

CAUSE NO. _____

Jonathan Anderson,
Plaintiff(s),

v.

**J Don Boney Jr and Mikaela Investments
LLC and US Bank National Association
As Trustee for the C Bass Mortgage
Loan Asset Backed Certificates Series
2005 CB5,**
Defendant(s),

§ IN THE DISTRICT COURT OF
§
§
§
§ HARRIS COUNTY, TEXAS
§
§
§ _____ JUDICIAL DISTRICT
§

**PLAINTIFF' ORIGINAL PETITION ON TRESPASS TO TRY TITLE AND APPLICATION
FOR TEMPORARY RESTRAINING ORDER AND INJUNCTIVE RELIEF**

TO THE HONORABLE JUDGE OF THE COURT:

NOW COMES **Jonathan Anderson**, the Plaintiff, files this Trespass to Try Title under Chapter 22 of the Texas Property Code against Defendants, J Don Boney Jr and Mikaela Investments LLC and US Bank National Association As Trustee for the C Bass Mortgage Loan Asset Backed Certificates Series 2005 CB5, for good and specific cause of action, and shows the Court as follows:

Discovery Control Plan

1. JONATHAN ANDERSON proposes that discovery in this case be conducted under Discovery Control Plan Level 2. Tex. R. Civ. P. 190.3

Parties

2. JONATHAN ANDERSON is a natural person whose homestead is in HARRIS County Texas.
3. Defendant, J Don Boney Jr, is a natural person and may be served at his residence at 2503 Rosedale, Houston, Texas 77004.
4. Defendant, MIKAELA INVESTMENTS LLC is a Texas LLC and may be served with process by and through its registered agent, William O. Stukeby, at 1705 W Northwest Highway, Suite 220, Grapevine, Texas 76051.
5. Defendant, US BANK NATIONAL ASSOCIATION AS TRUSTEE FOR THE C BASS MORTGAGE LOAN ASSET BACKED CERTIFICATES SERIES 2005 CB5, is a national

banking company and may be served with process by and through its registered agent, CT Corporation System at 19999 Bryan Street, Suite 900, Dallas, Texas 75201.

Venue and Jurisdiction

4. This is an action in rem, and this Court has jurisdiction because the res is located in whole or in part in Harris County, Texas.
5. Venue in HARRIS County, Texas is proper in this cause under Section 15.011 of the Texas Civil Practice and Remedies Code because the real property, the subject of this lawsuit, is situated in HARRIS County, Texas.
6. The damages sought in this suit are within the jurisdictional limits of the Court. As required by Rule 47 of the Texas Rules of Civil Procedure, Plaintiff states that Plaintiff seeks monetary relief over \$250, but not more than \$1,000,000.

Brief Summary

7. The December 6, 2022, purported substitute trustee sale of property exclusively owned by the Plaintiff was unlawful, because the substitute trustee purported to foreclose on the entire west-half of Lots 5 and 6 of a subdivision in Harris County Texas. However, the mortgagor, a relative of the Plaintiff, only owned half of the west-half of Lots 5 and 6; and the Defendant noteholder, US BANK NATIONAL ASSOCIATION AS TRUSTEE FOR THE C BASS MORTGAGE LOAN ASSET BACKED CERTIFICATES SERIES 2005 CB5, did not have a valid lien on the Plaintiff's half of the west-half of Lots 5 and 6; consequently, at the December 6, 2022, purported trustee sale, the Defendant Mikaela Investments LLC, did not acquire title to the Plaintiff's half of the west-half of Lots 5 and 6.

Factual Background

The Property

8. October 29, 1976, the Plaintiff's grandparents, J. Don Boney and Peggy Boney were deeded the entire property located at 2213/2215 Wheeler Avenue, Houston, Texas 77004, with the following legal description of the entire property (the "Property"):

West Fifty (50') feet of Lots Five (5) and Six (6) in Block Five (5) of the subdivision of a 10-acre Holman Outlot Sixty-Five (65), a subdivision in Harris County Texas, according to the map of record in Volume 40, Page 521, of the Deed Records of Harris County, Texas. See Exhibit A

Plaintiff's Interest in the Property

9. The Plaintiff is the owner of half of the Property (the “Plaintiff’s Property”).
10. J. Don Boney died and on May 5, 1983, his wife, the Plaintiff’s grandmother, acting as the personal representative of J. Don Boney deeded half of the Property to J. Don Boney, Jr. See Exhibit B
11. In 2016, the Plaintiff’s grandmother, Peggy Boney died intestate and on May 17, 2016, all of Peggy Boney’s heirs executed a special warranty deed, transferring half of the Property to the Plaintiff. See Exhibit C

Defendants’ Claim as Cloud on Title

12. Unbeknownst to the Plaintiff, February 16, 2005, Defendant, J. Don Boney, Jr. closed on a note for \$87,000, secured by a purported Deed of Trust, listing the entire Property as collateral for the loan (the “DOT”). See Exhibit D
13. The current loan servicer of J. Don Boney, Jr’s note is Nerez.
14. As of November 18, 2022, the payoff of J. Don Boney, Jr’s note was \$121,355.15.
15. Staff of Default Power Services, Inc. are designated as the purported current trustee of the DOT.
16. October 27, 2022, the purported current trustee posted a Substitute Trustee Sale Notice in the HARRIS County Clerk’s Office of the entire Property. See Exhibit E
17. September 6, 2022, the substitute trustee purported to auction the entire Property to Defendant US Bank National Association As Trustee for the C Bass Mortgage Loan Asset Backed Certificates Series 2005 CB5 for \$283796.

Invalidity of Defendants’ Claim

18. As stated the purported substitute trustee sale of the entire Property was unlawful, because Defendant, J. Don Boney, Jr. only owned one-half of the Property and the Plaintiff owned the other half of the Property.

Arguments

Trespass to Try Title under Chapter 22 of the Texas Property Code

19. The Substitute Trustee Sale of the Property is unlawful because the purported current substitute trustee included the Plaintiff’s half of the Property in the void sale to Defendant Mikaela Investments LLC.
20. In a trespass-to-try-title action, the plaintiff is required to prove its title by proving (1) a regular chain of title of conveyances from the sovereign to the plaintiff; (2) a superior title to that of the

defendant out of a common source; (3) title by limitations; or (4) prior possession which has not been abandoned. *Teon Mgmt. LLC v. Turquoise Bay Corp.*, 357 S.W.3d 719 at 728 (11th Tex. Ct. of Appeals October 27, 2011).

21. As stated, J. Don Boney's Jr's interest and the Plaintiff's interest in the Property stem from the deed awarded to Plaintiff's grandparents. As stated, May 5, 1983, J. Don Boney Jr was deeded only half of the Property; and May 17, 2016, the Plaintiff was deeded the remaining half of the Property.

The Substitute Trustee Lacked Authority to Foreclose on the Plaintiff's half of the Property

22. The purported substitute trustee sale conducted December 6, 2022, claimed to have transferred all of the Property to Defendant Mikaela Investments LLC; consequently, the void sale appears on its face to be valid but is void, because the substitute trustee had no authority to post or sell the Plaintiff's half of the Property.
23. The general effect of a good faith purchaser for value without notice does not apply to a purchaser at a *void* foreclosure sale. A purchaser at a foreclosure sale obtains only such title as the trustee had authority to convey. *First Southern Properties, Inc. v. Vallone*, 533 S.W.2d 339, 341 (Tex.1976).
24. Whether a trustee's deed at a foreclosure sale is void or voidable depends on its effect upon the title at the time it was executed and delivered. *Diversified, Inc. v. Walker*, 702 S.W.2d 717, 721 (Tex.App.-Houston [1st Dist.] 1985, writ ref'd n.r.e.). If the deed is a mere nullity, passing no title and conferring no rights whatsoever to the purchaser, then it is void ab initio. However, if the deed passed title to the purchaser, subject only to the rights of the grantor to have it set aside because it was improperly made, then the deed is voidable. *Id.* (citing *Slaughter v. Qualls*, 139 Tex. 340, 162 S.W.2d 671, 674 (1942)). "That which is void is without vitality or legal effect. That which is voidable operates to accomplish the thing sought to be accomplished, until the fatal vice in the transaction has been judicially ascertained and declared." *Slaughter*, 162 S.W.2d at 674.
25. A purchaser obtains no greater interest in the property than the debtor himself could have conveyed at the time of the sale. *Allied First Nat. Bank of Mesquite v. Jones*, 766 S.W.2d 800, 804 (Tex.App.-KAUFMAN 1988, no writ) ("Since the conditions and limitations on the trustee's power to convey the land were never fulfilled, such power never lawfully came into being, and the foreclosure sale and trustee's deed were therefore void."); *see also Sani v.*

Powell, 153 S.W.3d 736, 742 (Tex.App.-KAUFMAN 2005, pet. denied) (finding that if the sheriff acts outside his authority in the foreclosure sale, the sale is void and title does not pass); *Spring Branch Independent School Dist. v. Siebert*, 100 S.W.3d 520, 524 (Tex.App.-Houston [1st Dist.] 2003, no pet.) (finding a foreclosure on a tax lien is void because it failed to describe a definite tract of land); *Oles v. Curl*, 65 S.W.3d 129, 131 (Tex.App.-Amarillo 2001, no pet.) (finding foreclosure sale void because it was conducted in violation of an automatic stay); *Field Measurement Serv., Inc. v. Ives*, 609 S.W.2d 615, 620 (Tex.App.-Corpus Christi 1980, writ ref'd n.r.e.) (void deed is neither title nor color of title for purposes of three-year statute of limitations).

26. However, when a foreclosure sale is void, whether the purchaser is a bona fide purchaser is irrelevant. *Diversified, Inc.*, 702 S.W.2d at 721 (“The general effect of a “good faith purchaser for value without notice” does not apply to a purchaser at a void foreclosure sale.”) (citing *First Southern Properties, Inc. v. Vallone*, 533 S.W.2d 339, 343 (Tex.1976)).
27. Because title never passes between parties in a void foreclosure sale, the remedy is to place the parties in the same position they were before, as if the foreclosure had never taken place. *Silliman v. Gammage*, 55 Tex. 365, 1881 Tex. LEXIS 127, *9–11, 1881 WL 9787 (1881); *Diversified, Inc.*, 702 S.W.2d at 721 (after finding a void foreclosure sale, the court found that “the trial court properly sought to restore the parties to the same position that they would have been in but for the wrongful sale”).

Conditions Precedent

28. Pursuant to Rule 54 of the Texas Rules of Civil Procedure, all conditions precedent have been performed or have occurred.

Request for Temporary Restraining Order

29. Plaintiff requests the Court to dispense with the issuance of a bond, and Plaintiff requests that the Defendant be temporarily restrained, without hearing, and upon notice and hearing be temporarily enjoined, pending further order of this Court, from foreclosing on the Deed of Trust.
30. If a temporary restraining order is not issued today, the Defendant Mikaela Investments LLC will sell the Plaintiff’s half of the Property and the Plaintiff will be irreparably harmed as stated in the attached affidavit.
31. The Plaintiff is likely to succeed on the merits because, as stated above, because the substitute trustee purported to foreclose on the entire Property. However, the mortgagor under the DOT, J.

Don Boney, Jr., only owned half of the Property, did not have a valid lien on the Plaintiff's half of the Property; consequently, at the December 6, 2022, purported trustee sale, the Defendant Mikaela Investments LLC, did not acquire title to the Plaintiff's half of the Property.

32. Granting the temporary restraining order is in the public interest, because discouraging void foreclosures is in the public interest.
33. The Defendant US Bank National Association As Trustee for the C Bass Mortgage Loan Asset Backed Certificates Series 2005 CB5 may simply foreclose in 30 days on Defendant J. Don Boney, Jr., which is permitted by the Deed of Trust; therefore, the potential harm to the Defendants are outweighed by the potential irreparable harm to the Plaintiff.

Request for Temporary Order

34. Plaintiff requests that the Court, after notice and a hearing, without the necessity of a bond and to make temporary orders and issue any appropriate temporary injunctions deemed necessary and equitable by the Court.

Attorney's Fees

35. Under Section 37.009, Tex Civ. Prac. & Rem Code, JONATHAN ANDERSON requests that the Court award them costs and reasonable and necessary attorneys' fees as are equitable and just against J DON BONEY JR AND MIKAELA INVESTMENTS LLC AND US BANK NATIONAL ASSOCIATION AS TRUSTEE FOR THE C BASS MORTGAGE LOAN ASSET BACKED CERTIFICATES SERIES 2005 CB5

Prayer

WHEREFORE, PREMISES CONSIDERED, the Plaintiff JONATHAN ANDERSON prays for the following:

36. Prayer for Injunctive Relief
37. WHEREFORE Plaintiff prays that after trial on the merits the Court sets aside the December 6, 2022, substitute sale.
38. Prayer for Relief
WHEREFORE Plaintiff prays that the Court immediately grant a temporary restraining order restraining Defendant MIKAELA INVESTMENTS LLC, in conformity with the allegations of this Plaintiff, from the acts set forth above, and Plaintiff prays that, after notice and hearing, this temporary restraining order be made a temporary injunction.
 1. Plaintiff prays for expenses, costs and interest as allowed by law.

2. Plaintiff prays for general relief.

Respectfully submitted,

/s/ James Minerve

James Minerve
State Bar No. 24008692
13276 N HWY 183, ste. 209
Austin, Texas 78750
(888) 819-1440 (Office)
(210) 336-5867 (Mobile)
(888) 230-6397 (Fax)
jgm@minervelaw.com
Attorney for Plaintiff
JONATHAN ANDERSON

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent to the following in accordance with the Texas Rules of Civil Procedure on this 13th day of December 2022:

CT Corporation System, registered agent for
US BANK NATIONAL ASSOCIATION AS TRUSTEE FOR THE C BASS MORTGAGE LOAN
ASSET BACKED CERTIFICATES SERIES 2005 CB5
19999 Bryan Street, Suite 900
Dallas, Texas 75201

J Don Boney Jr
2213 Wheeler Street
Houston, Texas 77004

William O. Stukey, registered agent for
MIKAELA INVESTMENTS LLC
1705 W Northwest Highway, Suite 220
Grapevine, Texas 76051

/s/ James Minerve

James Minerve