

NO. 202326878

KELLY DOYLE ET AL

Plaintiffs

v.

NATIONSTAR MORTGAGE LLC D/B/A
MR. COOPER

Defendant

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IN THE DISTRICT COURT

HARRIS COUNTY, TEXAS

334th JUDICIAL DISTRICT

NATIONSTAR MORTGAGE LLC'S
MOTION FOR TRADITIONAL AND NO-EVIDENCE SUMMARY JUDGMENT

Nationstar Mortgage LLC d/b/a/ Mr. Cooper ("Nationstar" or "Defendant") hereby files this *Motion for Traditional and No-Evidence Summary Judgment* as to the claims asserted against it by Kelly Doyle and Walter Doyle (the "Doyles" or "Plaintiffs"). Defendant is entitled to summary judgment as a matter of law because there is no genuine dispute as to any material fact, and because there is no evidence of one or more essential elements of Plaintiffs' claims.

I.
PROCEDURAL BACKGROUND

1. This lawsuit is one of several lawsuits filed by Plaintiffs to avoid foreclosure on their delinquent home mortgage loan.

2. On September 18, 2020, Plaintiffs filed an identical lawsuit in this Court, under Cause No. 2020-58073 (the "Prior Lawsuit").¹

3. On January 30, 2023, this Court dismissed the Prior Lawsuit for want of prosecution.²

¹ Ex. 6., Plaintiffs' Prior Lawsuit Petition (9.18.2020).

² Ex. 4., Dismissal for Want of Prosecution (1.30.23).

4. On February 9, 2023, Plaintiffs moved to reinstate the Prior Lawsuit, and a hearing was held on that motion on February 24, 2023.³ After the hearing, this Court noted that opposing “counsel failed to file a proposed order to reinstate as ordered during Feb. 24, 2023 hearing so case is disposed and MSJ passed.”⁴

5. On April 29, 2023, Plaintiffs filed the instant action against Nationstar, which raises similar claims based on identical operative facts as the Prior Lawsuit. However, as set forth below, each claim fails as a matter of law and lacks evidentiary support. For these reasons, Nationstar is entitled to final summary judgment on the claims against it.

II. **FACTUAL BACKGROUND**

A. The Home Equity Loan.

6. In March 2017, Plaintiff Walter Doyle obtained a home equity loan for \$310,000.00.⁵ Plaintiffs Walter and Kelly Doyle, as husband and wife, executed a Texas Home Equity Security Instrument to secure repayment of the loan. The Security Instrument encumbers the real property located at 10330 Robs Run Court, Houston, Texas (the “Property”).⁶

In this lawsuit, Plaintiffs claim that the loan did not escrow sums to pay for taxes assessed against the Property, nor for hazard insurance to protect the Property. (Pet. ¶ 7.) Despite this, Plaintiffs allege that “Defendant [Nationstar, the current servicer of the loan] has been illegally withholding amounts for escrow, not crediting payments properly and threatening foreclosure on a perfectly performing loan.” (*Id.*)

B. The Escrow Waiver and Plaintiffs’ Promise to Pay Property Taxes.

³ Ex. 5., Motion to Reinstate, Notice of Hearing (2.24.23).

⁴ Ex. 7., Prior Lawsuit Docket Sheet.

⁵ Ex. 1A, Note (App. 4-7).

⁶ Ex. 2, Security Instrument (App. 102-116).

Indeed, at the closing of the loan, Plaintiff Walter Doyle executed an Escrow/Impound Account Waiver Statement, therein promising to pay all property tax assessments and hazard insurance premiums on his own accord (i.e., without the lender escrowing for those amounts).⁷ The Waiver Statement expressly required Plaintiffs to make “timely and complete payment” for taxes and insurance, meaning “payment as to prevent delinquency, cancellation or lapse of coverage, or loan default notice or remedies.”⁸

In addition, the Waiver Statement warned Plaintiffs that “upon failure to remit same, monthly payments shall immediately be increased to include the Funds for the Escrow Items to the extent and on the conditions required by applicable law; and this waiver shall be of no further force and effect.”⁹ (*Id.*)

C. Plaintiffs’ Failure to Pay Property Taxes.

Generally, a property owner must pay property taxes on or before January 31 of each calendar year. Tex. Tax Code § 32.01(a) (tax lien attaches to property to secure payment of taxes, penalties, and interest on January 1 of each calendar year); *id.* §§ 31.02(a), 31.04(a) (making February 1 the date that taxes imposed the previous year become delinquent if a bill was mailed on or before January 10 of the current year).

Despite their promise to do so—and despite the requirements of the Texas Tax Code—Plaintiffs failed to pay all of their 2018 property taxes on or before the January 31, 2019 deadline.¹⁰ Notably, the Harris County Tax Assessor-Collector’s Tax Receipt for the 2018 tax year is dated February 28, 2019 (“Receipt Date: 02/28/2019”), it shows the assessment of penalties and interest

⁷ **Ex. 1B**, Escrow Waiver Statement (App. 8).

⁸ *Id.*

⁹ *Id.* In addition, the Security Instrument provides for revocation of the Waiver Statement upon Plaintiffs’ failure to remit timely and complete payments for taxes and insurance. [**Ex. 2**, Security Instrument, ¶ 3, App. 104-105.]

¹⁰ **Ex. 3**, Tax Receipt dated February 28, 2019 (App. 119).

(“PI”), and it shows a returned item charge of \$30.00.¹¹ In sum, Plaintiffs’ did not make a payment towards their 2018 property taxes until February 28, 2019, having “bounced” their prior payment to the Tax-Assessor Collector.

Ultimately, Cenlar (servicer of the loan immediately prior to Nationstar) paid the property taxes still outstanding for tax year 2018.¹² Specifically, on May 28, 2019, Cenlar made two payments to the Harris County Tax Assessor-Collector: (1) \$1,274.53 for “County Tax,” and (2) \$165.67 for “City, Utility.”¹³

This resulted in Plaintiffs owing \$1,440.20 as necessary to repay the advance made to pay the delinquent property taxes. In other words, the advance created an escrow shortage that Plaintiffs are now obligated to repay. Specifically, Section 9 of the Security Instrument permits the lender to pay delinquent property taxes to protect its lien position, and further provides that amounts disbursed to do so “shall become additional debt of Borrower secured by this Security Instrument.”¹⁴ Further, by the express terms of the Escrow/Impound Account Waiver Statement,

¹¹ *Id.* According to the Harris County Tax Assessor-Collector: “If the payment is rejected by your financial institution there will be a returned item charge of \$30.” (E-Check FAQs, accessible at <https://www.hctax.net/Property/Echeck>.)

¹² **Ex. 1D**, Monthly Statement dated May 31, 2019 (App. 63). Nationstar became servicer of the loan later that year, effective August 1, 2019. [**Ex. 1E**, Notice of Servicing Transfer, App. 97.] The first statement sent by Nationstar to the borrower, Walter Doyle, was the monthly statement dated August 20, 2019. [**Ex. 1D**, Monthly Statements, App. 69.]

¹³ **Ex. 1D**, Monthly Statement dated May 31, 2019 (App. 63); **Ex. 3**, Tax Receipts dated May 31, 2019 (App. 120-121).

¹⁴ **Ex. 2**, Security Instrument (App. 107). Note further that a property tax lien attaches to the tract creating the delinquency. *See Richey v. Moor*, 249 S.W. 172, 173 (Tex. 1923). Additionally, the principle of lien priority based upon time of filing does not apply to a tax lien. A lien for ad valorem taxes imposed by state, county, or city taxing units in Texas perfects upon attachment on January 1 of each year without further action by the taxing authority. Tex. Tax Code § 32.01(d). Such a tax lien is always senior to and has priority over other liens. The Code states:

[A] tax lien provided by this chapter takes priority over the claim of any creditor of a person whose property is encumbered by the lien and over the claim of any holder of a lien on a property encumbered by the tax lien, whether or not the debt or lien existed before attachment of the tax lien.

the waiver is “of no further force and effect” due to Plaintiffs’ failure to timely pay all of the property taxes assessed against the Property, and “monthly payments shall immediately be increased to include the Funds for the Escrow Items”¹⁵

D. Plaintiffs’ Chronic Failure to Make Payments on the Loan.

At the time Plaintiffs filed this lawsuit, in April of 2023, Plaintiffs were 1,173 days delinquent on their loan payments, with the most recent payment being on February 29, 2022.¹⁶ Rather than cure their perpetual delinquency, Plaintiffs have resorted to filing baseless lawsuits to avoid Nationstar’s lawful foreclosure efforts.

E. The Instant Lawsuit.

This Court dismissed Plaintiff’s previous lawsuit for want of prosecution on January 30, 2023.¹⁷ Plaintiffs have since refiled an identical lawsuit against Nationstar, the current servicer of the home equity loan, on the premise that Nationstar “has been illegally withholding amounts for escrow, not crediting payments properly and threatening foreclosure on a perfectly performing loan.” (Pet. ¶ 7.) In short, Plaintiffs allege they obtained a non-escrow loan but that Nationstar is now impermissibly charging escrow.

Plaintiffs’ live Petition bring claims against Nationstar for: (1) breach of contract, and (2) violation of the Fair Debt Collection Act (the “FDCA”). Plaintiffs also seek injunctive relief in the form of an order barring Nationstar from foreclosing on the home equity lien. As more fully set forth below, Plaintiffs’ claims are wholly unsupported and subject to summary judgment on both

Id. § 32.05(b). This is so regardless of whether the taxing authorities timely file the lien. *See Conseco Fin. Serv. Corp. v. J & J Mobile Homes, Inc.*, 120 S.W.3d 878, 881-82 (Tex. App.—Fort Worth 2003, pet. denied) (holding tax liens for 1997-2000 took priority over pre-existing perfected security interest in mobile home by virtue of § 32.05).

¹⁵ **Ex. 1B**, Escrow Waiver Statement (App. 8).

¹⁶ **Ex. 1C**, Nationstar Correspondence, April 18, 2023 (App. 10).

¹⁷ **Ex. 4.**, Dismissal for Want of Prosecution.

traditional and no-evidence grounds.

III.
EVIDENCE

In support of this motion, Defendant proffers the following evidence, incorporated herein by reference for all purposes:

Exhibit	Item
1	Nationstar's Business Records Affidavit
1A	Texas Home Equity Note
1B	Escrow/Impound Account Waiver Statement
1C	Nationstar Correspondence (4.18.23)
1D	Monthly Statements (7.18.23)
1E	Notice of Servicing Transfer (08.09.19)
2	Texas Home Equity Security Instrument [certified copy]
3	Harris County Tax Assessor-Collector Tax Receipts [certified copies] for tax years 2017-21
4	Dismissal for Want of Prosecution
5	Motion to Reinstate, Notice of Hearing
6	Plaintiffs' Prior Lawsuit (9.18.20)
7	Prior Lawsuit Docket Sheet

IV.
LEGAL STANDARD

A. Standard under Rule 166a.

In a summary judgment proceeding brought by a defendant, the movant must present summary judgment proof establishing, as a matter of law, that there is no genuine issue of material fact on one or more of the essential elements of the plaintiff's cause of action.¹⁸ The movant may accomplish this by offering summary judgment evidence showing that at least one element of the

¹⁸ *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 774 (Tex. 1995); *Gibbs v. Gen. Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970).

non-movant's cause of action has not been established conclusively against the non-movant.¹⁹ It is not necessary for the movant to disprove all elements of the non-movant's cause of action; rather, if a movant-defendant can disprove any one of the essential elements, then the court should render summary judgment for that defendant.²⁰

B. Standard under Rule 166a(i).

The burden of proof in a no-evidence summary judgment proceeding is on the same party who would bear the burden of proof at trial.²¹ Once a no-evidence motion for summary judgment challenging one or more elements essential to the non-movant's claim or defense is filed, the burden of proof on the challenged elements shifts to the non-movant.²² The burden of the non-movant is to raise a genuine issue of material fact about the element challenged by the no-evidence motion for summary judgment.²³

C. Adequate time for discovery has passed.

7. An adequate time for discovery has passed. It is within the trial court's discretion to determine whether there has been an adequate time for discovery.²⁴ Even where the discovery period has not run, a court can still determine that there has been adequate time for discovery. Here, Plaintiffs filed an identical lawsuit in this Court on September 18, 2020, under Cause No. 2020-58073 (the "Prior Lawsuit").²⁵ During both the Prior Lawsuit and the instant action, Plaintiffs have failed to produce any evidence to support their claims against Defendant. Plaintiffs' inability

¹⁹ *Union Pump Co.*, 898 S.W.2d at 774.

²⁰ *Wheeler v. Yettie Kersting Mem'l Hosp.*, 866 S.W.2d 32, 36 (Tex. App.—Houston [1st Dist.] 1993, no writ).

²¹ *Marsaglia v. Univ. of Tex. at El Paso*, 22 S.W. 3d 1, 3 (Tex. App.—El Paso 1999, pet. denied).

²² Tex. R. Civ. P. 166a(i).

²³ *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001).

²⁴ *Restaurant Teams Int'l, Inc. v. MG Secs. Corp.*, 95 S.W. 3d 336,339 (Tex. App.—Dallas 2002, no pet.).

²⁵ **Ex. 6.**, Plaintiffs' Prior Lawsuit Petition (9.18.2020).

to avoid summary judgment under Rule 166a(i) cannot, in any way, be attributed to an insufficient opportunity to engage in discovery.²⁶

V.

TRADITIONAL MOTION FOR SUMMARY JUDGMENT

A. Plaintiffs' Own Breach Bars their Breach of Contract Claim.

Under Texas law, a plaintiff can only bring a breach of contract claim if she performed under the contract or if her failure to perform has been excused. *Moe v. Option One Mortg. Corp.*, No. 14-07-00550-CV, 2009 WL 136892, at *3 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (mortgagor who failed to make payments and maintain insurance “did not perform or tender performance, but instead breached the contract”); see *Walker v. Willow Bend Mortg. Co. LLC*, No. 3:18-CV-0666-D, 2019 WL 1569683, at *6 (N.D. Tex. Apr. 11, 2019) (“Wells Fargo has produced evidence, in the form of Walker's loan records, indicating that Walker has not performed his contractual obligations by remaining current on his mortgage payments until the alleged breach. Walker has failed to identify evidence to the contrary. Walker therefore lacks evidence for an essential element of his breach of contract claim.”).²⁷

In the case at bar, the summary judgment evidence conclusively demonstrates that Plaintiffs have not performed under the loan agreement. First and foremost, Plaintiffs have

²⁶ See *Specialty Retailers, Inc. v. Fuqua*, 29 S.W.3d 140, 145 (Tex.App.—Houston [14th Dist.] 2000, pet. denied) (finding that a discovery period of eight months was adequate); *McClure v. Attebury*, 20 S.W.3d 722, 729–730 (Tex. App.—Amarillo 1999, no pet.) (finding that seven months from the date of the filing of the petition to the filing of the motion for summary judgment was adequate time for discovery).

²⁷ *Walker* and the other federal authority cited in this case are persuasive because, in home-mortgage litigation, Texas courts routinely rely on federal interpretations of Texas law. See *Bierwirth v. BAC Home Loans Servicing LP*, No. 03-11-00644-CV, 2012 WL 3793190, at *1 n.3 (Tex. App.—Austin Aug. 30, 2012, no pet.) (“Federal authority is persuasive here because a great amount of home-mortgage litigation in Texas is tried in its federal courts, applying Texas foreclosure law.”); *Robeson v. Mortgage Electronic Registration Systems Inc.*, No. 02-10-227-CV, 2012 WL 42965, at *4, n.4 (Tex. App.—Fort Worth Jan. 5, 2012, pet. denied) (explaining that federal authority is “particularly persuasive” in this area); see also *Martins v. BAC Home Loans Servicing LP*, 722 F.3d 249, 253 n.2 (5th Cir. 2013) (explaining that “most foreclosure cases are decided by federal courts under diversity jurisdiction”).

repeatedly failed to make timely monthly payments on the loan and were delinquent on the loan at the time they filed this suit.²⁸ Specifically, at the time Plaintiffs filed this lawsuit, in April of 2023, Plaintiffs were 1,173 days delinquent on their loan payments, with the most recent payment being on February 29, 2022.²⁹

Additionally, despite their promise in the Escrow/Impound Account Waiver Statement to do so, Plaintiffs failed to pay all of their 2018 property taxes on or before the January 31, 2019 deadline. The Tax Receipt is dated February 28, 2019, evidencing the fact the Harris County Tax Assessor-Collector received Plaintiffs' payment *after* January 31, 2019.³⁰ The face of the government record shows as follows:

DOYLE WALTER D & KELLY ANN 10330 ROBS RUN CT CYPRESS, TX 77433-4794				LT 14 BLK 1 CYPRESS CREEK LAKES SEC 21				
Parcel Address: 10330 ROBS RUN CT Legal Acres: 0.0000				Remit Seq No: 76705229 Receipt Date: 02/28/2019 Deposit Date: 03/04/2019 Print Date: 08/19/2022 01:57 PM Printed By: SSMITH				
Deposit No:	201903047900							
Validation No:	784							
Account No:	135-796-001-0014							
Operator Code:	PHAMPTON							

Year	Tax Unit Name	Rec Type	Tax Value	Tax Rate	Levy Paid	P&I	Coll Fee Paid	Total
2018	Harris County	TL	431,075	0.418580	1,162.52	81.38	0.00	1,243.90
2018	Harris County Flood Control Dist	TL	431,075	0.028770	79.91	5.59	0.00	85.50
2018	Port Of Houston Authority	TL	431,075	0.011550	32.08	2.25	0.00	34.33
2018	Harris County Hospital District	TL	431,075	0.171080	475.14	33.26	0.00	508.40
2018	Harris County Dept. Of Education	TL	431,075	0.005190	14.41	1.01	0.00	15.42
2018	Lone Star College System	TL	533,456	0.107800	370.51	25.93	0.00	396.44
2018	Emergency Serv Dist #9-E.M.S./Fire	TL	511,902	0.052710	173.84	12.17	0.00	186.01
2018	STATE OF TEXAS	TL	0	0.000000	30.00	0.00	0.00	30.00
					\$2,338.41	\$161.59	\$0.00	\$2,500.00

Ann Harris Bennett
Tax Assessor-Collector in and For
Harris County, Texas, do hereby certify this to be a true and
correct copy of the records of the Harris County Tax Office.
WITNESS my hand and this 26th day of August, 2022

Ann Harris Bennett
Tax Assessor-Collector
Harris County, Texas
By: Susan Smith
Deputy

²⁸ Ex. 1-C, Ex. 1-F.

²⁹ Ex. 1C, Nationstar Correspondence, April 18, 2023 (App. 10).

³⁰ Ex. 3, Tax Receipt dated February 28, 2019 (App. 119).

The above tax receipt shows the assessment of penalties and interest (“PI”), and it shows a returned item charge of \$30.00.³¹ In sum, Plaintiffs did not make a payment towards their 2018 property taxes until February 28, 2019, having “bounced” their prior payment to the Tax-Assessor Collector.

Moreover, Plaintiffs’ February 2019 payment was not enough to satisfy all taxes due and owing. As a result, Cenlar (the servicer of the loan immediately prior to Nationstar) paid the property taxes still outstanding for tax year 2018.³² Specifically, on May 28, 2019, Cenlar made two payments to the Harris County Tax Assessor-Collector: (1) \$1,274.53 for “County Tax,” and (2) \$165.67 for “City, Utility.”³³ As also shown above, Plaintiffs have repeatedly failed to make timely monthly payments on the loan and were delinquent on the loan at the time they filed this suit.³⁴ See *Shin v. Chase Home Fin., LLC*, No. 05-12-01634-CV, 2014 Tex. App. LEXIS 7070, at *8 (Tex. App.—Dallas June 30, 2014, no pet.) (“The waiver of escrow agreement required appellants make their tax payments timely and before any penalties were assessed. If appellants failed to do so, **Chase was permitted to set up an escrow account.** It is undisputed that appellants did not pay the taxes when due and were assessed penalties for their failure to do so. It is also undisputed that Chase paid appellants' taxes and the penalties assessed. After it did so, appellants refused to pay the increased monthly payment to cover the escrow for taxes.”)

Nationstar’s summary judgment evidence is fatal to Plaintiffs’ breach of contract claim. It is undisputed that Plaintiffs have defaulted on not only the loan’s payment terms, but also on the

³¹ *Id.* According to the Harris County Tax Assessor-Collector: "If the payment is rejected by your financial institution there will be a returned item charge of \$30." (E-Check FAQs, accessible at <https://www.hctax.net/Property/Echeck>.)

³² **Ex. 1D**, Monthly Statement dated May 31, 2019 (App. 63).

³³ **Ex. 1D**, Monthly Statement dated May 31, 2019 (App. 63); **Ex. 3**, Tax Receipts dated May 31, 2019 (App. 120-121).

³⁴ **Ex. 1D**, Monthly Statements (App. 14-96).

loan's requirement that Plaintiffs make timely and complete payments for assessed property taxes. Because a party to a contract who is herself in default cannot maintain a suit for its breach, Defendant is entitled to summary judgment in its favor on Plaintiffs' breach of contract claim. *Moe v. Option One Mortg. Corp.*, 2009 WL 136892, at *3; see *Villareal v. Wells Fargo Bank, N.A.*, 814 F.3d 763, 767 (5th Cir. 2016).

B. The Economic Loss Doctrine Bars Plaintiffs' Texas Debt Collection Act Claim.

The economic loss doctrine bars Plaintiffs' TDCA claim because it arises from conduct governed by the loan agreement (the Note and Security Instrument). In Texas, the economic loss rule "generally precludes recovery in tort for economic losses resulting from the failure of a party to perform under a contract." *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 12 (Tex. 2007). That is, "a duty in tort does not lie when the only injury claimed is one for economic damages recoverable under a breach of contract claim." *Sterling Chems. Inc. v. Texaco Inc.*, 259 S.W.3d 793, 796 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). Thus, the rule restricts contracting parties to contractual remedies for economic losses associated with their relationship, "even when the breach might be reasonably viewed as a consequence of a contracting party's negligence." *Lamar Homes, Inc.*, 242 S.W.3d at 13. The burden is on the plaintiff to establish evidence of an independent injury. *Esty v. Beal Bank S.S.B.*, 298 S.W.3d 280, 302 (Tex. App.—Dallas 2009, no pet.)

Texas courts have routinely dismissed TDCA and other tort claims based on underlying contract disputes between the parties. See, e.g., *Hammond v. Ocwen Loan Servicing LLC*, No. 3:14-CV-2599-BN, 2014 WL 5326722, at *4 (N.D. Tex. Oct. 20, 2014) (compiling cases barring TDCA claims based on breach of contract because of the economic loss doctrine); *Daryani v. Wells Fargo Bank, N.A.*, 2012 U.S. Dist. Lexis 114080, 2012 WL 3527924 (S.D. Tex. Aug. 13,

2012) (the economic loss rule bars plaintiff's fraud and negligence claims where "[a]ny alleged duty that [defendant] may have breached would relate to the parties' contractual relationship, and cannot, as a matter of law, form the basis of a negligence claim."); *Law v. Ocwen Loan Servicing LLC*, 587 Fed. App'x. 790, 796 (5th Cir. 2014) ("Because [plaintiff] has not alleged non-economic damages resulting independently of the [contractual relationship], the economic loss doctrine bars [the] negligence claims"); *Crawford v. Ace Sign Inc.*, 917 S.W.2d 12, 14 (Tex. 1996) (extending the principles underlying the economic loss rule to DTPA claims under the "mere breach of contract" defense); see *Robinson v. Match.com LLC*, 2012 U.S. Dist. LEXIS 112742, at *15 (N.D. Tex. Aug. 10, 2012) (dismissing DTPA claim in which the defendant allegedly "made certain misrepresentations regarding its dating services to get Plaintiffs to subscribe or renew their subscriptions," since the claim, at its "essence," was "virtually identical" to Plaintiffs' breach of contract claim).

Here, there is no dispute that Plaintiffs' TDCA claim stems from the loan agreement. Plaintiffs' argument is, in essence that Defendant wrongfully applied payments and has attempted to wrongfully foreclose under the loan documents. (Pet. at 3-4.) Because Plaintiffs' alleged injuries and Defendant's alleged liability stem from the loan agreement, Plaintiffs' TDCA claim is barred as a matter of law and Defendant is entitled to summary judgment on the claim.

C. Plaintiffs' Request for Injunctive Relief Fails as a Matter of Law.

Plaintiffs seek an injunction "to prevent Defendant's [sic] from foreclosing on Plaintiff s [sic] Homestead." (Pet. at 5.) To obtain injunctive relief, a plaintiff must plead for some form of permanent relief, i.e., a suit for damages. See *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002); see also *Jackson v. Fed. Home Loan Mortg. Corp.*, No. 4:11-CV-507- A, 2011 WL 3874860, at *3 (N.D. Tex. Sept. 1, 2011). If the plaintiff's causes of action fail or are not

recognized in Texas, the trial court cannot grant an injunction. *See Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993). As shown above, all of Plaintiffs' claims are subject to summary judgment in favor of Defendant. Their request for injunctive relief should thus be denied.

VI.
NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT

A. Plaintiffs Have No Evidence to Support Their Breach of Contract Claim Against Nationstar.

To establish a viable breach of contract claim, a plaintiff must demonstrate: “(1) the existence of a valid contract, (2) the performance or tendered performance by the plaintiff, (3) breach of the contract by the defendants, and (4) damages to the plaintiff resulting from that breach.” *Harris v. Am. Prot. Ins. Co.*, 158 S.W.3d 614, 622-23 (Tex. App.—Fort Worth 2005, no pet.).

1. No Evidence of Performance or Tendered Performance

A party who is in default under a contract cannot maintain a suit for its breach. *Villarreal v. Wells Fargo Bank, N.A.*, 814 F.3d 763, 767 (5th Cir. 2016). Nationstar hereby challenges Plaintiffs to show that she has performed or tendered performance under the contract (here, the Note and Deed of Trust). Unless Plaintiffs can produce competent summary judgment evidence establishing this essential element, Nationstar is entitled to summary judgment on the breach claim. Tex. R. Civ. P. 166a(i); *Dolcefino*, 19 S.W.3d at 917.

2. No Evidence Nationstar Breached the Contract

Nationstar hereby challenges Plaintiffs to show that Nationstar breached the parties' contract. Unless Plaintiffs can produce competent summary judgment evidence establishing this essential element, Nationstar is entitled to summary judgment on the breach claim. Tex. R. Civ. P. 166a(i); *Dolcefino*, 19 S.W.3d at 917.

3. No Evidence of Damages

Generally, the measure of damages for breach of contract is that which restores the injured party to the economic position he would have enjoyed if the contract had been performed. *Sava Gumarska v. Advanced Polymer Sciences Inc.*, 128 S.W.3d 304, 317 n.6 (Tex. App.—Dallas 2004, no pet.). Consequential damages may not be recovered unless they are foreseeable and traceable to the wrongful act and result from it. *See Stuart v. Bayless*, 964 S.W.2d 920, 921 (Tex. 1998).

Nationstar hereby challenges Plaintiffs to show that they suffered damages stemming from the alleged breach. Unless Plaintiffs can produce competent summary judgment evidence establishing this essential element, Nationstar is entitled to summary judgment on the Plaintiffs' breach of contract claim. Tex. R. Civ. P. 166a(i); *Dolcefino*, 19 S.W.3d at 917.

B. Plaintiffs Have No Evidence to Support Their TDCA Claim Against Nationstar.

To state a claim under the TDCA, a plaintiff must allege that: (1) the debt at issue is a consumer debt; (2) the defendant is a “debt collector” within the meaning of the TDCA; (3) the defendant committed a wrongful act in violation of the TDCA; (4) the wrongful act was committed against the plaintiff; and (5) the plaintiff was injured as a result of the defendant's wrongful act. *Gaber*, 2020 WL 5242419, at *5. Further, the TDCA provides, “a person may sue for: (1) injunctive relief to prevent or restrain a violation of this chapter; and (2) actual damages sustained as a result of a violation of this chapter.” TEX. FIN. CODE § 392.403(a). Thus, a person must obtain injunctive relief or prove actual damages to successfully maintain an action under the TDCA. *See Elston v. Resolution Servs., Inc.*, 950 S.W.2d 180, 185 (Tex. App.—Austin 1997, no pet.) (affirming summary judgment where the plaintiff “did not provide summary-judgment proof that he suffered actual damages resulting from [the defendant's] alleged violation of the Act”).

1. No Evidence of Any Wrongful Act

Nationstar hereby challenges Plaintiffs to show that Nationstar committed a wrongful act against them (elements 3 and 4). Unless Plaintiffs can produce competent summary judgment evidence establishing this essential element, Nationstar is entitled to summary judgment on all of Plaintiffs' TDCA claims.³⁵ Tex. R. Civ. P. 166a(i); *Dolcefino*, 19 S.W.3d at 917.

2. No Evidence of Damages

Nationstar hereby challenges Plaintiffs to show that they suffered actual damages stemming from a violation of the TDCA (element 5). Unless Plaintiffs can produce competent summary judgment evidence establishing this essential element, Nationstar is entitled to summary judgment on all of Plaintiffs' TDCA claims. Tex. R. Civ. P. 166a(i); *Dolcefino*, 19 S.W.3d at 917.

VII. **CONCLUSION**

The arguments, authorities, and summary judgment evidence cited herein clearly establish that summary judgment is proper in favor of Defendant on Plaintiffs' claims against it. Defendant is entitled to summary judgment as a matter of law. In addition, Plaintiffs lack evidence to support their claims against Defendant. Defendant therefore asks the Court to grant final summary judgment in its favor, to enter a take-nothing judgment against Plaintiffs, to award Defendant its costs, and to grant all other and further relief to which Defendant may show itself justly entitled.

³⁵ Plaintiff alleges that Defendant violated three (3) particular provisions of the TDCA: (1) Tex. Fin. Code § 392.304(a)(8) (prevents a debt collector from "misrepresenting the character, extent, or amount of a consumer debt, or misrepresenting the consumer's status in a judicial or governmental proceeding"); (2) Tex. Fin. Code § 392.304(a)(19) (prohibits a debt collector from "using any other false representation or deceptive means to collect a debt or obtain information concerning a consumer"); and (3) Tex. Fin. Code § 392.301(a)(8) (a debt collector "may not use threats, coercion, or attempts to coerce that ... threaten[] to take an action prohibited by law").

Dated: August 31, 2023

Respectfully submitted,

/s/ Grant M. Figari

Grant M. Figari, SBN: 24119480

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ATTORNEY FOR DEFENDANT

NATIONSTAR MORTGAGE LLC D/B/A MR.

COOPER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on August 31, 2023, he served a true and correct copy of the foregoing document electronically as follows:

David "Mac" McKeand, SBN: 24037782

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Filing Description: Nationstar Mortgage LLC's Motion for Traditional and No-Evidence Summary Judgment

Status as of 9/5/2023 10:44 AM CST

Case Contacts

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