

2018-21642 / Court: 055

CAUSE NO. _____

SHANADOLYN JOHNSON AND
BRIAN A. BREWER - TRUSTEE

v.

WILMINGTON SAVINGS FUND
SOCIETY, FSB

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

_____ JUDICIAL DISTRICT

**PLAINTIFFS' ORIGINAL PETITION, APPLICATION FOR INJUNCTIVE RELIEF,
AND REQUEST FOR DISCLOSURES**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Shanadolyn Johnson and Brian A. Brewer - Trustee, Plaintiffs herein, filing this their Original Petition, Application for Injunctive Relief, and Request for Disclosures complaining of Wilmington Savings Fund Society, FSB, Defendant herein, and for causes of action would respectfully show the Court as follows:

DISCOVERY

1. Plaintiffs intend to conduct discovery under Texas Rules of Civil Procedure 190.3 (Level 2).

PARTIES

2. Shanadolyn Johnson as well as Brian A. Brewer - Trustee are individuals who reside and/or conduct business in Harris County, Texas and may be served with process on the undersigned legal counsel.

3. Wilmington Savings Fund Society, FSB is an entity formed under the laws of the State of Delaware which conducts business in Harris County, Texas and may be served with process as follows:

Wilmington Savings Fund Society, FSB
C/O Corporate Officer
500 Delaware Avenue
Wilmington, DE 19801

JURISDICTION AND VENUE

4. The Court has jurisdiction over Wilmington Savings Fund Society, FSB because the Defendant is an entity formed under the laws of the State of Delaware which conducts business in Harris County, Texas.

5. The Court has jurisdiction over the controversy because the damages are within the jurisdictional limits of the Court. Venue is mandatory in Harris County, Texas because the subject matter of this lawsuit involves real property which is located in Harris County, Texas. Further, all or a substantial part of the events or omissions giving rise to Plaintiffs' causes of action occurred in Harris County, Texas thus venue is proper under §15.002(a)(1) of the Texas Civil Practice and Remedies Code.

RELEVANT FACTS

6. The subject matter of this lawsuit is the real property and the improvements thereon located at 1938 Bevington Oaks Circle, Katy, TX 77450 (the "Property").

7. Shanadelyn Johnson ("Johnson") and her husband Luchas purchased the Property on or about September 28, 2007. During the process of purchasing the Property, Johnson executed a Note in the amount of \$200,450 as well as a Deed of Trust in which Countrywide Bank, FSB is listed as the Lender. A true and correct copy of the Deed of Trust is attached hereto as Exhibit "1" and incorporated herein for all purposes.

8. Upon information and belief, the Note and Deed of Trust were subsequently transferred to Wilmington Savings Fund Society, FSB ("Wilmington") for which Selene Finance LP ("Selene") acts as the loan servicer.

9. Johnson began to have financial difficulties during the term of the loan. Realizing that she may soon become in default on her mortgage payments, Johnson entered into debt restructuring negotiations with Selene in order to modify the terms and conditions of the loan.

10. Johnson was offered a loan modification review by Selene during February 2018. A Selene representative assured Johnson that if she gathered and submitted all of the required documents along with a loan modification application at least 37 days prior to a foreclosure sale, Wilmington would not post her Property for foreclosure sale until her application had been accepted or denied and she had been provided the opportunity to appeal that decision if needed. Additionally, the Selene representative stated that she was memorializing the conversation in her notes and that the agreement to defer any foreclosure proceedings pending loan modification review would be signed by her supervisor and mailed to Johnson - Johnson continue to await that agreement.

11. In reliance on the agreement, Johnson promptly gathered and submitted all the required documents along with a loan modification application on February 23, 2018. On February 26, 2018, Selene contacted Johnson and requested additional documents to supplement her loan modification application. Johnson promptly complied with Selene's request and submitted the documentation on March 5, 2018 – this was Johnson's first complete loan modification application. As such, Johnson ceased all other loss mitigation options.

12. On March 16, 2018, Johnson received correspondence from Selene denying her loan modification application explaining that she did not meet the minimum income requirements which, based on the minimum income requirement percentage she was provided by Selene, was inaccurate. Because Selene assured Johnson that she would be provided the opportunity to appeal a denial of her loan modification application (if needed) before any action would be taken to

foreclose on her Property, Johnson promptly submitted an appeal letter on March 23, 2018 stating that Selene failed to apply Johnson's supplemental income to her gross income. On March 27, 2018, Johnson spoke with a Selene representative, Maria Malaro, who informed Johnson that her appeal was not considered by Selene's upper management to be an "official" appeal because the documentation she submitted with her appeal did not prove a discrepancy in the amount calculated as her gross income. Johnson informed Ms. Malaro that she was receiving rent from a cousin who is living with her as well as child support payments – all of which were not included in her gross income. Ms. Malaro instructed Johnson to submit documentation proving the rental and child support payments and assured Johnson she would forward the documentation to the underwriting manager for approval. Johnson submitted the requested documentation via email on March 28, 2018. A true and correct copy of the related email is attached hereto as Exhibit "2" and incorporated herein for all purposes.

13. In the interim, Johnson was approached by Brian A. Brewer - Trustee of the Bevington Oaks Trust ("Brewer") on March 25, 2018 who informed Johnson that Selene posted her Property for foreclosure sale on April 3, 2018. This surprised Johnson because she had not received any correspondence from Selene informing her that Wilmington had initiated the foreclosure process. Apparently, Selene posted Johnson's Property for foreclosure sale on April 3, 2018 without sending her proper and timely notice of default, an opportunity to cure the default, notice of intent to accelerate the debt, notice of acceleration of debt, and notice of substitute trustee's sale prior to the foreclosure sale as required by the Texas Property Code – Selene violated Johnson's due process rights as well as the terms and conditions of the Deed of Trust. Moreover, posting the Property for foreclosure violated the agreement between Selene and Johnson whereby Wilmington would not foreclose on Johnson's Property until she was provided

a review of her complete loan modification application (submitted at least 37 days prior to the scheduled foreclosure) which includes a fair and equitable appeal. A true and correct copy of the Notice of Substitute Trustee's Sale, which was provided to Plaintiffs by the undersigned legal counsel, is attached hereto as Exhibit "3" and incorporated herein for all purposes. As of March 28, 2018, Johnson's loan modification application is still under review.

13. Brewer offered to help Johnson with her mortgage issues by paying off her mortgage loan, purchasing the Property from her, and renting the property back to her. To facilitate the process, Johnson executed a Special Warranty Deed whereby she transferred her ownership interest in the Property to Brewer subject to the existing mortgage with Wilmington. A true and correct copy of the related Special Warranty Deed is attached hereto as Exhibit "4" and incorporated herein for all purposes.

14. Accordingly, Plaintiffs allege that Wilmington is about to wrongfully sell their Property at a foreclosure sale on April 3, 2018 in violation of the agreements between the parties, the Texas Property Code, and RESPA.

CLAIMS

AGENCY & RESPONDEAT SUPERIOR

15. Wherever it is alleged that Defendant did anything, or failed to do anything, it is meant that such conduct was done by Defendant's employees, vice principals, agents, attorneys, and/or affiliated entities, in the normal or routine scope of their authority, or ratified by Defendant, or done with such apparent authority so as to cause Plaintiffs to reasonably rely that such conduct was within the scope of their authority. Plaintiffs did rely to Plaintiffs' detriment on Defendant's representatives being vested with authority for their conduct. Defendant is vicariously liable for the conduct of their employees, vice principals, agents, attorneys, affiliated entities, and

representatives of Defendant's affiliated entities by virtue of respondeat superior, apparent authority, and estoppel doctrines.

**FIRST CAUSE OF ACTION:
BREACH OF CONTRACT**

16. To the extent not inconsistent herewith, Shanadolyn Johnson ("Johnson") incorporates by reference the allegations made in paragraphs 1 through 15 as if set forth fully herein.

17. The actions committed by Wilmington Savings Fund Society, FSB ("Wilmington") constitute breach of contract because:

- A. There exists a valid, enforceable contract between Johnson and Wilmington;
- B. Johnson has standing to sue for breach of contract;
- C. Johnson performed, tendered performance, or was excused from performing her contractual obligations;
- D. Wilmington breached the contract; and
- E. The breach of contract by Wilmington caused Johnson's injury.

**SECOND CAUSE OF ACTION:
COMMON LAW FRAUD**

18. To the extent not inconsistent herewith, Shanadolyn Johnson ("Johnson") incorporates by reference the allegations made in paragraphs 1 through 15 as if set forth fully herein.

19. The actions committed by Wilmington Savings Fund Society, FSB ("Wilmington") constitute common law fraud because Selene made false and material representations to Johnson when informing her that Wilmington would take no action to foreclose

on her Property until her loan modification application was accepted or denied and she was afforded the required appeal opportunity (if needed) - Johnson's account was still being reviewed for a loan modification yet Wilmington posted her Property for foreclosure sale on April 3, 2018. Selene knew that the representations were false or made these representations recklessly, as a positive assertion, and without knowledge of its truth. In addition, Selene made these representations with the intent that Johnson act on them and Johnson relied on these representations which caused Johnson's injury.

**THIRD CAUSE OF ACTION:
PROMISSORY ESTOPPEL**

20. To the extent not inconsistent herewith, Shanadolyn Johnson ("Johnson") incorporates by reference the allegations made in paragraphs 1 through 15 as if set forth fully herein.

21. The actions committed by Wilmington Savings Fund Society, FSB ("Wilmington") constitute promissory estoppel because:

- A. Wilmington made a promise to Johnson;
- B. Johnson reasonably and substantially relied on the promise to her detriment;
- C. Johnson's reliance was foreseeable by Wilmington; and
- D. Injustice can be avoided only by enforcing Wilmington's promise.

**FOURTH CAUSE OF ACTION:
VIOLATION OF RESPA/REGULATION X**

22. To the extent not inconsistent herewith, Shanadolyn Johnson ("Johnson") incorporates by reference the allegations made in paragraphs 1 through 15 as if set forth fully herein.

23. The Real Estate Settlement Procedures Act (“RESPA”) dictates that “[a] loan servicer shall exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application.” 12 C.F.R. § 1024.41(b)(1). Additionally, a loan servicer must “[n]otify the borrower in writing within 5 days after receiving the loss mitigation application ... that the servicer has determined that the loss mitigation application is incomplete”. *Id.* § 1024.41(b)(2)(i)(B).

24. Further, RESPA prohibits a loan servicer from *making* the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process if the borrower submits a “complete loss mitigation application” during the 120-day pre-foreclosure review period or before the servicer has made the first notice of filing. *Id.* § 1024.41(f). Additionally, RESPA prohibits a loan servicer from *moving* for foreclosure if the borrower submits a “complete loss mitigation application” after the servicer has made the first notice or filing but more than 37 days before a foreclosure sale unless:

- (a) the servicer has sent the borrower a notice that the borrower is not eligible for any loss mitigation option and the appeal process of the pertinent section is not applicable;
- (b) the borrower has not requested an appeal within the applicable time period,
or
- (c) the borrower’s appeal has been denied. *Id.* § 1024.41(f) - (g).

25. As such, the actions committed by Wilmington Savings Fund Society, FSB (“Wilmington”) are a violation of RESPA because:

- A. Johnson was working with Wilmington pursuing loss mitigation options;
- C. Johnson submitted a complete loss mitigation application prior to Wilmington's first notice of filing;
- D. Alternatively, Johnson submitted a complete loss mitigation application more than 37 days prior to the foreclosure sale;
- E. Wilmington failed to provide formal notice of acceptance or denial of the loan modification application and the required 30-day appeal period (if needed) prior to the foreclosure sale;
- F. Wilmington completed the violation by posting Johnson's Property for foreclosure sale on April 3, 2018.

**FIFTH CAUSE OF ACTION:
NEGLIGENT MISREPRESENTATION**

29. To the extent not inconsistent herewith, Shanadelyn Johnson ("Johnson") incorporates by reference the allegations made in paragraphs 1 through 15 as if set forth fully herein.

30. The elements of a claim for negligent misrepresentation are: (1) the representation is made by a defendant in the course of its business, or in a transaction in which it has a pecuniary interest; (2) the defendant supplies "false information" for the guidance of others in their business; (3) the defendant does not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation. *Fed. Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991).

31. In the course of its business and in a transaction in which it had a pecuniary interest, Wilmington represented to Johnson that they were not going to foreclose on her loan without first accepting or denying the loan modification application and providing the required appeal period.

Johnson relied on these representations from Wilmington and acted accordingly. Wilmington then pursued foreclosure against Johnson. The information provided by Wilmington to Johnson was false. At best, Wilmington supplied this information without exercising reasonable care or competence in their communications with Johnson. Johnson relied on these representations which caused Johnson's injury.

**SIXTH CAUSE OF ACTION:
VIOLATION OF TEXAS PROPERTY CODE §5.065**

31. To the extent not inconsistent herewith, Shanadelyn Johnson ("Johnson") incorporates by reference the allegations made in paragraphs 1 through 15 as if set forth fully herein.

33. Pursuant to the provisions of the Texas Property Code, the holder of a note must ordinarily give notice to the maker of the holder's intent to accelerate the time for payment as well as notice of acceleration. If the mortgagee intends to accelerate the maturity of the debt, the notice must unequivocally inform the mortgagor of the mortgagee's intention. A proper notice of default must give the borrower notice that the alleged delinquency must be cured; otherwise, the loan will be accelerated and the property will go to foreclosure. Prior to a foreclosure action, the noteholder is also required to give the home owners clear and unequivocal acceleration notice. Effective acceleration requires two acts: notice of intent to accelerate and notice of acceleration.

34. The actions committed by Wilmington Savings Fund Society, FSB ("Wilmington") constitute violations of the Texas Property Code §5.065 because Wilmington never sent proper and timely notice of default, the opportunity to cure the default, notice of intent to accelerate the debt, notice of acceleration, and notice of substitute trustee's sale which are required in order for Wilmington to foreclose on its lien rights to the Property.

DAMAGES:
ACTUAL DAMAGES

35. Plaintiffs are entitled to recover their actual damages from Defendant for which Plaintiffs plead in an amount which does not exceed the jurisdictional limits of this Court.

NOMINAL DAMAGES

36. Plaintiffs are entitled to recover their nominal damages from Defendant associated with Plaintiffs' cause of action for Violation of RESPA/Regulation X, for which Plaintiffs plead in an amount which does not exceed the jurisdictional limits of this Court.

EXEMPLARY DAMAGES

37. Plaintiffs are entitled to recover their exemplary damages from Defendant for which Plaintiffs plead in an amount which does not exceed the jurisdictional limits of this Court.

ATTORNEYS' FEES

38. Plaintiffs were forced to employ the undersigned attorneys to represent them and have agreed to pay them reasonable attorneys' fees for their services. Plaintiffs are entitled to recover their reasonable attorneys' fees pursuant to Chapter 38 of the Texas Civil Practices & Remedies Code for which Plaintiffs plead in an amount which does not exceed the jurisdictional limits of this Court.

CONDITIONS PRECEDENT

39. All conditions precedent to the Plaintiffs' right to bring these causes of action have been performed, have occurred, or have been waived.

REQUEST FOR DISCLOSURES

40. Wilmington Savings Fund Society, FSB is hereby requested to disclose to Shanadolyn Johnson as well as Brian A. Brewer - Trustee, within 50 days of service of this request, the information and material described in Rule 194 of the Texas Rules of Civil Procedure.

APPLICATION FOR TEMPORARY RESTRAINING ORDER

41. To the extent not inconsistent herewith, Plaintiffs incorporate by reference the allegations made in paragraph 1 through paragraph 39 as if set forth fully herein.

42. Unless Defendant is enjoined, Plaintiffs will suffer probable harm which is imminent and irreparable since Defendant is about to sell Plaintiffs' Property at a foreclosure sale on April 3, 2018 thereby depriving Plaintiffs of ownership of the Property. Further, Defendant may take legal action to evict or otherwise cause Plaintiffs to be dispossessed of the Property. Plaintiffs have no adequate remedy at law because the subject matter is real property and any legal remedy of which Plaintiffs may avail themselves will not give them as complete, equal, adequate, and final a remedy as the injunctive relief sought in this Application.

43. Therefore, Plaintiffs request that this Court issue a Temporary Restraining Order and, thereafter, a Temporary Injunction, to restrain Defendant from selling the real property which is the subject matter of this lawsuit commonly known as 1938 Bevington Oaks Circle, Katy, TX 77450 as well as from taking any legal action to evict Plaintiffs and any other occupants from, or enforcing a writ of possession regarding, the aforementioned property.

44. Plaintiffs further requests that, upon trial on the merits, Defendant be permanently enjoined from the same acts listed in Paragraph 43 above.

45. Plaintiffs are likely to prevail on the merits of the lawsuit as described above.

46. The granting of the relief requested is not inconsistent with public policy

considerations.

BOND

47. Plaintiffs are willing to post a reasonable temporary restraining order bond and requests that the Court set such bond.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully request that:

- A. Defendant be cited to appear and answer herein;
- B. The Court conduct a hearing on Plaintiffs' Application for Injunctive Relief;
- C. A Temporary Restraining Order be issued restraining Defendant, its agents, employees, officers, directors, shareholders, and legal counsel, and those acting in concert or participation with them who receive actual notice of the Order, by personal service or otherwise, from selling the real property which is the subject matter of this lawsuit and is commonly known as 1938 Bevington Oaks Circle, Katy, TX 77450 as well as from taking any legal action to evict Plaintiffs and any other occupants from, or enforcing a writ of possession regarding, the aforementioned property;
- D. A Permanent Injunction be entered enjoining Defendant from the same acts listed in Paragraph C above; and

E. Upon final hearing or trial hereof, the Court order a judgment in favor of Shanadolyn Johnson as well as Brian A. Brewer - Trustee against Wilmington Savings Fund Society, FSB for their actual damages, nominal damages, exemplary damages, reasonable attorneys' fees, all costs of court, and such other and further relief, both general and special, at law or in equity, to which Plaintiffs may be entitled.

Respectfully submitted,

VILT AND ASSOCIATES, P.C.

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