

CAUSE NO. 2022-39990

NICIA VITORINO ASSIGNEE OF	§	IN THE DISTRICT COURT
WILLIAM CALLEDARE	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	
	§	151 ST JUDICIAL DISTRICT OF
POST OAK CROSSING COUNCIL OF	§	
CO-OWNERS, WOODFOREST	§	
ASSOCIATION, PRESTIGE	§	
ASSOCIATION MANAGEMENT	§	
GROUP CORPORATION, HOUSTON	§	
HOA MANAGEMENT, AND SEARS	§	HARRIS COUNTY, TEXAS
BENNETTT & GERDES, LLC	§	
<i>Defendants.</i>	§	

PLAINTIFF’S OPPOSITION TO DEFENDANTS’ MOTIONS TO
DISMISS PURSUANT TO TEXAS RULE OF CIVIL PROCEDURE 91a

TO THE HONORABLE MICHAEL ENGELHART, DISTRICT JUDGE:

NOW COMES, Plaintiff, Nicia Vitorino assignee of William Calledare, and files her Opposition (the “Opposition”) to Defendants’ Motions to Dismiss Pursuant to Texas Rule of Civil Procedure 91a (“Motions to Dismiss”). In support of her Opposition, Plaintiff alleges as follows:

1. Rule 91a of the Texas Rules of Civil Procedure reads as follows:

Except in a case brought under the Family Code or a case governed by Chapter 14 of the Texas Civil Practice and Remedies Code, a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact. A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them do not entitle the claimant to the relief sought. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.

2. On January 20, 2023, Plaintiff filed an assignment of claims from William Calledare to her which establishes that Plaintiff is the proper party to bring the claims against the Defendants arising from the October 4, 2022 foreclosure sales.

3. In response to the Motions to Dismiss, Plaintiff filed her Third Amended Petition

which sets forth completely different theories from the prior petitions pursuant to Tex. R. Civil. Procedure 91a5.s

4. In her Third Amended Petition, Plaintiff has asserted the following causes of action:
 - a. Declaratory Judgment that the redemption prices that the Defendants asserted that Plaintiff must pay to redeem the Augusta Property and the Woodforest Property violated Tex. Property Code §82.113(g) because such redemption prices were excessive.
 - b. Negligence because Defendants owed a duty to use ordinary care in complying with their obligations under Texas Property Code §82.113(g) and failed to discharge that duty. Such failure resulted from inflating the minimum foreclosure bid prices and thus the redemption prices that Plaintiff would have to pay to redeem the Augusta Property and the Woodforest Property. Plaintiff has suffered damages as a proximate result Defendants' failure to use ordinary care.
 - c. Wrongful Foreclosure as to the Augusta Property and the Woodforest Property because the Defendants inflated the minimum bid prices at the October 4, 2022 foreclosure sale that would have to be paid at the foreclosure sales in violation of Texas Property Code §82.113(g) which caused the redemption prices chargeable to Plaintiff to be substantially higher than they should have been.
 - d. Violation of Tex. Property Code §12.002(a). Defendants knew that the minimum bids at the October 4, 2022 foreclosure sales included inflated charges that should never have been asserted and that such minimum bids were a fraudulent claim against the Augusta Property and the Woodforest Property

as a consequence. Such charges became components of the redemption prices that Plaintiff would have to pay to redeem the Augusta Property and the Woodforest Property. Defendants inflated the minimum bids with the intent to deceive Plaintiff into paying the excessive redemption prices for the Augusta Property and the Woodforest Property. Plaintiff suffered damages from Defendants' false representations by having to pay far more than the proper redemption price for the Woodforest Property and by foregoing the redemption of the Augusta Property.

5. Despite Defendants' protestations to the contrary, at least two courts of appeals have sustained similar causes of action to challenge inflated minimum bids at foreclosure sales where the former condominium owners have rights of redemption. See *Burton v. Prince*, 577 S.W.3d 280 (Tex. App. 2019—Houston [14th], no pet.); *402 Lone Star Prop. LLC v. Bradford*, 2017 Tex. App. LEXIS 11047 (Tex. App. 2017—San Antonio, opinion vacated because parties settled).

6. In construing Tex. R. of Civil Procedure 91a, the Courts of Appeals have held that Texas is a fair notice pleading jurisdiction and that the fair notice standard is applied to evaluate pleadings upon a motion to dismiss under Tex. R. of Civil Procedure 91a. In *City of Madisonville v. Hernandez*, 2022 Tex. App. LEXIS 8931 (Tex. App.-Waco-2022, no petition), the Court of Appeals held:

Under the fair notice standard, a pleading is sufficient if it provides the opposing party with fair and adequate notice of the facts upon which the pleader bases their claims to enable the opposing party to prepare a defense or response. . . .

Under this standard we look to the pleader's intent and uphold the pleading "even if some element of a cause of action has not been specifically alleged" because "[e]very fact that will be supplied that can be reasonably inferred from what is specifically stated." quoting *Roark v. Allen*, 633 SW2d 804, 810 (Tex. 1982),

quoting *Gulf, Colorado & Santa Fe Ry. Co. v. Bliss*, 368 S.W. 2d 594, 599 (Tex. 1962) . . .When applying the fair notice standard to our review of the pleadings on a Rule 91a motion to dismiss, we must construe the pleadings liberally in favor of the plaintiff, look to the pleader's intent, and accept as true the factual allegations in the pleadings to determine if the cause of action has a basis in law or fact.

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7. Plaintiff has alleged appropriate facts to underlie her causes of action in the Third Amended Petition. She alleged specifics regarding the minimum bid prices were inflated and how much they were in excess of the actual amounts owed the respective property owner associations. She further alleged that the redemption prices that she paid for Woodforest and would have been compelled to pay for Augusta were inflated. Plaintiff's alleged causes of action have been sustained in other cases as cited above. Accordingly, Plaintiff has satisfied the fair notice standard and her 3rd Amended Petition should not be dismissed.

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that the Court deny the Motions to Dismiss.

Dated: _____

Respectfully submitted,

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***When emailing or serving the firm, please include both the firm email and the lead attorney.**

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

Pursuant to Texas Rules of Civil Procedure, I hereby certify that a true, correct, and complete copy of the foregoing was served on all parties in accordance with the Texas Rules of Civil Procedure on this day, January 23, 2023.

/s/ Alex R. Hernandez, Jr. /s/

Alex R. Hernandez, Jr.

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