

CAUSE NO. 2022-59398

QUEST TRUST COMPANY	§	IN THE DISTRICT COURT
	§	
VS.	§	152ND JUDICIAL DISTRICT
	§	
SANDY DASIGENIS, TRUSTEE, JONATHAN CAMPBELL AND MAIRA GIRALDO, <i>ET AL</i>	§	HARRIS COUNTY, TEXAS

**PLAINTIFF'S RESPONSE TO DEFENDANT'S
MOTION FOR INTERLOCUTORY SUMMARY JUDGMENT**

1. PARTIES

A. QUEST TRUST COMPANY for the benefit of CAROLINE ALLISON IRA #2593721 is "Plaintiff Quest". Plaintiff Quest is represented by WILLIAM C. BOYD (TBA 02779000) (email: wboyd@pattersonboyd.com) and S. SCOTT BOYD (TBA 24026909) (email: ssboyd@pattersonboyd.com) of Patterson, Boyd & Lowery, P.C., 2101 Louisiana St., Houston, Texas 77002; (Ph. 713-222-0351 and fax: 713-759-0642).

B. SANDY DASIGENIS aka SANDRA DASIGENIS, trustee is "Defendant Trustee" and is represented by Alicia M. Matsushima (Texas Bar No. 24002546) and Moises Liberato Jr. (Texas Bar No. 24132067) of INVICTA LAW FIRM, 1923 Washington Ave. Ste. 2275, Houston, Texas 77007; (713) 955-4559 Tel.; (713) 881-9954 Fax; alicia@invictalawfirm.com; moises@invictalawfirm.com.

C. MAIRA GIRALDO is "Defendant Giraldo" and is represented by Alicia M. Matsushima (Texas Bar No. 24002546) and Moises Liberato Jr. (Texas Bar No. 24132067) of INVICTA LAW FIRM, 1923 Washington Ave. Ste. 2275, Houston, Texas

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D. JONATHAN CAMPBELL is “Defendant Campbell” and is represented by Alicia M. Matsushima (Texas Bar No. 24002546) and Moises Liberato Jr. (Texas Bar No. 24132067) of INVICTA LAW FIRM, 1923 Washington Ave. Ste. 2275, Houston, Texas 77007; (713) 955-4559 Tel.; (713) 881-9954 Fax; alicia@invictalawfirm.com; moises@invictalawfirm.com.

E. HOGAR HISPANO INC. is “Defendant Hogar” and is a Florida Company. Its current address is unknown.

F. ANDERS LENDING LLC d/b/a ANDERS CAPITAL GROUP is “Defendant Anders” and it has not appeared in the case.

G. DUTCH MILL MHP, LLC is “Defendant Dutch” and it is represented by Alicia M. Matsushima (Texas Bar No. 24002546) and Moises Liberato Jr. (Texas Bar No. 24132067) of INVICTA LAW FIRM, 1923 Washington Ave. Ste. 2275, Houston, Texas 77007 (713-955-4559 Tel.; 713-881-9954 Fax; alicia@invictalawfirm.com; moises@invictalawfirm.com).

2. SUMMARY JUDGMENT EVIDENCE

Plaintiff incorporates its Motion for Summary Judgment previously filed with the Court and utilizes the same summary judgment evidence, which are attached hereto.

A. Plaintiff’s declaration is attached as Exhibit “A” and incorporated by reference.

B. A true and correct copy of the relevant Deed of Trust and Notice of foreclosure are attached as Exhibit “B” and incorporated by reference.

C. An email from Defendant Trustee is attached as Exhibit “C” and incorporated by reference.

D. A true and correct copy of Plaintiff’s February 2022 deed to the property is attached as Exhibit “D” and incorporated by reference.

E. Defendant Dutch Mill’s October 2022 trustee’s deed to the property is attached as Exhibit “E” and incorporated by reference.

3. DIPSUTED ISSUES OF FACT

The primary issue of fact in this case is whether refusing \$2,500 cash as part of a foreclosure sale tender from the highest bidder is reasonable, assuming a trustee has authority to limit the terms of payment as dictated by the Texas Property Code and Deed of Trust. Plaintiff argues it is not reasonable.

4. ARGUMENT AND AUTHORITIES

This Court already considered Plaintiff’s Motion for Summary Judgment on the issue of whether a trustee can refuse cash tendered at a foreclosure sale. See Court’s file. Plaintiff incorporates its Motion for summary Judgment on this same issue here. *Id.* The Court denied the motion finding a fact issue as to where refusing cash was reasonable. Defendant Trustee filed a cross-Motion for Summary Judgment arguing as a matter of law that refusing cash is reasonable. Plaintiff disputes refusing cash is reasonable, creating a fact issue. See Fisch v. Transcon. Ins. Co., 356 S.W.2d 186, 192 (Tex. Civ. App.—Houston [1st Dist.] 1962, writ ref’d n.r.e.) (“Ordinarily what is ‘reasonable’ is a question of fact.”).

A trustee’s authority to act is limited to and dictated by the Deed of Trust and Texas Property Code. It has long been held, a trustee owes a fiduciary duty to the grantor to strictly comply with the terms of the deed of trust:

The Court also recognizes a trustee "does have 'a duty to 'act with absolute impartiality and fairness to the grantor in performing the powers vested in him by the deed of trust.'" *Marsh v. Wells Fargo Bank, N.A.*, 760 F. Supp. 2d 701, 708 (N.D. Tex. 2011) (citations omitted). The duty has been found to be breached when **"the trustee fails to comply strictly with the terms of the deed of trust or the notice and sale provisions of § 51.002 of the Texas Property Code."** *Id.*; see *Peterson v. Black*, 980 S.W.2d 818, 822 (Tex. App.—San Antonio 1998, no pet.) ("trustee has no duty to take affirmative actions beyond that required by statute or the deed of trust to ensure a fair sale"; "trustee's duties are fulfilled by complying with the deed of trust"); *First State Bank v. Keilman*, 851 S.W.2d 914, 921-22, (Tex. App.—Austin 1993, writ denied) ("a mortgagee is under no duty to take affirmative action, beyond that required by statute or the deed of trust, to ensure a 'fair' sale." In other words, a debtor may recover damages for common-law wrongful foreclosure only if the mortgagee either (1) fails to comply with statutory or contractual terms, or (2) complies with such terms, yet takes affirmative action that detrimentally affects the fairness of the foreclosure process." "[T]rustee fulfills his duty to act with impartiality and fairness by strictly complying with the terms of the deed of trust"). Although no case law could be found on this issue, and in fact, the Court could find no cases discussing the application of § 51.0075(f) in general, **the Court presumes without deciding that a breach of the duty could potentially be alleged if the trustee or substitute trustee violates the provisions of or exceeds the authority granted in § 51.0075.**

Martinez v. Reconstruct Co., N.A., 2015 U.S. Dist. LEXIS 181955, *35-37, 2015 WL 12552032 (emphasis added)

As stated in *Martinez*, the trustee owes a duty to strictly comply with the terms of the deed of trust, and has no authority to modify the Texas Property Code.

In this case, the Deed of Trust specifically states the Trustee will conduct a cash sale. See Exhibit "B" attached to Plaintiff's Motion for Summary Judgment (Deed of Trust). Likewise, the Texas Property Code section 51.0075(f) specifically states that "The purchase price in a sale held by a trustee or substitute trustee under this section is due and payable without delay on acceptance of the bid...." Tex. Prop. Code §51.0075(f). Plaintiff was the highest bidder and tendered payment at the time of the sale. Plaintiff complied with the statute by immediately tendering payment. The Property Code does not limit the type of payment allowed, only that payment be tendered immediately. To allow

Defendant Trustee to refuse cash would allow the trustee to modify the Texas Property Code (and the Deed of Trust) by conditioning payment on her own personal preferences. Such a modification is not reasonable.

While section 51.0075(a) does allow the trustee to “set reasonable conditions for conducting the public sale,” the express language of the statute limits those conditions to how the sale is conducted, not the form of payment. For example, for safety concerns, if the trustee preferred to conduct the sale via zoom instead of in person, this variation would improperly vary the deed of trust and statute requiring all sales to take place at a designated location. Tex. Prop. Code §51.002. Varying the payment terms is no different than varying the payment location—they are fundamental terms in the deed of trust and Property Code.

A trustee does not have authority to vary those terms, or to otherwise refuse payment as allowed by the Property Code. In this case, the cash amount was very small--\$2500. Whatever reason the trustee states for refusing cash becomes unreasonable based on the small amount involved. Exhibit “A.” Therefore, a genuine issue of material fact exists as to where refusing \$2500 as partial payment at a foreclosure sale is reasonable.

3. PRAYER

Plaintiff requests the Court deny Defendant’s Motion for Summary Judgment, and award Plaintiff such other relief to which Plaintiff is entitled.

RESPECTFULLY SUBMITTED,

PATTERSON, BOYD & LOWERY, P.C.

BY: /s/ S. Scott Boyd
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CERTIFICATE OF SERVICE

The forgoing amended pleadings was served by efile on all parties of record as indicated in the Parties section above on the 2nd day of June, 2023.

alicia@invictalawfirm.com; moises@invictalawfirm.com
Attorneys for Defendants

/s/ S. Scott Boyd
S. SCOTT BOYD

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.

Scott Boyd on behalf of Scott Boyd
Bar No. 24026909
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Envelope ID: 76226457
Filing Code Description: No Fee Documents
Filing Description: No Fee Documents
Status as of 6/2/2023 10:27 AM CST

Case Contacts

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