishes its right to summary judgment as a matter of law, the burden shifts to the non-movant to present evidence that raises a genuine issue of material fact. *M.D. Anderson Hosp. & Tumor, Inst. v. Willrich*, 28 S.W.3d 22 (Tex. 2000). Summary judgment should be granted if the moving party can show the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. See, *Black v. Victoria Lloyds Ins. Co.*, 797 S.W.2d 20, 23 (Tex. 1990).

10. The movant for a traditional motion for summary judgment has the burden to show that there are no genuine issues of material fact and that she is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). If the movant's motion for summary judgment facially establishes its right to judgment as a matter of law, then the burden shifts to the non-movant to raise fact issues

precluding summary judgment. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). In determining whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985).

11. No-Evidence Motion for Summary Judgment. To succeed on a no evidence motion, "A motion for summary judgment must be granted if, after adequate time for discovery, the moving party asserts that there is no evidence of one or more specified elements of a claim or defense on which the adverse party would have the burden of proof at trial and the respondent produces no summary judgment evidence raising a genuine issue of material fact on those elements." *LMB, Ltd. v. Moreno*, 201 S.W.3d 686, 688 (Tex. 2006); *see also*, Tex. R. Civ. P. 166a(i). The motion must state the elements as to which there is no evidence. Tex. R. Civ. P. 166a(i). Once a no evidence motion has been filed in accordance with rule 166a(i), the burden shifts to the nonmovant to bring forth evidence that raises a fact issue on the challenged evidence. *See Macias v. Fiesta Mart, Inc.*, 988 S.W.2d 316, 316–17 (Tex. App.—Houston [14th Dist.] 1999, no pet.). A no evidence motion is properly granted if the nonmovant fails to bring forth more than a scintilla of probative evidence to raise a genuine issue of material fact as to an essential element of the nonmovant's claim on which the nonmovant would have the burden of proof at trial. *See Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). If the evidence supporting a finding rises to a level that would enable reasonable, fair-minded persons to differ in their conclusions, then more than a scintilla of evidence exists. *See Havner*, 953 S.W.2d at 711. Less than a scintilla of evidence exists when the evidence is so weak as to do no more than create a mere surmise or suspicion of a fact, and the legal effect is that there is no evidence. *See Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983).

B. Plaintiff Cannot Maintain Her Breach of Contract Claim.

12. Plaintiff asserts that Defendant First American breached the terms of the Deed of Trust by improperly accelerating the loan. *See* Plaintiff's Petition. Under Texas Law, to prevail on her breach of contract claim, Plaintiff must plead and prove that: (1) Plaintiff and Defendant are parties to a valid and enforceable contract; (2) Plaintiff performed, tendered performance, or was excused from performing under the contract; (3) Defendant breached the contract; and (4) Defendant's breach caused Plaintiff injury. *Hovorka v. Cmty. Health Sys., Inc.*, 262 S.W.3d 503, 508-09 (Tex. App.—El Paso 2008, no pet.); *Doss v. Homecoming Financial Network, Inc.*, 210 S.W.3d 706, 713 (Tex. App.—Corpus Christi 2006, pet. denied).

13. In the mortgage context, a borrower who breaches her obligations under the note and deed of trust is precluded from asserting a breach of contract action. *See Sgroe v. Wells Fargo Bank, N.A.*, 941 F.Supp.2d. 731, 747 (E.D. Tex. 2013); *see also Marsh v. JPMorgan Chase Bank, N.A.*, 888 F.Supp. 805, 815 (W.D. Tex. 2012); *Germanson v. Midland Mortgage*, 2022 WL 1157903 (W.D. Tex., San Antonio Apr.19, 2022)(citing *Marsh* for finding that a plaintiff cannot state a viable cause of action for breach of contract in the absence of an allegation that plaintiff is current on the loan). Plaintiff has not established or even plead that she performed under the Loan Agreement. Accordingly, Plaintiff is not entitled to the relief sought because Plaintiff did not perform her obligations under the Note and Deed of Trust for failure to meet her payment obligations.

14. Further, even if she had asserted performance under the loan, Plaintiff's claim that she did not receive proper notices fails. Plaintiff seeks relief for breach of contract on the allegation that Defendant did not provide Plaintiff notice of default and opportunity to cure and, as such, the loan was improperly accelerated. *See* Plaintiff's Petition. Plaintiff's loan was properly accelerated

as all notices required by the Deed of Trust and Property Code were properly served upon Plaintiff as the attached evidence establishes and further detailed below.⁹

15. Notice of Default Properly Served. Plaintiff's Petition does not dispute her default, instead Plaintiff argues that Defendant First American failed to provide proper Notice of Default and therefore Defendant First American is liable for breach of the Deed of Trust. Plaintiff is wrong. Notice of default was sent to Plaintiff on April 7, 2021.¹⁰ Pursuant to Texas Property Code §51.002(e), service of the notice of default under Tex. Prop. Code 51.002 is complete when the notice is deposited in the United States mail. Delivery of the notice is not required, thus proper notice was given to Plaintiff when notice of default was deposited into the mail.¹¹ Moreover, any claim by Plaintiff that she did not *receive* notice of default does not, as a matter of law, support any claims because, under Texas law, “[t]here is no requirement that [a plaintiff actually] receive the notice.” *See Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 253-56 (5th Cir. 2013) (citing Tex. Prop. Code § 51.002(e)); *see also Rodriguez v. Ocwen Loan Servicing, LLC*, 306 F. App’x 854, 856 (5th Cir. 2009) (mere contention that foreclosure-related notice was not “received,” without more, “cannot state a claim for relief because Texas law only imposes a constructive-notice requirement.”); *Wheeler v. JPMorgan Chase Bank, Nat’l Ass’n*, No. 4:13–CV–364, 2013 WL 3965304, at *4 (S.D. Tex. Aug. 1, 2013) (granting motion to dismiss for failure to state a claim based on allegations that plaintiff did not receive notice of the foreclosure).

16. Plaintiff has failed, since April 7, 2021, to bring the loan current and the notice of default is effective. Absent a showing that the Note was reinstated by Plaintiff after the notices of default,¹² Defendant First American was not required to serve new notice of default. *Thompson*

⁹ See Exhibit A, A-4 and A-5.

¹⁰ See Exhibits A and A-4.

¹¹ *Id.*

¹² *Id.*

v. Chrysler First Bus. Credit Corp., 840 S.W.2d 25, 30-31 (Tex. App.—Dallas 1992, no writ); *Herrera v. Emmis Mortgage*, 1995 WL 65461 *4 (Tex. App.—San Antonio, Nov. 8, 1995); *Ogden v. Gibraltar Savings Association*, 640 S.W.2d 232 (Tex. 1982).

17. Defendant First American Effectively Accelerated the Loan. Effective acceleration requires two acts: (1) notice of intent to accelerate and (2) notice of acceleration. *Holy Cross Church of God in Christ*, 44 S.W.3d 562, 566 (Tex. 2001). “Both notices must be clear and unequivocal.” *Id.* Pursuant to the Texas Property Code, notice is deemed sufficient when notice of default and acceleration are sent by certified mail to the borrowers. Service of a notice under Tex. Prop. Code § 51.002 by certified mail is complete when the notice is deposited in the United States mail, postage prepaid and addressed to the debtor at the debtor's last known address. Tex. Prop. Code § 51.002(e).

18. As detailed above, notice of default was sent to Plaintiff on April 7, 2021. Thereafter, when Plaintiff failed to bring her loan current, Plaintiff was sent notice of acceleration and sale on June 9, 2021.¹³

19. Substitute Trustee Properly Appointed. Plaintiff also argues that the loan was not properly accelerated because the substitute trustee appointment was filed within twenty-one (21) days of the foreclosure sale. However, as Courts have held in Texas, under Texas law trustees may ratify and affirm actions taken prior to filing of appointment. *Calvillo v. Carrington Mortg. Svcs.*, 487 S.W.3d 626, 632 (Tex. App –El Paso, 2015). Specifically similar here, in analyzing the case law on ratification, the El Paso Court found that it has long been settled in Texas that when a substitute trustee signs and posts a notice prior to the substitute trustee’s appointment, *the subsequent post-appointment acts of the substitute trustee have the effect of ratifying and affirming*

¹³ See Exhibits A and A-5.

his pre-appointment acts. Id. (emp. added) summarizing *Chandler v. Guar. Mortgage Co.*, 89 S.W.2d 250, 254 (Tex. Civ. App. —San Antonio 1935, no writ).¹⁴ Herein, Defendant First American complied with the terms of the Note, Deed of Trust and Texas Property Code in sending notices and appointing the trustee and Plaintiff's claims simply fail as a matter of law.

20. Further, Plaintiff has suffered no damages and cannot establish same. Plaintiff has not been dispossessed of the Property and Plaintiff has not made payments on the Loan Agreement while continuing to reside in the property rent or mortgage free.¹⁵ Plaintiff cannot maintain her cause of action for breach of contract due to Defendant's performance under the Loan Agreement¹⁶ and Plaintiff's lack of damages.

21. Finally, Plaintiff has no evidence that she tendered performance under the contract or that she has damages resulting from any alleged breach by Defendant. Therefore, her claim fails for lack of evidence as well.

C. Declaratory Judgment Claim Fails.

22. Plaintiff's Petition additionally seeks declaratory judgment that the Appointment of Substitute Trustee and Notice of Substitute Trustee's Sale are defective, and therefore the subsequent non-judicial foreclosure sale should be set aside. Plaintiff incorrectly reasons that Defendant's alleged failure to properly accelerate robs it of standing to conduct foreclosure. *See* Plaintiff's Complaint. Plaintiff also seeks declaratory judgment based on the same alleged procedural defects that Defendant does not have the power of sale to conduct foreclosure.

¹⁴ *See also Wilson v. Armstrong*, 236 S.W. 755, 760 (Tex. Civ. App.—Beaumont, 1921); *Bernal-Bell v. Saxon Mortgage Servs., Inc.*, No. 04-10-00099-CV, 2010 WL 3250115, at *3 (Tex. App.—San Antonio Aug. 18, 2010, no pet.) (mem. op., not designated for publication) (actions before substitute trustee's appointment were ratified by her appointment, and there was no irregularity in the sale).

¹⁵ *See* Exhibits A and A-4.

¹⁶ *See* Exhibits A, A-1, A-2, A-4, and A-5.

23. “A declaratory judgment action is merely a vehicle that allows a party to obtain an ‘early adjudication of an actual controversy’ arising under other substantive law.” *Capital One v. Swisher-35, Ltd.*, 2008 WL 4274499, at *2 (N.D. Tex. Sept. 17, 2008) (quoting *Collin County, Tex. v. Homeowners Ass’n for Values Essential to Neighborhoods*, 915 F.2d 167, 170 (5th Cir. 1990)). “In a declaratory judgment action, the controversy between the parties relates to the ‘underlying cause of action of the defendant against the plaintiff.’” *Id.* Thus, the Declaratory Judgment Act can provide no relief to a plaintiff unless a justiciable controversy exists between the parties. *Kazmi v. BAC Home Loans Servicing, L.P.*, 2012 WL 629440, at *15 (E.D. Tex. Feb. 3, 2012) report and recommendation adopted, 2012 WL 629433 (E.D. Tex. Feb. 27, 2012), 517 Fed. Appx 228 (5th Cir. 2013) (per curiam) (unpublished).

24. Plaintiff’s claims for Declaratory Judgment are rooted in the allegation that Defendant failed to follow proper procedures in accelerating the loan. However, as detailed above in the prior section on breach, the summary judgment evidence conclusively establishes that notice of default and notice of acceleration were properly served on Plaintiff and that Defendant strictly complied with all applicable law.¹⁷ Given the foregoing, Plaintiff’s claim for declaratory judgment fail as a matter of law and Defendant First American is entitled to summary judgment dismissing these claims.

D. Defendant is Not Liable for Wrongful Foreclosure.

25. Plaintiff’s claim for wrongful foreclosure fails as a matter of law. To prevail on a wrongful foreclosure claim, Plaintiff must establish (1) a defect in the foreclosure sale proceedings, (2) a grossly inadequate sales price, and (3) a causal connection between the defect and the grossly inadequate sales price. See, *Sauceda v. GMAC Mortg. Corp.*, 268 S.W.3d 135, 139 (Tex. App.—

¹⁷ See Exhibits A, A-2, A-3, A-4, and A-5.

Corpus Christi 2008, no pet.); *Charter Nat'l Bank-Houston v. Stevens*, 781 S.W.2d 368, 371 (Tex. App.—Houston [14th Dist.] 1989, *writ denied*). A wrongful foreclosure claim requires evidence of an irregularity in the sale that causes the property to be sold at a grossly inadequate price. *See American Sav. & Loan Ass'n of Houston v. Musick*, 531 S.W.2d 581, 587 (Tex. 1975); *Biggers v. BAC Home Loans Servicing, LP*, 767 F. Supp. 2d 725, 729 (N.D. Tex. 2011).

26. First, Plaintiff is still in possession of the property and Texas law does not afford a claimant the right to assert a claim for wrongful foreclosure when he is still in possession of the property. *Baker v. Countrywide Home Loans, Inc.*, 2009 U.S. Dist. LEXIS 53704 (N.D. Tex. June 2009); *Peterson v. Black*, 980 S.W.2d 818, 823 (Tex. App.—San Antonio 1998, no pet.); *Wieler v. United Savings Assoc. of Tex.*, 887 S.W.2d 155, 159 n.2 (Tex. App.—Texarkana 1994, *writ denied*); *Port City State Bank*, 561 S.W.2d at 547.

27. Second, Plaintiff has not and cannot establish that there was defect in the foreclosure proceedings, as the substitute trustee was authorized to conduct the sale and all proper notices were sent.¹⁸ In addition, even if there was any defect in the proceedings (there was not), Plaintiff has no evidence to support a causal connection between an alleged defect and a grossly inadequate sales price. The foreclosure of the subject Property was the foreclosure of a second lien note and deed of trust, and the buyer at sale would take subject to any outstanding first lien. There is no evidence that the first lien was released and thus Plaintiff has no claim of an inadequate sales price.

28. Finally, the party seeking relief must prove the party suffered injury. *Port City State Bank v. Leyco Constr. Co.*, 561 S.W.2d 546, 547 (Tex. Civ. App.—Beaumont 1978, no writ). In a wrongful foreclosure suit, the measure of damages is the difference between the value of the property

¹⁸ *See* breach of contract and declaratory judgment sections above for detailed explanation on compliance with the Note, Deed of Trust, Texas Property Code and all applicable law. *See also* Exhibits A through A-6

in question at the date of the foreclosure and the remaining balance due on the indebtedness. *Farrell v. Hunt*, 714 S.W.2d 298, 299 (Tex. 1986). This measure of damages is based upon a tort theory of recovery to compensate the aggrieved for his lost possession of the property. *Peterson*, 980 S.W.2d at 823 ("Recovery [for wrongful foreclosure] is conditioned on the disturbance of the mortgagor's possession based on the theory that the mortgagee must have committed a wrong similar to the conversion of personal property"). Because recovery is premised upon one's lack of possession of real property, individuals never losing possession of the property cannot recover on a theory of wrongful foreclosure. *Id.*

29. In the instant case, Defendant All About Homes, LLC purchased the Property at a foreclosure sale. Nevertheless, Plaintiff refuses to vacate the Property and filed this lawsuit to prevent her eviction. *See Plaintiff's Petition*. Therefore, Plaintiff remains in possession of the Property. As such, Defendant First American is entitled to summary judgment dismissing Plaintiff's claim for wrongful foreclosure as a matter of law based upon the undisputed summary judgment evidence.

E. Plaintiff is Not Entitled to Fees.

30. To recover attorneys' fees, Plaintiff must prevail on a cause of action for which attorneys' fees are recoverable. *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997)). The record shows that Plaintiff cannot establish her claims for breach of contract, declaratory judgment, wrongful foreclosure, and injunctive relief. Accordingly, Plaintiff is not entitled to attorneys' fees.

V. CONCLUSION AND PRAYER

31. The summary judgment evidence conclusively establishes that there is no genuine issue of material fact, Plaintiff's claims fail as a matter of law and Defendant is entitled to a dismissal of all claims with prejudice.

WHEREFORE, PREMISES CONSIDERED, Defendant First American National, LLC prays that after consideration of this Motion for Summary Judgment, the Court grant summary judgment in its favor dismissing all of Plaintiff's claims with prejudice, and any and all other relief, in law and in equity, to which Defendant may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Texas Rules of Civil Procedure, I certify that a true and correct copy of the foregoing has been sent on this the 3rd day of May 2022 to all parties of record the method indicated below.

VIA E-SERVICE:

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