

CAUSE NO. 2022-78335

SUSAN PETERSON,
Plaintiff(s),

VS.

HUNTER-KELSEY II, LLC
Defendant(s).

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IN THE DISTRICT COURT

281ST JUDICIAL DISTRICT

HARRIS COUNTY, TEXAS

MOTION FOR SUMMARY JUDGMENT

COMES NOW, Hunter-Kelsey II, LLC, Defendant and Counter-Plaintiff (“Hunter-Kelsey”), and files this Motion for Summary Judgment, and respectfully shows the Court as follows:

I. INTRODUCTION AND SUMMARY OF ARGUMENT

(1) Hunter-Kelsey files this hybrid motion for summary judgment seeking dismissal with prejudice of all claims brought in this suit by Plaintiff, Susan Peterson (“Peterson”) against Hunter-Kelsey, and for judgment in favor of Hunter-Kelsey, granting all claims asserted against Peterson. Hunter-Kelsey is entitled to foreclose the real property that is the subject of this lawsuit (“the Subject Property”) to satisfy a debt owed by Peterson. Peterson took out a loan with Hunter-Kelsey collateralized by the Subject Property. She defaulted due to failure to make payments in conformity with the amortized payment schedule in the Promissory Note. The only reason she filed this suit was to unjustly delay a non-judicial foreclosure. She received an ex parte temporary restraining order (“TRO”) preventing a foreclosure scheduled to occur on December 6, 2022, but then never pursued a temporary injunction. Nonjudicial foreclosures can only occur on the first Tuesday of the month in Texas, with very little exception. Borrowers often abuse the judicial system by seeking TROs to stop foreclosures without just cause, only to

then dismiss their suit without prejudice. When the lender resets the sale for another first Tuesday of the month, at least 21 days of notice is required, providing malicious borrowers ample time to rinse and repeat the process of TROs and dismissals in perpetuity. In order to avoid potentially endless cycles of ex parte TROs and dismissals of suit without prejudice, Hunter-Kelsey took charge and lead in this case by countersuing for judicial foreclosure. After Hunter-Kelsey receives judgment in this case, Peterson will be barred by collateral estoppel and the doctrine of finality of judgments from using and abusing the judicial system as a tool to perpetually avoid her contractual obligations to Hunter-Kelsey.

II. MOTION FOR SUMMARY JUDGMENT STANDARD

(2) There are two types of summary judgment motions in Texas – traditional and no-evidence motions for summary judgment. Tex. R. Civ. P. 166a.(a), (b) and (i); *see Neely v. Wilson*, 418 S.W.3d 52, 59 (Tex. 2013). A no-evidence motion for summary judgment is proper where, after adequate time for discovery, the nonmoving party fails to establish its burden of proof relating to one or more elements of its claim through its pleadings or by other summary judgment evidence. *See Thomas v. Omar Invs.*, 156 S.W.3d 681, 684 (Tex. App.—Dallas 2005, no pet.). Alternatively, a traditional motion for summary judgment allows the movant to offer summary judgment evidence to controvert or supplement the evidence presented by the nonmovant. *United Blood Servs. v. Longoria*, 938 S.W.2d 29, 30 (Tex. 1997).

(3) A movant can bring a hybrid motion under both theories where, as here, the grounds are appropriate. *Young Ref. Corp. v. Pennzoil Co.*, 46 S.W.3d 380, 385 (Tex. App.—Houston [1st Dist.] 2001, pet. Denied); *Binur v. Jacobo*, 135 S.W.3d 646, 650-51 (Tex. 2004). A court should grant a summary judgment motion when there is no genuine issue of material fact,

only issue(s) of law determined in favor of the movant. *G&H Towing Co v. Magee*, 347 S.W.3d 293, 296-97 (Tex. 2011). The movant need not disprove all elements of the cause of action it seeks to dispel, rather, it only must disprove one element of each cause of action against the movant. *See Stanfield v. Neubaum*, 494 S.W.3d 90, 96 (Tex. 2016). Each cause of action that lacks sufficient proof for at least one of its elements must be removed. *Id.* When a movant submits a hybrid summary judgment motion, the court must consider the no-evidence motion first. *Community Health Sys. Prof'l Servs. v. Hanson*, 525 S.W.3d 671, 680 (Tex. 2017).

III. BACKGROUND OF RELEVANT FACTS

(4) Peterson took out a loan for \$117,000.00 with Hunter-Kelsey II, LLC, evidenced by a Promissory Note dated July 25, 2016. *See Exhibit 1.A.*, attached hereto and incorporated herein. She pledged the Subject Property as collateral for the loan, described as:

Lot 38, Block 4, Replat and Extension of Westmont, according to the map or plat thereof, recorded in Volume 77, Page 1, Map Records, Harris County, Texas; more commonly known as 9302 Highmeadow Drive, Houston, Texas 77024.

(“the Subject Property”). Peterson executed a Deed of Trust of even date evidencing the the aforesaid security for the loan, recorded as Document No. RP-2016-332736 in the Official Public Records of Harris County, Texas. *See Exhibit 1.B.*, attached hereto and incorporated herein.

(5) Peterson was obligated to repay the debt in monthly installments of \$1,446.43 on the 25th day of each month, beginning August 25, 2016. *See Exhibit 1.A.*

(6) The Promissory Note had a maturity date of July 25, 2021, at which time the remainder of the loan became due and owing in full. *Id.*

(7) Peterson failed to pay the loan off by the maturity date, and, on December 3, 2021, Hunter-Kelsey II, LLC issued her a Notice of Default Due to Maturity. *See Exhibit 1.C.*, attached hereto and incorporated herein. This notice stated that if Peterson did not pay in full the amount due at the time of \$133,365.52, by December 24, 2021, that Hunter-Kelsey II, LLC would take the steps necessary to foreclose its lien on the Subject Property. *Id.* Hunter-Kelsey II, LLC sent this notice via First Class and Certified Mail. *Id.* Hunter-Kelsey II, LLC did not receive either mailing back, returned to sender. *Id.* Further, according to an official report published by the United States Postal Service from its website, this notice was delivered. *Id.*

(8) Peterson failed to pay the loan off by December 24, 2021, and Hunter-Kelsey II, LLC set the Subject Property for foreclosure sale on February 1, 2022. *See Exhibit 1.D.*, attached hereto and incorporated herein. Further, according to an official report published by the United States Postal Service from its website, the notice of sale was delivered to Peterson. Hunter-Kelsey II, LLC sent this notice via First Class and Certified Mail. *Id.* Hunter-Kelsey II, LLC did not receive either mailing back, returned to sender. *Id.*

(9) Hunter-Kelsey II, LLC agreed to hold off on the sale to give Peterson time to sell the Subject Property voluntarily, to generate proceeds to pay off the debt. *See Exhibit 1.E.*, attached hereto and incorporated herein. Peterson signed a payment plan agreement with Hunter-Kelsey II, LLC on January 12, 2022. *Id.* This agreement obligated Peterson to make a payment of \$7,500.00 before January 25, 2022, then monthly payments of \$2,500.00 on the 25th day of each subsequent month, beginning in February, 2022, **to end on August 2, 2022.** *Id.* Peterson fraudulently and falsely suggests in her Petition that this agreement was indefinite such that as long as she made monthly payments of \$2,500.00, Hunter-Kelsey II, LLC would not foreclose. *See Plaintiff's Petition at Paragraph 10.* That could not be farther from the truth. *See Exhibit 1.E.*

The agreement not only had an end date of August 2, 2022, but, in addition, **explicitly stated that the Subject Property would be set for foreclosed on August 2, 2022.** *Id.* The hold off period contemplated, in exchange for the payments, ended August 2, 2022. Peterson has received more time than she bargained for. *Id.* This agreement did not result in reinstatement of the account by any means. *Id.* Peterson misuses the word and concept of ‘reinstatement’. *See id.* Her debt had matured already, naturally and organically, on July 25, 2021. *See Exhibit 1.A.* There was no amortized payment schedule left to reinstate. *Id.* Rather, the agreement was to hold off on the foreclosure for a short time in exchange for payments. *See Exhibit 1.E.*

(10) As part of the consideration for the agreement, Peterson acknowledged and admitted for evidentiary purpose that the aforesaid Promissory Note and Deed of Trust were valid and enforceable. *Id.*

(11) **Peterson failed to make payments in accord with the hold off agreement.** *See Exhibit 1.F.*, attached hereto and incorporated herein. Per the terms of the agreement, she should have made **1)** the original \$7,500.00 payment by January 25, 2022, **2)** a \$2,500.00 payment by February 25, 2022, **3)** a \$2,500.00 payment by March 25, 2022, **4)** a \$2,500.00 payment by April 25, 2022, **5)** a \$2,500.00 payment by May 25, 2022, and **6)** a \$2,500.00 payment by June 25, 2022. *See Exhibit 1.E.* The remainder of the debt was agreed to be paid before July 10, 2022. *Id.*

(12) Peterson made the initial payment of \$7,500.00 to stop the sale, one payment of \$2,500.00 on February 25, 2022, then failed to make any other payments. *See Exhibit 1.F.*

(13) Peterson failed to make her \$2,500.00 payment before March 25, 2022. *Id.* She failed to make her \$2,500.00 payment before April 25, 2022. *Id.*

(14) On May 10, 2022, Hunter-Kelsey II, LLC issued Peterson a second Notice of Default Due to Maturity, giving her until May 31, 2022 to pay off the total amount due at that

time of \$133,151.12, and notifying her that Hunter-Kelsey II, LLC would otherwise foreclose its lien. *See Exhibit 1.G.*, attached hereto and incorporated herein. Hunter-Kelsey II, LLC sent this notice via First Class and Certified Mail. *Id.* Hunter-Kelsey II, LLC did not receive either mailing back, returned to sender. *Id.* Further, according to an official report published by the United States Postal Service from its website, this notice was delivered. *Id.*

(15) Despite Peterson's failure to make payments per the payment plan agreement, Hunter-Kelsey II, LLC performed, in full, and then some, by holding off on foreclosing long after the bargained for August 2, 2022 end date. *See Exhibit 1.H.*, attached hereto and incorporated herein. Peterson has absolutely nothing to complain about. She got significantly more time than she bargained for, even though she failed to make the payments she promised to, disregarding her end of the bargain. *Id.*

(16) Hunter-Kelsey II, LLC rescheduled the foreclosure sale for December 6, 2022. *Id.* Hunter-Kelsey II, LLC issued notice of sale to Peterson this time at two addresses. *Id.* Hunter-Kelsey II, LLC also sent each copy of the notice via First Class and Certified Mail. *Id.* In total, Hunter-Kelsey II, LLC sent Peterson four (4) copies of this notice. *Id.* Hunter-Kelsey II, LLC did not receive any of these notices back, returned to sender. *Id.* Further, according to an official reports published by the United States Postal Service from its website, the copies of the notice sent via Certified Mail were delivered. *Id.*

(17) This Court then issued an ex parte TRO on December 2, 2022, resulting in cancelation of the December 6, 2022 foreclosure sale. Peterson now attempts to use Hunter-Kelsey's good faith and willingness to work with her against Hunter-Kelsey. *See* Peterson's Petition. By filing this suit, Peterson attempts to seize an olive branch generously extended to her by Hunter-Kelsey and wield it as a sword in a sword fight. Hunter-Kelsey is no longer interested

in trying to help her under these circumstances and simply seeks judicial order honoring its contractual right to foreclose its lien to satisfy Peterson's debt.

IV. NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT

(18) The legal basis for a no-evidence summary judgment motion is found in Tex. R. Civ. P. 166a(i), which states:

After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

Id. Said rule permits the disposal of claims that are not genuinely in controversy. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 n.5 (Tex. 1979).

A. GROUNDS FOR NO-EVIDENCE SUMMARY JUDGMENT

(19) Peterson claims 1) Breach of Contract, 2) Common Law Fraud, and 3) Violation of the Texas Debt Collection Act. Hunter-Kelsey moves for no-evidence summary judgment on all three (3) counts pursuant to Tex. R. Civ. P. 166a(i).

i) CAUSE OF ACTION 1: BREACH OF CONTRACT

(20) To prevail in a suit for breach of contract, a plaintiff must show: (1) that a valid contract exists; (2) that plaintiff performed or tendered performance; (3) that defendant breached; and (4) the breach cause plaintiff injury. *Prime Prods., Inc. v. S.S.I. Plastics, Inc.*, 97 S.W.3d 631, 636 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). There is no evidence to support

elements (2), (3) or (4) for Peterson's claim to breach of contract. Her claim is based on the aforementioned payment plan agreement attached as Exhibit 1.E. First, she failed to perform on that agreement by failing to make payments as promised, so there is no evidence to establish element (2). Further, there is no evidence of element (3), that Hunter-Kelsey breached the agreement. Hunter-Kelsey was obligated to hold off on foreclosing under the agreement until August 2, 2022. *Id.* There is no evidence that Hunter-Kelsey attempted to foreclose before then. Finally, there is no evidence of element (4). Because Hunter-Kelsey did not breach the agreement, there was no injury caused by any breach.

ii) CAUSE OF ACTION 2: COMMON LAW FRAUD

(21) The elements of Common Law Fraud are: (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 758 (Tex. 2001)(citing *Formosa Plastics Corp. v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998)).

(22) There is no evidence to support elements (2), (3), (4), (5) or (6) to support Peterson's claim for common law fraud. First, regarding element (2), there is no evidence that Hunter-Kelsey made any false representations to Peterson. Hunter-Kelsey honored its word by holding off on foreclosing until well after the foreclosure date contemplated in the payment plan agreement of August 2, 2022, even though Peterson failed to perform her end of the bargain. *See* Exhibits 1.E and 1.H. Second, regarding element (3), because there was no false representation,

Hunter-Kelsey did not know of a false representation. Third, regarding element (4), because there was no false representation, there was no intent that anyone act on a false representation. Fourth, regarding element (5), because there was no false information, nobody acted in reliance on a false representation. Finally, regarding element (6), because there was no false representation, no injury was suffered because of a false representation. There is no evidence of any of the aforesaid elements.

iii) CAUSE OF ACTION 3: VIOLATION OF THE TEXAS DEBT COLLECTION ACT

(23) The Texas Debt Collection Act does not apply to the debt in this case because this is debt, as a matter of law, does not qualify as consumer debt. Prerequisites to claims under the Texas Debt Collection Act are (1) that the debtor qualifies as a “Consumer”, (2) that the debt is “Consumer debt”, (3) that the lender qualifies as a “Creditor”, (4) that the activity qualifies as “Debt collection”, and (5) there is a “Debt collector” involved, as those terms are defined in Tex. Fin Code Secs. 392.001, as follows:

(1) "Consumer" means an individual who has a consumer debt.

(2) "Consumer debt" means an obligation, or an alleged obligation, primarily for personal, family, or household purposes and arising from a transaction or alleged transaction.

(3) "Creditor" means a party, other than a consumer, to a transaction or alleged transaction involving one or more consumers.

[...]

(5) "Debt collection" means an action, conduct, or practice in collecting, or in soliciting for collection, consumer debts that are due or alleged to be due a creditor.

(6) "Debt collector" means a person who directly or indirectly engages in debt collection and includes a person who sells or offers to sell forms represented to

be a collection system, device, or scheme intended to be used to collect consumer debts.

Every single one of those definitions is premised on there being “consumer debt”, and, therefore, without consumer debt, none of them apply.

(24) Commercial debt is not consumer debt under the Texas Debt Collection Act. *Dick v. Colorado Hous. Enterprises, L.L.C.*, 780 Fed. Appx. 121, 126 (5th Cir. 2019)(citing *First Gibraltar Bank, FSB v. Smith*, 62 F.3d 133, 135-36 (5th Cir. 1995)). Using loan funds for commercial purposes, like opening a restaurant, qualify the debt as commercial debt and disqualify the debt as consumer debt. *Id.*

(25) Peterson signed a “Business Purposes Affidavit” during the closing of this loan, attached hereto as **Exhibit 2.A**. In it she swore under oath, at paragraph 3., “None of the proceeds from the Loan will be used for personal, family or household uses or purposes. The purposes for which I intend to use the proceeds from the Loan are as follows: The funds will be used to upgrade the kitchen and I will not rent to family.” *Id.* Peterson owned the property as a rental, for commercial purposes, and pledged not to rent it to her family during the life of the loan, and not to use any of the money for personal, family or household uses or purposes. *Id.*

(26) This debt categorically qualifies as commercial, and not consumer debt, and, therefore, the Texas Debt Collection Act does not apply.

(27) Further, even if the Texas Debt Collection Act did apply for arguments sake, nothing nefarious happened during the foreclosure process that would entitle Peterson to any awards under that act. In her Petition, Peterson cited specifically to Tex. Fin Code Secs. 392.304(a)(8), (14) and (19), which states:

- (a) Except as otherwise provided by this section, in debt collection or obtaining information concerning a consumer, a debt collector may not use a fraudulent, deceptive, or misleading representation that employs the following practices:

[...]

(8) misrepresenting the character, extent, or amount of a consumer debt, or misrepresenting the consumer debt's status in a judicial or governmental proceeding;

[...]

(14) representing falsely the status or nature of the services rendered by the debt collector or the debt collector's business;

[...]

(19) using any other false representation or deceptive means to collect a debt or obtain information concerning a consumer.

(28) There is no evidence of any misrepresentation by Hunter-Kelsey of the character, extent or amount of the debt Peterson owes, or any misrepresentation of the debts status in any proceedings, whatsoever. The amounts states in all of the documents in Exhibit 1 are true and accurate, and there is no evidence to the contrary. Therefore, there is no evidence of Tex. Fin Code Sec. 392.304(a)(8).

(29) There is no evidence of any false representations of the status or nature of the services rendered by the debt collector or the debt collector's business. There is no evidence of any false representations or deceptive means to collect a debt or obtain information concerning a consumer, of any kind, whatsoever. Therefore, there is no evidence of Tex. Fin Code Secs. 392.304(a)(14) or (19).

V. MOTION FOR TRADITIONAL SUMMARY JUDGMENT

(30) The second type of summary judgment motion is traditional summary judgment, which relies on affirmative evidence presented by the movant in support of the motion. *see Neely*, 418 S.W.3d at 59. However, the same overall principle applies – cases that have no genuine issues of material fact, only issues of law, should be disposed of by the Court through summary judgment. *G&H Towing Co*, 347 S.W.3d at 296-97.

(31) Under Tex. R. Civ. P. 166a.(c), a traditional summary judgment is proper when the movant's evidence, as a matter of law, either proves all the elements of the movant's claim or disproves the facts of at least one element of the non-movant's claim or defense. *See, e.g., Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471-72 (Tex. 1991). Rule 166a. provides a means of summarily dismissing a case when it involves a question of law and no genuine issue as to any material fact exists. *See id.* Thus, the party moving for traditional summary judgment bears the burden to show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 215-16 (Tex. 2003) (citing *Haase v. Glazner*, 62 S.W.3d 795, 797 (Tex. 2001)); *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999). 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 satisfies its burden, the burden shifts to the non-movant to preclude summary judgment by presenting evidence that raises a genuine issue of material fact. *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 907 (Tex. 1982); *Affordable Motor Co. v. LNA, LLC*, 351 S.W.3d 515, 519 (Tex. App.—Dallas, 2011, pet denied).

A. SUMMARY JUDGMENT EVIDENCE

(32) To support the facts in this motion, Hunter-Kelsey offers the following summary-judgment evidence attached to this motion and incorporates the evidence into this motion by reference:

- | | |
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| Exhibit 1. | Hunter-Kelsey's First Business Records Affidavit. |
| Exhibit 2. | Hunter-Kelsey's Second Business Records Affidavit |
| Exhibit 3. | Affidavit of Dylan Schultz in Support of Attorney's Fees |

Exhibit 4. Peterson's Petition

Exhibit 5. Affidavit of Dylan Schultz Authenticating Exhibits

All aforesaid Exhibits are referenced and incorporated herein, above, as if set forth at length. Hunter-Kelsey hereby states its intent to use all said exhibits as summary judgment proof in accordance with Tex. R. Civ. P. 166a.(d).

B. NO GENUINE ISSUE OF MATERIAL FACT AS TO PETERSON'S CLAIMS AGAINST HUNTER-KELSEY OF TEXAS, LLC

(33) Paragraphs 19-29, above, are incorporated here as if set forth at length. In addition to there being no evidence of any of Peterson's claims, Hunter-Kelsey provides summary judgment evidence that conclusively establishes that it did nothing by follow the law regarding foreclosure of its liens. Hunter-Kelsey is entitled to foreclose it liens. Peterson called into question the notice requirements in her Petition. Hunter-Kelsey complied with the notice requirements by depositing all notices into the U.S. Mail, by certified mail, and even has proof of receipt of each notice, even though that is not required. *See* Exhibits 1.C, 1.G., and 1.H. In this instance, there is uncontroverted evidence that notices were properly given to Peterson. *See id.* Therefore, there is no actual issue in this case as to sufficiency of notice. It is a red herring, completely without any merit.

(34) Peterson admits in her Petition that she is indebted to Hunter-Kelsey II, LLC. *See* Plaintiff's Petition, Paragraphs 8 through 11.

(35) As the basis for her claims, Peterson stated that she never received notice of default, notice of acceleration or notice of sale, and that, essentially, she performed by tendering payments pursuant to the Promissory Note. *See* Peterson's Petition at Paragraph 13. All of these things are patently false.

(36) The notice of default was properly issued, twice, with proof not only that Hunter-Kelsey II, LLC deposited them in the mail on December 3, 2021 and May 10, 2022, but, also, that Susan Peterson actually received them both times. *See* Exhibits 1.C. and 1.G. The proof is in the form of reports published by the United States Postal Service on its official government owned and operated website. *Id.*

(37) There was no need to accelerate the maturity of the debt, because the Promissory Note had already matured naturally, on July 25, 2021, before any notice of default was given. *See* Exhibit 1.A. The maturity date of the debt was never accelerated. *Id.*

(38) The notice of sale for the December 6, 2022, sale was properly issued with proof not only that Hunter-Kelsey deposited this notice in the mail on November 1, 2022, but, also, that Susan Peterson actually received them both times. *See* Exhibits 1.C. and 1.G. The proof is in the form of reports published by the United States Postal Service on its official government owned and operated website. *Id.*

(39) Payment history on this loan is documented in Exhibit 1.F. It not only shows that Susan Peterson failed to pay off the debt by the maturity date, but, further, that she failed to make payments in conformity with the aforesaid payment plan agreement. *Id.* Her suggestion that she performed is without any merit. *Id.* It is clear that she has failed to make timely payments per the Promissory Note and the payment plan agreement, and that Hunter-Kelsey is entitled to foreclose its lien.

(40) Peterson may try to argue that despite the aforesaid uncontroverted proof of deposit into the mail by published government reports relating to each aforesaid notice, that somehow, she never received them. Whether she received the notices is immaterial. Tex. P. Code Sec. 51.002(e) governs both notices of default and notices of sale. It says, “Service of a notice

under this section 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.” It does not require that a lender prove actual delivery of notice to a debtor. *See Krueger v. Swann*, 604 S.W.2d 454, 457 (Tex.Civ.App.—Tyler 1980, writ ref’d n.r.e.).

(41) The general purpose of the notice requirements is to “provide only a minimum level of protection for the debtor, and it provides for only constructive notice of foreclosure.” *Id.* Actual receipt of the notice is irrelevant and immaterial. *King*, 2008 Tex. App. LEXIS 5274, at *6 (Tex. App.—Corpus Christi July 17, 2008, no pet.) (mem. op.). Deposit of notice into the United States Certified Mail satisfies a lender’s obligation to provide constructive notice to the debtor. *See Kressenberg v. Nationstar HECM Acquisition Trust 2015-2*, No. 02-18-00261-CV, 2020 Tex. App. LEXIS 3013, at *9 (Tex. App.—Fort Worth Apr. 9, 2020, no pet.) (mem. op.); *see also Ebrahimi v. Caliber Home Loans, Inc.*, No. 05-18-00456-CV, 2019 Tex. App. LEXIS 3033, 2019 WL 1615356, at *7 (Tex. App.—Dallas Apr. 15, 2019, pet. denied) (mem. op.) (stating that Section 51.002(e) “makes it clear that service is completed upon deposit in the mail, not actual receipt; there is no requirement that a plaintiff physically receive the notice in order for service to be valid and effective”). A debtor must show that a lender did not send notice by certified mail to the borrower’s last known address for there to be a defect in the notice requirement. *Onwuteaka v. Cohen*, 846 S.W.2d 889, 892 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

(42) Proof as to whether the notice was deposited in the mail is material and germane to whether foreclosure is proper. *Id.* In this instance, there is uncontroverted evidence that notices were properly given to Peterson. *See Exhibit 1.*

(43) A plea for more time is not a defense to foreclosure in Texas. *Lincoln Nat’l Life*

Ins. Co. v. Freudenstein, 87 S.W.2d 810 (Tex. App.—San Antonio 1935). A borrower is not entitled to stop a foreclosure simply to save equity, create time to sell or to find a new loan. *Id.* at 811 . Such excuses by a debtor do not abridge a lender’s contractual right to foreclose. *Id.*

(44) Because there is no evidence of any legal issue with the notices issued by Hunter-Kelsey to Peterson, and because all of the summary judgment evidence establishes that there is no genuine issue of material fact that they were properly issued, the Court must grant Hunter-Kelsey’s Motion for Summary Judgment.

C. NO GENUINE ISSUE OF MATERIAL FACT AS TO HUNTER-KELSEY OF TEXAS, LLC’S CLAIMS AGAINST PETERSON

(45) The statements and arguments in paragraphs 33 – 44, above, are incorporated here as if set forth at length. They establish that there are no genuine issues of material fact, and, therefore, Hunter-Kelsey is entitled to summary judgment as a matter of law as to its claims to: 1) Breach of Contract; 2) Foreclosure; 3) Declaratory Judgment, Attorney’s Fees, Costs of Court and Judgment Interest.

i) COUNTERCLAIM 1 - BREACH OF CONTRACT

(46) The elements of breach of contract are set forth in paragraph 20, above, and are incorporated here as if set forth at length. Hunter-Kelsey and Peterson entered a valid contract. *See* Exhibit 1. Hunter-Kelsey tendered performance by advancing Peterson money. *Id.* Peterson breached her contractual obligation by failing to make timely payments to repay the debts. *Id.* Hunter-Kelsey sustained money damages because of Peterson’s breach; Hunter-Kelsey’s damages are quantified in the payoff statement attached as **Exhibit 2.B**. Hunter-Kelsey does not

have use of the money Peterson was supposed to have repaid by now. Hunter-Kelsey is entitled to repayment of reasonable attorney's fees pursuant to the "Attorney Charges" clause on the second and third pages of each of the Promissory Notes. *See* Exhibit 1.A. Hunter-Kelsey's reasonable and necessary attorney's fees are evidenced by Exhibit 3. There are no genuine issues of material fact as to any of the elements of Breach of Contract in favor of Hunter-Kelsey, and, therefore, its motion for summary judgment regarding same should be granted.

ii) COUNTERCLAIM 2 – FORECLOSURE

(47) Paragraph (46) above, is incorporated here as if set forth at length. Peterson's breach of contract triggered Hunter-Kelsey's right to foreclose. Rather than participate in potentially endless cycles of ex parte TRO litigation, each time Hunter-Kelsey schedules the Subject Property for a nonjudicial foreclosure sale, Hunter-Kelsey seeks affirmative relief by a final and appealable judgment for foreclosure, isolated from collateral attack in another district court, that it is entitled to, in accord with the Deed of Trust. *See* Exhibit 1.B. Tex. R. Civ. P. 309 allows for judicial foreclosure of a lien otherwise entitled to nonjudicial foreclosure. Hunter-Kelsey is also entitled to a personal judgment against Peterson for repayment of the debt, and post judgment interest at a rate of 17.989%. *See* Exhibit 1.A., Page 1, establishing the Default Interest Rate; *see also* Chapter 51 of the Texas Property Code; *see also* Tex. Fin. Code Sec. 304.002.

iii) COUNTERCLAIM 3 – DECLARATORY JUDGEMENT, ATTORNEY’S FEES, COSTS OF COURT AND JUDGMENT INTEREST.

(48) The primary basis for the TRO in this case, that deprived Hunter-Kelsey of exercising its right to foreclose, was Peterson’s patently false assertion that Hunter-Kelsey did not comply with the notice requirements in the Texas Property Code. The allegations were not only without merit but were with blatant disregard for the truth and the law. The notices of default and notice of sale are attached as Exhibits 1.C., 1.G. and 1.H. Peterson called into question the veracity and legitimacy of said notices by filing this suit, and, therefore, Hunter-Kelsey is entitled to a determination by court order of the validity of said notices pursuant to Tex. Civ. Prac. & Rem. Code Sec. 37.004(a). Hunter-Kelsey is further entitled to reimbursement of attorney’s fees as evidenced by Exhibit 3 and Tex. Civ. Prac. & Rem. Code Sec. 37.009. Further, Hunter-Kelsey is entitled to payment or reimbursement of court costs and post judgment interest at 17.989% from each Promissory Note (*See* Exhibit 1.A. establishing the Default Interest Rate), pursuant to Tex. Fin. Code Sex. 304.003.

PRAYER

Based on Hunter-Kelsey’s No-Evidence Motion for Summary Judgment and/or Traditional Motion for Summary Judgment, Hunter-Kelsey respectfully requests that the Court grant said motions for summary judgment and enter a full, final and appealable order dismissing all of Peterson’s claims against Hunter-Kelsey, granting all of Hunter-Kelsey’s claims against Peterson in the aforesaid amounts, and award any other relief to which Hunter-Kelsey may be entitled in law or in equity.

Respectfully submitted,

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By: /s/ Dylan Schultz
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**ATTORNEYS FOR
HUNTER-KELSEY OF TEXAS, LLC**

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing instrument, and any associated attachments, exhibits or proposed orders, were delivered to all opposing counsel and other parties listed below who have made an appearance in this suit pursuant to TEX. R. CIV. P. 21a. on 15th day of February, 2023 as follows:

Erick DeLaRue, attorneys for Susan Peterson
Via eService to: erick.delarue@delaruelaw.com

/s/ Dylan Schultz
Dylan Schultz
Attorney Certifying

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Kaleb McCann on behalf of Dylan Schultz
Bar No. 24103529
kaleb@srbslaw.com
Envelope ID: 72806529
Status as of 2/15/2023 5:07 PM CST

Case Contacts

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