

CAUSE NO. 2022-59398

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| QUEST TRUST COMPANY | § | IN THE DISTRICT COURT |
| Plaintiff, | § | |
| | § | |
| | § | |
| V. | § | 152 nd JUDICIAL DISTRICT |
| | § | |
| | § | |
| SANDY DASIGENIS, TRUSTEE, | § | |
| JONATHAN CAMPBELL AND MAIRA | § | |
| GIRALDO, ET AL | § | |
| Defendants. | § | HARRIS COUNTY, TEXAS |

DEFENDANTS SANDY DASIGENIS, TRUSTEE, MAIRA GIRALDO, JONATHAN CAMPBELL and DUTCH MILL, MHP, LLC'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT UNDER THE DECLARATORY JUDGMENT ACT

COME NOW, Defendants, SANDY DASIGENIS a/k/a SANDRA DASIGENIS, TRUSTEE, MAIRA GIRALDO, JONATHAN CAMPBELL and DUTCH MILL, MHP, LLC (collectively "Defendants") and hereby file their Cross Motion for Partial Summary Judgment under the Declaratory Judgment Act against Plaintiff, QUEST TRUST COMPANY FBO Caroline Allison ("Plaintiff") and in support thereof, show the Court as follows:

I. SUMMARY

1. This case is about Plaintiff's failure to adhere to the simple rules of the September 6, 2022 foreclosure sale. On this date, Plaintiff, Quest Trust Company, through Caroline Allison, attended a public auction for the property at 8602 Twisting Vine Lane, Houston, Texas 77040. The sale was conducted by the substitute trustee, Sandy Dasigenis. Ms. Dasigenis does not accept cash as a form of payment for a bid due to safety concerns. Ms. Dasigenis duly announced her No Cash Rule prior to the first public sale of the day on September 6, 2022.

2. At 12:15 P.M., Ms. Allison was the highest bidder for the property, but she failed to abide by the rules and attempted to pay a portion of the purchase price in cash instead of cashier's

checks. Ms. Allison was given additional time, until 12:57 P.M., to obtain the checks, but she was unable to do so. The sale had to be concluded by 1:00 P.M., so the bidding was reconvened, and the property was sold to Defendant, Dutch Mill MHP LLC at 12:59 P.M.

3. As the substitute trustee, Ms. Dasigenis is allowed to set reasonable conditions for conducting the public sale, if the conditions are announced before the bidding is opened for the first sale of the day. Tex. Prop. Code § 51.0075(a). *Significantly, there is no requirement in the Texas Property Code that a trustee must accept cash for the successful bid.*

4. Ms. Allison alleges that the September 6, 2022 foreclosure sale was wrongful because Ms. Dasigenis' rule prohibiting cash as a form of payment is unreasonable. Ms. Allison's position is without merit. On the contrary, Ms. Dasigenis' No Cash Rule, which is justified by safety concerns, is very reasonable. Clearly, carrying large amounts of cash in a public place can be dangerous, and Ms. Dasigenis' rule prohibiting cash and only accepting cashier's checks addresses those safety concerns. Moreover, the act of refusing cash at public auctions is widely practiced by constables or sheriffs at their public tax auctions throughout Texas.

5. Pursuant to the Declaratory Judgment Act ("DJA"), Tex. Civ. Prac. & Rem. Code § 37.004, this Court should find that Ms. Dasigenis' No Cash Rule is a reasonable condition of the September 6, 2022 foreclosure sale and complies with section 51.0075(a) of the Texas Property Code as a matter of law.

II. BACKGROUND FACTS

6. Defendant, Sandy Dasigenis has been conducting foreclosure sales as a trustee in Harris and surrounding counties for over forty years. She has conducted over 9,600 trustee sales in her career. As part of her procedures, before the commencement of the first sale of the day, Ms. Dasigenis announces the rules relating to the conduct of the public auctions that she will be

handling that day. At the October 2021 sale and thereafter, Ms. Dasigenis started announcing that, beginning with the January 2022 sales, she would no longer accept cash for payment of the successful bid due to safety concerns. *See Exhibit 1*, Declaration of Sandra Dasigenis. In this respect, Ms. Dasigenis' "General Admonishment to Purchaser" provides, in relevant part:

Effective with the January 2022 sales, I no longer accept cash due to safety reasons. If the purchaser does not tender the certified funds immediately or as agreed to by the Substitute Trustee, the sale will be reconvened and the property re-auctioned, unless otherwise announced. ... **Just to reiterate, effective with the January 2022 sales, I no longer accept cash.**

See Exhibit 2 (emphasis in original). Ms. Dasigenis duly announced these rules prior to the commencement of the first sale of all the auctions since October 2021.

7. Defendant, Hogar Hispano Inc. was the mortgagee and holder of a loan ("Loan") that was secured by the property commonly known as 8602 Twisting Vine Lane, Houston, Texas 77040 (the "Property").¹ *See Exhibit 1.1*. The borrower had defaulted on the Loan and the Property was posted for foreclosure, with the sale to occur on September 6, 2022 between the hours of 10:00 A.M. and 1:00 P.M. *Id.* Ms. Dasigenis was the substitute trustee that conducted the foreclosure sale on this date. *See Exhibit 1*.

8. As was her usual practice, Ms. Dasigenis announced prior to the commencement of her first sale of the day for the September 6, 2022 public auctions that she would not accept cash for payment of a bid due to safety concerns. *See Exhibits 1 and 2*. The Notice of Sale of the Property listed 10:00 A.M. as the earliest time that the sale would begin, thus, the sale had to be completed within three (3) hours thereafter, by 1:00 P.M.²

¹ Defendant, Hogar Hispano Inc. was named as a defendant in this lawsuit but was never served.

² *Saravia v. Benson*, 433 S.W.3d 658, 665 (Tex. App.—Houston [1st Dist.] 2014, no pet.)(sale must be completed within three hours of the earliest time listed in the notice).

9. At 12:15 P.M., Plaintiff (through Ms. Caroline Allison) submitted the successful bid. However, contrary to the No Cash Rule announced by Ms. Dasigenis prior to the first sale of the day, Ms. Allison attempted to pay part of the bid (\$2,500.00) in cash. Ms. Allison was again informed of the rule that only cashier's checks, and not cash, would be accepted as payment. Ms. Allison stated that she could go to the bank, but it would take an hour. Ms. Dasigenis advised that an hour was too long to wait because the sale had to be completed by 1:00 P.M. In response, Ms. Allison stated that she was waiting for someone to bring cashier's checks. Ms. Allison was allowed until 12:57 P.M. to obtain the checks but she was unable to do so. The sale had to be concluded by 1:00 P.M., so Ms. Dasigenis reconvened the bidding and the Property was sold to Dutch Mill MHP LLC at 12:59 P.M. *See Exhibit 1.*

10. For the reasons stated herein, it is clear that Ms. Dasigenis' refusal to accept cash due to safety concerns is a reasonable condition of the September 6, 2022 foreclosure sale as a matter of law. Accordingly, summary judgment in Defendants' favor is proper.

III. SUMMARY JUDGMENT EVIDENCE

11. This Motion is supported by the following evidence, which Defendants incorporate into the Motion by reference:

Exhibit 1: Declaration of Sandy Dasigenis, Trustee

Exhibit 1.1: Notice of Acceleration and Foreclosure Sale

Exhibit 2: Ms. Dasigenis' Presale Announcement of Auction Rules

Exhibit 3: Declaration of Alicia Matsushima

Exhibit 4: Rules of Sheriff/Constable Public Auctions for Chambers County, Williamson County, Upshur County, Rusk County, Denton County, Cherokee County, and Hunt County (all prohibiting cash as a form of payment at public auction).

IV. ARGUMENT AND AUTHORITY

A. Summary Judgment Standard

12. The party moving for traditional summary judgment has the burden of showing that no genuine and material fact issue exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). The correct interpretation of a statute is a question of law. *Sirius XM Radio, Inc. v. Hegar*, 643 S.W.3d 402, 406 (Tex. 2022). Moreover, Plaintiff has the burden to prove a foreclosure was wrongful. *Greater Sw. Office Park, Ltd. v. Tex. Commerce Bank Nat'l Ass'n*, 786 S.W.2d 386, 388 (Tex. App.—Houston [1st Dist.] 1990, writ denied). Thus, summary judgment is appropriate where there is no evidence to support an essential element of Plaintiff's claim. *Boerjan v. Rodriguez*, 436 S.W.3d 307, 310 (Tex. 2014).

B. The Declaratory Judgment Act applies to determine whether Ms. Dasigenis' rules of the September 6, 2022 foreclosure sale are reasonable and in compliance with section 51.0075(a) as a matter of law.

13. Section 37.004(a) of the DJA provides, in relevant part:

(a) A person ... whose rights, status, or other legal relations are affected by a statute, ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status, or other legal relations thereunder.

Tex. Civ. Prac. & Rem. Code § 37.004.

14. Thus, the DJA applies to determine whether Ms. Dasigenis' rule of not accepting cash as a form of payment at the September 6, 2022 foreclosure sale is reasonable and in compliance with Tex. Prop. Code § 51.0075(a) as a matter of law. *Id.*

C. Not Accepting Cash as Payment at a Public Auction Is a Reasonable Condition as a Matter of Law.

i. **Ms. Dasigenis is authorized under the Texas Property Code to set her own reasonable conditions for conducting the public sales.**

15. The Texas Property Code expressly allows that: “[a] trustee or substitute trustee

may set reasonable conditions for conducting the public sale if the conditions are announced before the bidding is opened for the first sale of the day held by the trustee or substitute trustee.” Tex. Prop. Code § 51.0075(a) (emphasis added). Ms. Dasigenis duly announced her rule against payment in cash prior to the first sale on September 6, 2022. *See Exhibits 1 and 2.*

ii. Ms. Dasigenis’ refusal to accept cash as a form of payment is a reasonable condition due to safety concerns.

16. Requiring the payment of a successful bid in cashier’s checks rather than cash is a reasonable condition under section 51.0075(a). Foreclosure auctions, by law, must be publicly noticed, conducted in a public place, bid amounts are publicly disclosed, and payment must be made without delay at the sale. Tex. Prop. Code §51.002. This renders carrying any amount of cash more dangerous than cashier’s checks. By publicly announcing that cash will not be accepted, and following through on that practice, any would-be assailant is less likely to be enticed and therefore provides more safety for the trustee and other participants in the sale. Moreover, cash is fungible and cannot be traced, whereas cashier’s checks can be traced and made to a specific payee, making them less desirable for theft and replaceable if lost. *See Exhibit 1, Declaration of Sandra Dasigenis. Significantly, there is no requirement in the Texas Property Code that a trustee must accept cash for the successful bid.*

iii. Multiple Texas counties do not accept cash as payment at sheriff or constable public auctions.

17. In addition, refusing cash payment for public auctions is practiced throughout Texas; thus, Ms. Dasigenis’ refusal to accept cash is a reasonable condition of the sale.

18. For example, the rules for the tax sales conducted by the Chambers County constable states that “[s]uccessful bidders may pay for their property by cashier’s check or money orders. NO CASH, CREDIT CARDS, PERSONAL OR COMPANY CHECKS ARE

ACCEPTED.” See Exhibit 4 (emphasis in original). Similarly, Hunt County conditions for the constable/tax foreclosure sales state “[o]nly Cashier’s Checks or U.S Postal Money Orders will be accepted by the Hunt County Constable’s Office and should be made payable to ‘Hunt County Constable’s Office.’” *Id.*

19. Other counties that do not accept cash as a form of payment at sheriff/constable public auctions are Williamson County, Upshur County, Rusk County, Denton County, and Cherokee County. *Id.*

20. By refusing to accept cash, the sheriff or constable of the above-named counties adhere to the very same condition of sale that Ms. Dasigenis applies to her own sales. Clearly, the No Cash Rule is not unreasonable under Tex. Prop. Code § 51.0075(a).

- iv. **Although not required to do so, Ms. Dasigenis allowed Plaintiff additional time (until 12:57 P.M.) to obtain the necessary cashier’s checks. Plaintiff failed to do so. Ms. Dasigenis properly reconvened the sale at 12:57 P.M. because the sale had to be completed by 1:00 P.M.**

21. Finally, Plaintiff was allowed sufficient time to produce the remaining funds by cashier’s check. Payment for a successful bid must be made without delay, or as may be agreed upon by the trustee. Tex. Prop. Code § 51.0075(f) (emphasis added).

22. Although not required to do so, Ms. Dasigenis allowed Plaintiff additional time, until 12:57 P.M., to obtain the necessary cashier’s checks. Because time was running out to complete the sale (there were only three minutes left at 12:57 p.m.) and Plaintiff was still unable to produce the cashier’s checks, the sale had to be reconvened to complete the sale by the required end time of 1:00 P.M. See Exhibit 1. Thus, the conditions of the September 6, 2022 foreclosure sale were reasonable as a matter of law. See e.g., *Heck v. CitiMortgage, Inc.*, 640 F. App’x 274, 278 (5th Cir. 2016) (unpublished) (plaintiff had successful bid of \$63,000 and requested 30-40 minutes to produce cashier’s checks but trustee only allowed 20 minutes; after plaintiff failed to

return with payment in 20 minutes, trustee reconvened the sale and the property was sold to someone else for \$60,224; court upheld the dismissal of plaintiff's claim that the trustee failed to give plaintiff sufficient time to obtain cashier's check to pay for successful bid).

23. Ms. Dasigenis not only followed the law, but also her own procedures as duly announced in the General Admonishment to Purchaser. Accordingly, summary judgment in Defendants' favor is proper.

v. Plaintiff has no evidence that Ms. Dasigenis' No Cash Rule was unreasonable.

24. Alternatively, Plaintiff has no evidence that Ms. Dasigenis' No Cash Rule was unreasonable as a matter of law. Ms. Allison simply asserts her subjective belief that Ms. Dasigenis' refusal to accept cash is unreasonable because she is upset with the outcome of the sale. Plaintiff could have simply followed the rules like everyone else and brought cashier's checks. But she did not. Because Plaintiff has failed in her burden of proof to show how the No Cash Rule is unreasonable, summary judgment for Defendants is appropriate on this basis.

V. CONCLUSION

25. Given the above, Plaintiff respectfully requests that the Court grant Defendants' Motion for Partial Summary Judgment and enter an Order declaring under the DJA that the condition prohibiting cash and requiring payment by cashier's check at the September 6, 2022 trustee sale was reasonable under section 51.0075(a) as a matter of law. Defendants request any further relief, at law or in equity, as shall be just.

Respectfully submitted,

INVICTA LAW FIRM

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MAIRA GIRALDO, JONATHAN CAMPBELL
and DUTCH MILL, MHP, LLC

CERTIFICATE OF SERVICE

I certify that a true copy of the above was served on each attorney of record or party in accordance with Rules 21 and 21a of the Texas Rules of Civil Procedure on May 12, 2023 as follows:

Via Texas eFile:
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QUEST TRUST COMPANY FBO
CAROLINE ALLISON IRA

/s/ Alicia M. Matsushima
Alicia M. Matsushima

Automated Certificate of eService

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Alicia Matsushima on behalf of Alicia Matsushima

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Case Contacts

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