

CAUSE NO. 2022-68773

**BRAXTON COLES
RENE COLES,**

Plaintiffs,

v.

**OCWEN MORTGAGE LOAN SERV
LLC AS TRUSTEE, ET AL.**

Defendants.

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IN THE DISTRICT COURT

269TH JUDICIAL DISTRICT

HARRIS COUNTY, TEXAS

**DEFENDANTS' ORIGINAL ANSWER AND SPECIAL
EXCEPTIONS TO PLAINTIFF'S ORIGINAL PETITION**

TO THE HONORABLE JUDGE OF SAID COURT AND ALL PARTIES:

COME NOW Defendants U.S. Bank National Association, as trustee for Structured Asset Investment Loan Trust Mortgage Pass-Through Certificates, Series 2005-5, PHH Mortgage Corporation¹, Mackie, Mackie Wolf Zientz & Mann ("MWZM"), and Ester Gonzales (collectively "Defendants"), pursuant to the Texas Rules of Civil Procedure, and file this Original Answer and Special Exceptions to Plaintiffs Description of Fraudulence ("Original Petition"), and respectfully show the Court as follows:

I. GENERAL DENIAL

Pursuant to Rule 92 of the Texas Rules of Civil Procedure, Defendants generally deny each and every allegation contained in Plaintiff's Original Petition, and any amendments or supplements thereto, and demand strict proof thereof.

¹ Plaintiff incorrectly named "PHH Mortgage Services" as the party-defendant in this case. PHH Mortgage Corporation is appearing herein in its correct capacity as stated above.

II. AFFIRMATIVE DEFENSES

In addition, Defendants plead the following defenses:

1. Plaintiffs' claims are barred by the applicable statute of limitations.
2. Plaintiffs have failed to state a claim upon which relief may be granted.
3. Plaintiffs' claims are barred, in whole or in part, by the doctrines of judicial estoppel, collateral estoppel, quasi estoppel, contractual estoppel, equitable estoppel and res judicata.
4. Some or all of Plaintiffs' claims are barred by failure of consideration.
5. Plaintiffs' claims are barred, in whole or in part, because Defendants' conduct was not the producing nor proximate cause of Plaintiffs' alleged losses, damages, and/or injuries.
6. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs are unable to prove their alleged losses, damages, and/or injuries in accordance with Texas law.
7. Some or all of Plaintiffs' claims are barred due to unclean hands.
8. Some or all of Plaintiffs' claims are barred due to the statute of limitations.
9. Some or all of Plaintiffs' claims are barred by their failure to perform their own contractual obligations.
10. Defendants are entitled to an offset of any damages awarded under the doctrine of recoupment and offset.
11. Defendants are equitably and contractually subrogated as to all of the claims contained in Plaintiffs' suit.
12. As foreclosure counsel, Defendants MWZM and Ester Gonzales are entitled to attorney immunity because all alleged actions were in furtherance of foreclosure.

III. SPECIAL EXCEPTIONS

Defendants' Special Exceptions should be sustained under TEX. R. CIV. P. 91 because of defects in form and substance. Plaintiff should be required to re-plead to cure the aforementioned defect regarding damages, or its claims should be dismissed. Defendants' Special Exceptions are as follows:

- a. Plaintiffs' Petition is deficient for failure to identify what causes of action pertain to which specific Defendants;
- b. Defendants specially except to the Petition because Plaintiffs failed to state a claim for fraudulent misrepresentation;
- c. Plaintiffs' Petition does not adequately allege or give fair notice of any claim;
- d. Plaintiffs' petition fails to allege damages or state a request for relief.

IV. ARGUMENT AND AUTHORITY

a. Plaintiffs' Petition is deficient for failure to identify what causes of action pertain to which specific Defendants

Defendants specially except to Plaintiffs' Petition because Plaintiffs have inadequately alleged what each of the Defendants allegedly did. From their pleading, Defendants have no way of determining which, if any, cause of action is alleged against which Defendant. TEX. R. CIV. P. 45(b)(stating that the action must be stated in concise language); TEX. R. CIV. P. 47(a)(stating that the action must be sufficient to give fair notice of claims); *see also Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000); *Subia v. Texas Dept. of Human Servs.*, 750 S.W.2d 827, 829 (Tex. App. – El Paso 1988, no writ). Plaintiffs should be required to re-plead to state specifically what each Defendant allegedly did and which cause of action, if any, is asserted against which Defendant.

b. Defendants specially except to the Petition because Plaintiffs failed to state a claim for fraudulent misrepresentation.

Plaintiffs' Petition contains no allegations which support fraudulent misrepresentation under Texas law. The Petition merely cites to Black Law's Dictionary and precedence under California state law. (*Petition* at ¶¶10-11 .) "To state a claim of fraud by misrepresentation under Texas law, a plaintiff must sufficiently allege (1) a misrepresentation that (2) the speaker knew to be false or made recklessly (3) with the intention to induce the plaintiff's reliance, followed by (4) actual and justifiable reliance (5) causing injury". *Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001.)

c. Plaintiff's Petition does not adequately allege or give fair notice of any claim.

If the plaintiff pleads a cause of action in general terms, the defendant may file special exceptions to require the plaintiff to plead specifically. *Subia v. Texas Dept. of Human Servs.*, 750 S.W.2d 827, 829 (Tex.App.—El Paso 1988, no writ.). Plaintiff has not pled any viable claims and as such under the "fair notice" standard of pleading Defendants cannot ascertain from the pleading the nature and basic issues of the case and controversy. TEX. R. CIV. P. 45(b) (stating that the action must be stated in concise language); TEX. R. CIV. P. 47(a) (stating that the action must be sufficient to give fair notice of claims); *see also Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000); *Subia v. Texas Dept. of Human Servs.*, 750 S.W.2d 827, 829 (Tex. App. – El Paso 1988, no writ).

d. Plaintiffs' petition fails to allege damages or state a request for relief.

Defendants specially except to the Plaintiffs' Original Petition because it fails to state a request for relief The pleading fails to apprise the defendants of the damages sought. Accordingly, Defendants request the court to order the plaintiffs to replead and state a request for relief and the damages sought.

V. PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendants pray that Plaintiffs (1) takes nothing on each and every claim (2) that Defendants be dismissed from this action with prejudice; (3) that Defendants' special exceptions be sustained; (4) that Defendants recover their attorneys' fees and costs of court; and (5) that Defendants be granted any other legal or equitable relief to which they may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on January 6, 2023, a true and correct copy of the foregoing document was delivered via regular U.S. mail to the party listed below:

Rene Coles
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Pro Se

/s/ Nicholas M. Frame
NICHOLAS M. FRAME

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