

CAUSE NO. 2023-12684

**HOUSTON PRIME INVESTMENTS,
LTD.,**

Plaintiff,

v.

**COMMUNITY LOAN SERVICING,
LLC,**

Defendant.

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IN THE DISTRICT COURT

133RD JUDICIAL DISTRICT

HARRIS COUNTY, TEXAS

DEFENDANT’S ORIGINAL VERIFIED ANSWER AND ORIGINAL COUNTERCLAIM

Defendant Community Loan Servicing, LLC (“Defendant”) files this Original Verified Answer and Original Counterclaim, respectfully shows the following:

I.
GENERAL DENIAL

Pursuant to Rule 92 of the Texas Rules of Civil Procedure, Defendant generally denies each and every allegation in Plaintiff Houston Prime Investment, Ltd.’s (“Plaintiff”) *Verified Second Amended Petition, Request for Injunctive and Declaratory Relief, and Request for Attorney’s Fees* (the “Second Amended Petition”), as well as any and all amended or supplemental petitions, and demands strict proof thereof.

II.
AFFIRMATIVE AND OTHER DEFENSES

In addition to its general denial, Defendant asserts the following affirmative and other defenses without conceding which party bears the burden of proof on such defenses:

1. Plaintiff fails to state a claim upon which relief can be granted, and therefore, Plaintiff’s claims should be dismissed.
2. Plaintiff’s claims are barred because it lacks legal capacity to sue and/or standing.

3. Plaintiff's claims are barred, in whole or in part, because it has failed to allege and prove all conditions precedent to recovery.

4. Plaintiff's claims are barred, in whole or in part, by Plaintiff's failure to allege facts sufficient to state a claim for any damages.

5. Plaintiff's claims are barred, in whole or in part, by the doctrines of estoppel, in all its forms, contractual estoppel, quasi-estoppel, waiver, unclean hands, laches, and/or other equitable doctrines.

6. Plaintiff's claims are barred, in whole or in part, by reason of Defendant's compliance with applicable statutes and other provisions of law.

7. Plaintiff's claims are barred, in whole or in part, by reason of Defendant's compliance with applicable contracts and agreements.

8. The actions of Defendant were taken in good faith, and Defendant did not knowingly, intentionally, or maliciously violate any laws.

9. Plaintiff's claims are barred, in whole or in part, because Defendant's acts and/or omissions were not the cause of Plaintiff's damages, if any. Rather, Plaintiff's damages, if any, were proximately caused by the acts, omissions, or breaches of other persons and/or entities, including Plaintiff itself, and the acts, omissions, or breaches were intervening and superseding causes of Plaintiff's damages, if any.

10. Plaintiff's claims are barred, in whole or in part, because Plaintiff failed to mitigate its damages, if any.

11. Defendant is not liable for the acts, omissions, or conduct of other persons or entities not authorized to act on its behalf; pleading further, and in the alternative, Defendant is not liable for the acts, omissions, or conduct of its agents who exceeded the scope of their authority.

12. Plaintiff's attorneys' fees are not recoverable, reasonable, or necessary.

13. Plaintiff's claims may also be barred by additional defenses that may arise during the course of this litigation, which defenses Defendant reserves the right to assert.

IV.
PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant prays that, upon final hearing hereof, judgment be rendered that Plaintiff takes nothing by this suit, and that Defendant be awarded its costs and expenses, as well as such other and further relief, at law and in equity, to which it may be justly entitled.

ORIGINAL COUNTERCLAIM

I.
PARTIES AND JURISDICTION

1. Defendant/Counter-Plaintiff Community has previously appeared in this case through the undersigned counsel.

2. Plaintiff/Counter-Defendant Houston Prime Investments, Ltd., has previously appeared in this case through counsel of record.

3. This Court has jurisdiction because the dispute involves real property located in Harris County, Texas, and the matter relates to the claims brought by Plaintiff in its *Verified Second Amended Petition, Request for Injunctive and Declaratory Relief, and Request for Attorney's Fees*.

4. Venue is proper in this County because this suit concerns real property located in Harris County, Texas.

II.
SUMMARY OF FACTS

5. On or about January 14, 2004, Plaintiff executed a Note for \$500,000 payable to Southwest Guaranty, Ltd., as lender on a loan secured by the property described in Exhibit A, commonly known as 8301 Gulf Freeway ("8301 Gulf Freeway") and 8303 Gulf Freeway ("8303

Gulf Freeway”), Houston, Texas 77017 (collectively, the “Property”). Concurrently with the Note, Plaintiff executed a Mortgage, Deed of Trust, Security Agreement and Assignment of Leases (the “Mortgage”). Community is the current mortgagee of record, beneficiary of the Mortgage, and owner and holder of the Note.

6. Under the terms of the Note and Mortgage (together, the “Loan Agreement”), Plaintiff was required to pay when due the principal and interest on the debt evidenced by the Note, as well as any applicable charges and fees due under the Note.

7. The Loan Agreement further provides that should Plaintiff fail to make payments on the Note as they became due and payable, or fail to comply with any or all of the covenants and conditions of the Mortgage, then the lender may enforce the Mortgage by selling the Property according to law and in accordance with the provisions set out therein.

8. Plaintiff has defaulted on the Note by failing to make monthly payments as required.

9. Plaintiff has also failed to pay taxes assessed against the Property pursuant to the terms of the Mortgage. Plaintiff’s failure to pay taxes created a lien against the Property which was superior to the Mortgage. Community has advanced an amount no less than \$168,668.66 to satisfy the tax obligations of Plaintiff and obtain the release of said tax liens against the Property.

10. Plaintiff has additionally failed to maintain insurance on the Property as required by the Mortgage. Community was forced to advance an amount no less than \$59,179.68 to pay for insurance on the Property to protect its collateral.

III. **CAUSES OF ACTION**

A. Breach of Contract

11. The foregoing paragraphs are incorporated by reference for all purposes.

12. Community asserts a cause of action for breach of contract against Plaintiff. The Note and Mortgage are valid and enforceable contracts between Plaintiff and Community. Community, as the current legal holder of the Note and Mortgage, has the right to enforce the Note. Community has performed its obligations fully under the contract; however, Plaintiff breached the contract by failing to substantially perform material obligations required under the contract (principally, the payment of amounts due under the contract).

13. Such breach is the proximate cause of injury and damages to Community. Community is entitled to actual damages and attorney's fees for Plaintiff's breach of contract.

14. Community has been forced to hire the undersigned attorneys to seek damages for Plaintiff's breach of contract. Community is therefore entitled to and seeks judgment against Plaintiff for its reasonable attorneys' fees in this action, both through trial and in the event of a subsequent appeal, as provided by the Note and Deed of Trust signed by Plaintiff and by statute. Tex. Civ. Prac. & Rem. Code § 38.001(8).

15. All conditions precedent have been performed or have occurred.

B. Trespass to Try Title/Declaratory Judgment

16. The foregoing paragraphs are incorporated by reference for all purposes.

17. Community holds a valid and subsisting lien on the property, an interest superior to the title claimed by Plaintiff. Plaintiff challenges the validity of that security interest based on limitations. Accordingly, Defendant seeks a declaration that:

- a. Community holds a valid security interest in the Property by virtue of the Mortgage;
- b. Community's security interest in the Property is superior to any interest claimed by Plaintiff;
- c. Plaintiff took any interest it currently hold subject to the Mortgage and

Community's security interest;

- d. Foreclosure under the Mortgage is not time barred by the statute of limitations;
- e. Community is entitled to conduct a non-judicial foreclosure sale in accordance with the provisions of the Mortgage and the Texas Property Code, where a trustee shall convey the Property to the highest bidder at public auction;
- f. When the Property is sold at a foreclosure sale, Community may submit a credit bid at the sale; and
- g. The effect of a foreclosure sale conducted in accordance with the Mortgage and the Texas Property Code shall be to divest Plaintiff of all rights and title to the Property.

18. Community is entitled to recover its reasonable and necessary attorney's fees under Chapter 38 of the Texas Civil Practice and Remedies Code, the Mortgage, and the Note.

19. All conditions precedent have been performed or have occurred.

C. Declaratory Judgment

20. The foregoing paragraphs are incorporated by reference for all purposes.

21. Plaintiff seeks a declaration regarding its rights to the Collateral under the Mortgage.

22. Pursuant to the Mortgage, as collateral and security for the loan, Plaintiff granted to Community a first priority security interest and lien in and to, *inter alia*, all of the Mortgaged Property, as defined by the Mortgage, including but not limited to Plaintiff's present and future rents, fixtures, equipment, building materials, condemnation proceeds, accounts, escrows, documents, deposits, and general intangibles as defined by the Uniform Commercial Code.

23. Community sent written notice to Plaintiff that Plaintiff was in default and indicating Community's intent to proceed with exercising one or more of its default remedies under the Security Agreement.

24. Plaintiff has failed and refused to cure the default under the contracts.

25. Community requests that the Court declare that Community is entitled to first priority security interest and lien in and to all of the Mortgaged Property, as defined by the Mortgage, including but not limited to Plaintiff's then existing, present, and future present and future rents, fixtures, equipment, building materials, condemnation proceeds, accounts, escrows, documents, deposits, and general intangibles as defined by the Uniform Commercial Code.

D. Suit for Judicial Foreclosure

26. The foregoing paragraphs are incorporated by reference for all purposes.

27. By its terms, the Note permits the lender to recover, in addition to unpaid principal and accrued interest, late charges and lender's costs of collection, including reasonable attorney's fees. In addition, the Mortgage permits the lender to recover costs to preserve the collateral such as insurance and taxes, and to charge interest thereon.

28. The Note also permits the lender to accelerate the Note if the borrower fails to cure a default after notice. Similarly, the Mortgage provides at paragraph 22, in relevant part, that the entire unpaid balance of the debt may be made immediately due and payable.

29. A default exists under the Note and Mortgage for Plaintiff's failure to pay the regular monthly installments as they came due. After giving proper notice of default and opportunity to cure, the balance of the Note is now due and payable in full.

30. Pursuant to the Note, interest has continued to accrue on the principal balance owed since the default on the loan. Costs to protect the collateral, costs of collection, including attorney fees and late charges are also due.

31. All proper notices required under the Note and Mortgage have been given.

32. Community seek a judgment fixing and establishing the amount of Community's lien against the Property and (1) final judgment that includes an order allowing foreclosure under the Deed of Trust and Tex. Prop. Code §51.002; or, alternatively, (2) judicial foreclosure of its lien and an order instructing the constable or sheriff to sell the Property to the highest bidder for cash in accordance with applicable Texas law. Community also seeks the following judicial declarations:

- a. Community holds a valid security interest in the Property by virtue of the Mortgage;
- b. Community's security interest in the Property is superior to any interest claimed by Plaintiff;
- c. Plaintiff took any interest it currently holds subject to the Mortgage and Community's security interest;
- d. Foreclosure under the Mortgage is not time barred by the statute of limitations;
- e. Community is entitled to conduct a non-judicial foreclosure sale in accordance with the provisions of the Deed of Trust and the Texas Property Code, where a trustee shall convey the Property to the highest bidder at public auction;
- f. When the Property is sold at a foreclosure sale, Community may submit a credit bid at the sale; and
- g. The effect of a foreclosure sale conducted in accordance with the Deed of Trust and the Texas Property Code shall be to divest Plaintiffs of all rights and title to the Property.

33. All conditions precedent have been performed or have occurred.

E. Declaratory Judgment – Equitable Lien/Equitable Subrogation

34. The foregoing paragraphs are incorporated by reference for all purposes.

35. Community seeks a declaration that it is entitled to a valid and enforceable equitable first lien on the property, equal to the amount of proceeds used to pay off the indebtedness secured by, and obtain the release of, the tax liens, plus interest accruing at the rate of 6%, to secure the amounts paid to secure a release of the tax liens securing repayment of the taxes assessed against the property, pursuant to the doctrine of equitable subrogation. When one party pays the debt of another, the paying party is subrogated to the rights of the creditor paid. “Equitable subrogation is the legal fiction whereby an obligation, extinguished by a payment made by a third person, is treated as still subsisting for the benefit of this third person, so that by means of it one creditor is substituted to the rights, remedies, and securities of another.” *See Day Cruises Mar., LLC v. Christus Spohn Health Sys.*, 267 S.W.3d 42 (Tex. App.—Corpus Christi 2008, pet. denied). Equitable subrogation is a theory based in restitution that originated to prevent unjust enrichment, such as double recoveries. *See State Farm Mut. Auto Ins. Co. v. Perkins*, 216 S.W.3d 396 (Tex. App.—Eastland 2006, no pet.). Texas courts have repeatedly accepted and applied the doctrine of equitable subrogation and have been in the forefront of doing so. *Diversified Mortg. Inv'rs v. Lloyd Blalock Gen. Contractor, Inc.*, 576 S.W.2d 794 (Tex. 1978).

36. The doctrine of subrogation is always given liberal interpretation and is broad enough to include every instance in which one person, not acting voluntarily, has paid a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the primary obligor. *McBroome Bennett Plumbing, Inc. v. Villa France, Inc.*, 515 S.W.2d 32 (Tex. Civ. App.—Dallas 1974, writ ref'd, n.r.e.) Equitable subrogation is instituted to guard the investment of a lender who pays another's debt by granting that lender the rights and security held by the previous creditor. *Vogel v. Veneman*, 276 F.3d 729 (5th Cir. 2002); *Smart v. Tower Land & Inv. Co.*, 597 S.W.2d 333 (Tex. 1980).

37. Community was not a mere volunteer, and the payoff of the tax liens was not a

voluntary payment. Plaintiff will be unjustly enriched if equitable subrogation is denied.

38. In the event this court finds the Mortgage is void, equitable subrogation grants Community the rights and security held by the liens it, or its predecessors-in-interest and/or their agents, discharged through payment of obligations to which Plaintiff was obligated. *LaSalle Bank Nat'l Assoc. v. White*, 246 S.W.3d 616 (Tex. 2007) (claim home equity loan did not comply with article XVI, section 50(a)(6) "does not abrogate [] this longstanding common law principle or preclude [lender]'s entitlement to equitable subrogation for the refinance portion of the loan proceeds that were used to extinguish [borrower]'s constitutionally permissible purchase-money and property-tax liens.").

WHEREFORE, PREMISES CONSIDERED, Community prays that the Court enter judgment in its favor as to all causes of action asserted herein, and award Community all damages and remedies sought herein, as well as all other relief, in law or in equity, to which Community may be justly entitled.

Respectfully submitted,

/s/ Elizabeth Hayes

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Elizabeth Hayes

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**ATTORNEYS FOR
COMMUNITY LOAN SERVICING, LLC**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served on all parties of record pursuant to the Texas Rules of Civil Procedure *via e-service and/or certified mail, return receipt requested* on this 17th day of March 2023.

/s/ Elizabeth Hayes

Attorney for Community Loan Servicing, LLC

VERIFICATION

My name is Elizabeth Hayes. I am counsel for Defendant Community Loan Servicing, LLC. I am of sound mind and capable of making this unsworn declaration pursuant to Texas Civil Practice and Remedies Code § 132.001. I am over the age of twenty-one (21) years, and have never been convicted of a felony or crime involving dishonesty. I am fully competent to testify to the matters herein. I have personal knowledge of the facts stated in Defendant's Original Verified Answer, and declare under penalty of perjury that such facts are true and correct.

Executed on March 17, 2023

/s/ Elizabeth Hayes

Elizabeth Hayes

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.

Kristi Russelburg on behalf of Elizabeth Hayes

Bar No. 24069001

krusselburg@polsinelli.com

Envelope ID: 73778860

Filing Code Description: Counter Claim/Cross

Action/Interpleader/Intervention/Third Party

Filing Description: Defendant's Original Verified Answer and Original Counterclaim

Status as of 3/17/2023 4:47 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Benjamin L. Hall, III		myteam@thlf.us	3/17/2023 3:50:16 PM	SENT
Hall Law GroupE-Service		myteam@thlf.us	3/17/2023 3:50:16 PM	SENT
Marc D.Cabrera		mcabrera@polsinelli.com	3/17/2023 3:50:16 PM	SENT
Elizabeth Hayes		ehayes@polsinelli.com	3/17/2023 3:50:16 PM	SENT

EXHIBIT A

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TRACT 1:

BEGINNING at a Nail Set in the center line of the concrete paving of Howard Drive and the West Property line of Winkler Drive;

THENCE North 39 Degrees 33 Minutes 15 Seconds West, along the Westerly Right - Of - Way line of Winkler Drive, as now located on the ground, a distance of 190 feet to the PC of a curve to the left having a Radius of 880.28 feet;

THENCE following said curve to the left along the Westerly Right - Of - Way line of Winkler Drive as now located on the ground, a distance of 187.22 feet to a found 5/8" iron rod and the POINT OF BEGINNING of this Tract;

THENCE continuing along said curve to the left and along the Westerly Right - Of - Way line of Winkler Drive as now located on the ground, a distance of 15.95 feet to a found 5/8" iron rod and point for corner;

THENCE South 48 Degrees 52 Minutes West, a distance of 227.08 feet to a found 1" iron pipe and point for corner;

THENCE South 43 Degrees 08 Minutes East, along the Easterly Right - Of - Way line of the Gulf Freeway, a distance of 15.50 feet to a found 1" iron pipe and point for corner;

THENCE North 48 Degrees 52 Minutes East, a distance of 230.88 feet to the POINT OF BEGINNING and containing 3549 square feet; and



TRACT 2:

BEGINNING at a Nail Set in the center line of the concrete paving of Howard Drive and the West property line of Winkler Drive;

THENCE North 39 Degrees 33 Minutes 15 Seconds West, along the Westerly Right - Of - Way line of Winkler Drive, as now located on the ground, a distance of 190 feet to the PC of a curve to the left having a Radius of 880.28 feet;

THENCE following said curve to the left along the Westerly Right - Of - Way line of Winkler Drive as now located on the ground, a distance of 213.17 feet to a found 5/8" iron rod and the POINT OF BEGINNING of this Tract;

THENCE continuing along said curve to the left marking the Westerly Right - Of - way line of Winkler Drive, as now located on the ground, a distance of 202.13 feet to a found 5/8" iron rod at the end of said curve;

THENCE North 74 Degrees 32 Minutes West, along the Westerly Right - Of - Way line of Winkler Drive as now located on the ground, a distance of 18.97 feet to a found 5/8" iron rod and point for corner;

THENCE South 48 Degrees 52 Minutes West, a distance of 139.85 feet to a found 5/8" iron rod end point for corner in the Easterly Right - Of - Way line of the Gulf Freeway;

THENCE South 43 Degrees 08 Minutes East along the Easterly right-of-way line of the Gulf Freeway, a distance of 200 feet to a point for corner;

THENCE North 48 Degrees 52 Minutes East, a distance of 227.08 feet to the POINT OF BEGINNING of this Tract, and containing 37,482 square feet; and

EXHIBIT A

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TRACT 3:

BEGINNING at a Nail Set in the center line of the concrete paving of Howard Drive and the West property line of Winkler Drive;
 THENCE North 39 Degrees 33 Minutes 15 Seconds West, along the Westerly Right - Of - Way line of Winkler Drive as now located on the ground, a distance of 190 feet to the PC of a curve to the left having a Radius of 680.28 feet;
 THENCE following said curve to the left along the Westerly Right - Of - Way line of Winkler Drive as now located on the ground, a distance of 419.30 feet to a found 5/8" iron rod at the end of said curve;
 THENCE continuing North 74 Degrees 32 Minutes West, along the Westerly Right - Of - Way line of Winkler Drive as now located on the ground, a distance of 16.97 feet to a found 5/8" iron rod and the POINT OF BEGINNING of this Tract;
 THENCE continuing North 74 Degrees 32 Minutes West, along the Westerly Right - Of - Way line of Winkler Drive as now located on the ground, a distance of 203.20 feet to a concrete Highway Marker;
 THENCE South 48 Degrees 28 Minutes West, a distance of 34 feet to a found 5/8" iron rod;
 THENCE South 43 Degrees 08 Minutes East, along the Easterly Right - Of - Way line of the Gulf Freeway a distance of 176 feet to a found 5/8" iron rod end point for corner;
 THENCE North 46 Degrees 52 Minutes East, a distance of 139.95 feet to the POINT OF BEGINNING of this Tract, and containing 16,113 square feet.

TRACT 4:

0.089 Acre of land, more or less, lying and situated in the John R. Harris Survey, Abstract No. 27, Harris County, Texas; said 0.089 acre Tract being a part of the 8.075 Acre Tract of land, more or less, described in a deed to the State of Texas, dated April 15, 1940, executed by Anny Wjer-Bonner King, et al, of record in Volume 1947, Page 472, of the Deed Records of Harris County, Texas, and being more particularly described by Motes and Bounds as follows:

COMMENCING at a Nail Set in the concrete pavement where the centerline of Winkler Drive and the centerline of Howard Drive intersect;
 THENCE North 39 Degrees 45 Minutes West, along the Westerly Right - Of - Way line of Winkler Drive, as now located on the ground, a distance of 190.00 feet to the PC of a curve to the left, having a Radius of 680.28 feet;
 THENCE following said curve to the left along the Westerly Right - Of - Way line of Winkler Drive, a distance of 40.00 feet to a point;
 THENCE South 50 Degrees 26 Minutes 45 Seconds West, a distance of 248.87 feet to a point; said point bears North 43 Degrees 08 Minutes West, a distance of 17.30 feet from a point in the common boundary of the Callahan and Vince - John R. Harris Survey line; said point being North 00 Degrees 26 Minutes West a distance of 2,378.80 feet from the Southwest corner of the Callahan and Vince Survey;
 THENCE North 43 Degrees 08 Minutes West, a distance of 140.35 feet to a found 1" iron pipe and the POINT OF BEGINNING;
 THENCE continuing North 43 Degrees 08 Minutes West, a distance of 381.86 feet to a point;
 THENCE South 38 Degrees 45 Minutes East, a distance of 382.49 feet to a found 1/2" square iron rod and point for corner;
 THENCE North 46 Degrees 52 Minutes East, a distance of 21.39 feet to the POINT OF BEGINNING.

EXHIBIT A

ANY PROVISION HEREIN WHICH RESTRICTS THE SALE, RENTAL, OR USE OF THE DESCRIBED REAL PROPERTY BECAUSE OF COLOR OR RACE IS VOID AND UNENFORCEABLE UNDER FEDERAL LAW.
 THE STATE OF TEXAS
 COUNTY OF HARRIS
 I hereby certify that this instrument was FILED in File Number Sequence on the date and at the time stamped herein by me; and was duly RECORDED in the Official Public Records of Real Property of Harris County, Texas on

RECORDERS MEMORANDUM
 AT THE TIME OF RECORDATION, THIS INSTRUMENT WAS FOUND TO BE INADEQUATE FOR THE BEST PHOTOGRAPHIC REPRODUCTION BECAUSE OF ILLEGIBILITY, CARBON OR PHOTO COPY, DISCOLORED PAPER, ET C.

JAN 23 2004



Cecily L. Kaufman
 COUNTY CLERK
 HARRIS COUNTY, TEXAS