

CAUSE NO. 2022-39990

NICIA VITORINO, ASSIGNEE OF § **IN THE DISTRICT COURT OF**
WILLIAM CALLEDARE, §
§
Plaintiff, §
§
v. § **HARRIS COUNTY, TEXAS**
§
POST OAK CROSSING COUNCIL OF §
CO-OWNERS, WOODFOREST §
ASSOCIATION, AND SEARS §
BENNETT & GERDES, LLC §
§
Defendants. § **151ST JUDICIAL DISTRICT**

**DEFENDANT POST OAK CROSSING COUNCIL OF CO-OWNERS’
TRADITIONAL AND NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT**

COMES NOW, Defendant Post Oak Crossing Council of Co-Owners (hereinafter referred to as the “Post Oak”), and files this, its No Evidence Motion for Summary Judgment, and in support thereof would respectfully show the Court the following:

**JOINER AND INCORPORATION BY REFERENCE OF DEFENDANT
WOODFOREST ASSOCIATION’S TRADITIONAL AND NO-EVIDENCE MOTION
FOR SUMMARY JUDGMENT**

Pursuant to Texas Rule of Civil Procedure 58, the Post Oak hereby joins, adopts, and incorporates by reference, as if fully set forth herein, the factual recitations, evidence, grounds for summary judgment, arguments, and authorities set out in Defendant Woodforest Association’s Traditional and No-Evidence Motion for Summary Judgment filed with the Court on October 19, 2023, and asserts the same herein on behalf of the Post Oak as to all claims asserted by Plaintiff Nicia Vitorino Assignee of William Calledare (“Plaintiff”).

Because Plaintiff’s causes of action against the Post Oak have no basis in law or fact, the Court must grant summary judgment as to the Post Oak on Plaintiff’s claim for violation of the Texas Civil practice and remedies Code Section 12.002(a).

I. SUMMARY OF ARGUMENT

The Court should grant summary judgment in favor of the Association because:

- The Post Oak has fully performed its responsibilities as to the foreclosure of the 12955 Woodforest Boulevard #33 Houston, Texas 77015 (“Property”).
- There is no evidence of one or more essential elements of Plaintiffs’ claims of negligence, violation of Tex. Civ. Practice and Remedies Code Section 12.002(a), wrongful foreclosure, and declaratory judgement.

II. RELEVANT BACKGROUND

On June 1, 2021, individuals named Ramesh Kapur and Hamayun Durrani purchased two (2) separate condominium units at a foreclosure sale identified as 1818 August Dr. #20 at Post Oak Crossing and 12955 Woodforest Blvd. #33 at Woodforest Condominiums (collectively the “Units”). The foreclosure sale was conducted against the prior owners of the Units for failure to pay monthly assessments which cover, in part, insurance, maintenance, repairs, and upkeep of the condominium units.

On June 15, 2021, Defendant received the email attached as Exhibit B in which Ramesh Kapur instructed Defendant to change the name on the Trustee Deeds to William Brian Caledare (“Caledare”). Thereafter, Ramesh Kapur retrieved the original Trustee Deeds from Defendant’s office. Following Ramesh Kapur’s retrieval of the Trustee Deeds, a dispute apparently arose between Plaintiff Caledare and Ramesh Kapur. Defendant is neither a part of nor has knowledge regarding the dispute.

Following the foreclosure sales, copies of the Trustee Deeds were issued to Defendants

Post Oak Crossing Council of Co-Owners and Woodforest Association. Both entities updated ownership to Caledare and began sending Caledare ownership information, including statements seeking payment of monthly assessments.

On November 19, 2021, Caledare contacted Defendant to obtain a copy of the Trustee Deeds. On November 30, 2021, upon being informed of an alleged dispute concerning the Trustees Deeds between Caledare and Ramesh Kapur, Defendant offered to provide new Trustee Deeds to Caledare upon receipt of a copy of his driver's license. On December 7, 2021, a copy of the driver's license was received and the Trustee Deeds were issued to Caledare via email on December 8, 2021, see Exhibit C.

On December 23, 2021, Caledare contacted Defendant again for a copy of the Trustees Deeds, at which time the Trustees Deeds were provided via email.

Following Caledare's acquisition of both Units, he failed to pay monthly assessments owed to Defendants Post Oak Crossing Council of Co-Owners and Woodforest Association. On April 21, 2022, ten (10) months after Caledare's acquisition of both Units, Defendant issued a Notice of Default to Caledare for unpaid fees owed for 1818 August Dr. #20 at Post Oak Crossing. On May 6, 2022, Defendant issued a Notice of Default to Caledare for unpaid fees owed for 12955 Woodforest Blvd. #33 at Woodforest Condominiums.

On May 26, 2022, Defendant, on behalf of Post Oak Crossing Council of Co-Owners, being Defendant's client, issued a Notice of Trustees sale to Caledare for unpaid assessments. On June 10, 2022, Defendant, on behalf of Woodforest Association, being Defendant's client, issued a Notice of Trustees sale to Caledare for unpaid assessments. The first foreclosure sale was scheduled to proceed forward on July 5, 2022.

At no time prior to the sales date on July 5, 2022, did Caledare pay the balance owed to

Post Oak Crossing Council of Co-Owners or Woodforest Association or establish a payment plan. In response to Defendants' request for payment of assessments rightfully owed, Plaintiff Nicia Vitorino filed this lawsuit and obtained a Temporary Restraining Order to stop the foreclosure sales scheduled for July 5, 2022. Plaintiff, however, failed to pay the bond or request and pay for citations. Plaintiff then obtained a continuance of the Temporary Injunction hearing on July 14, 2022, and August 9, 2022. Citations for the Defendants were not requested until September 28, 2022. As of date, neither Plaintiff nor Calledare made any attempt to pay the debt owed to Defendants Post Oak Crossing Council of Co-Owners or Woodforest Association. Further, Plaintiff's Counsel did not communicate with Defendant whatsoever regarding the various pleadings and extensions filed with the Court.

In September, both Units were reposted for the October 4, 2022, foreclosure sale. No Temporary Injunction was in effect. Prior to the sale, Plaintiff notified Defendant that she did not have the funds to pay the balances owed to either Defendant, Post Oak Crossing Council of Co-Owners or Woodforest Association. On October 4, 2022, Defendant proceeded forward to complete the foreclosure sale of both Units. **After** completing the sale, Defendant was notified that Plaintiff again obtained a Temporary Restraining Order to stop the foreclosure sales. Of note, the Temporary Restraining Order was obtained after the sales were completed. Further, the bond was not paid until October 17, 2022. Following completion of the foreclosure sales, Calledare was notified of his right to redeem both Units during the following 90 days. Calledare has received the payoff for redemption, but has made no attempt to redeem the Unit(s).

The Plaintiff's claims against Defendant appear to be based upon Calledare's alleged failure to receive the Trustee Deeds from the June 2021 foreclosure sale in a timely manner and

incorrect information received from Ramesh Kapur's Third Amended Petition (See Exhibit A) reads, in part,

"18. After the purchase of the properties, Mr. Kapur advised Plaintiff not to initiate the HOA payments, as Sarah Gerdes would be paying it from the excess proceeds for 6 months or so, as she had done for many other properties that he bought from her as the trustee." See page 3 of Plaintiff's Third Amended Petition.

"19. On October 5, 2021, Plaintiff sent an email to Houston HOA Management inquiring, among other things, the Account Balance as of July 2021, because she was not sure as to how many payments Sarah Gerdes would be paying." See page 4 of Plaintiff's Third Amended Petition.

"23. These demands were consistently denied, until May 2022, almost one year later, when Sarah Gerdes finally issued, via email, a copy of the registered deeds; up to this date Plaintiff have not received the registered originals via mail." See page 4 of Plaintiff's Third Amended Petition.

Plaintiff's pleadings and allegations are not supported or based on law. Rather, Plaintiff believed Ramesh Kapur's false statement that excess proceeds would be paid towards the assessments owed by Calledare after the foreclosure sale. The only causes of action identified in Plaintiff's Third Amended Petition is a claim for Declaratory Judgment and for Negligence. See pages 7 and 8 of Plaintiff's Third Amended Petition.

For the reasons detailed below, the Post Oak now asks the Court to grant summary judgment in favor of the Post Oak as to all claims asserted by Plaintiff in the case at bar.

III. NO EVIDENCE SUMMARY JUDGMENT

Standard for No-Evidence Motion for Summary Judgment

Rule 166a of the Texas Rules of Civil Procedure permits a trial court to use summary judgment to promptly dispose of cases that involve unmeritorious claims.¹ Under Rule 166a(i), a party may "move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim . . . on which an adverse party would have the burden of proof at

¹ *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, n.5 (Tex. 1979).

trial.”² “The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.”³ A fact is “material” only if it “might affect the outcome of the suit under the governing law.”⁴ A material fact “may not be established by piling inference upon inference” and “may not be proved by unreasonable inferences from other facts and circumstances.”⁵

“A no-evidence summary judgment is properly granted if the non-movant fails to bring forth more than a scintilla of probative evidence to raise a genuine issue of material fact as to an essential element of the non-movant’s claim on which the non-movant would have the burden of proof at trial.”⁶ The movant is entitled to summary judgment unless the non-movant’s evidence “rises to a level that would enable reasonable fair-minded persons to differ in their conclusions.”⁷

Defendant is entitled to a no-evidence summary judgment on plaintiff’s cause of action for negligence, violation of Tex. Civ. Practice and Remedies Code Section 12.002(a), and Declaratory Judgement because plaintiff has had an adequate time for discovery. To determine whether an adequate time for discovery has passed, courts consider the following nonexclusive factors: (1) the nature of the suit, (2) the evidence necessary to controvert the motion, (3) the length of time the case has been on file, (4) the length of time the motion has been on file, (5) the amount of discovery that has already taken place, (6) whether the movant requested stricter deadlines for discovery, and (7) whether the discovery deadlines in place were specific or vague.⁸ Plaintiff filed its Original Sworn Petition on July 5, 2022. The discovery deadline set

² Tex. R. Civ. P. 166a(i).

³ *Id.* (emphasis added).

⁴ *Moore v. K Mart Corp.*, 981 S.W.2d 266, 269 (Tex. App.—San Antonio 1998, pet. denied).

⁵ *Engstrom v. First Nat’l Bank of Eagle Lake*, 936 S.W.2d 438, 445 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

⁶ *Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 70-71 (Tex. App.—Austin 1998, no pet.).

⁷ *Id.* at 71.

⁸ *McInnis v. Mallia*, 261 S.W.3d 197, 201 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *Cmty. Initiatives, Inc. v. Chase Bank*, 153 S.W.3d 270, 278 (Tex. App.—El Paso 2004, no pet.).

by the Court's docket-control order is November 2, 2023. Plaintiff has had an adequate time for discovery.

A. Negligence

Plaintiff sues the Post Oak for negligence. In order to succeed on this claim, Plaintiff must show that: 1) the Post Oak owed Plaintiff a legal duty; 2) the Association breached that duty; and 3) the Post Oak's breach proximately caused Plaintiff's injury.⁹ However, Plaintiff cannot succeed on this claim because there is no evidence that the Post Oak owed Plaintiff a legal duty or that the Post Oak breached that duty. There also is no evidence that the Post Oak's alleged breach proximately caused Plaintiff's injury. Because there is no evidence of one or more of these essential elements of Plaintiff's claim, the Court must grant summary judgment as to the Post Oak on Plaintiff's negligence claim.

B. Declaratory Judgment

Plaintiff sues the Post Oak for a declaratory judgment. There are two prerequisites for a declaratory judgment action there must be a real controversy between the parties and the controversy must be one that will actually be determined by the judicial declaration sought.¹⁰ A request for declaratory judgment is moot if the claim presents no live controversy.¹¹ A controversy doesn't exist when the issues presented are no longer "live".¹² However, Plaintiff cannot succeed on this claim because there is no evidence of a live controversy. By Plaintiff's own judicial admission, the foreclosure sale and the associated redemption all occurred nearly a year ago in 2022. "[T]he Declaratory Judgment Act does not empower a court to render an

⁹ *Kroger Co. v. Elwood*, 197 S.W.3d 793 (Tex. 2006).

¹⁰ *Nehls v. Hartman Newspapers, LP*, 522 S.W.3d 23 (Tex. App.—Houston [1st Dist.] 2017, pet. denied)

¹¹ *Id.*

¹² *Id.*

advisory opinion or to rule on a hypothetical fact situation.”¹³ Because there is no evidence of one or more of these essential elements of Plaintiff’s claim, the Court must grant summary judgment as to the Post Oak on Plaintiff’s claim for a declaratory judgment.

C. Wrongful Foreclosure

Plaintiff sues the Post Oak for wrongful foreclosure. The elements of a wrongful foreclosure claim are: (1) a defect in the foreclosure sale proceedings; (2) a grossly inadequate selling price; and (3) a causal connection between the defect and the grossly inadequate selling price.¹⁴ Plaintiff cannot succeed on this claim because there is no evidence that there was a defect in the foreclosure sale, or a grossly inadequate selling price, nor a causal connection between the alleged defect and the alleged grossly inadequate selling price. The crux of Plaintiff’s claim for wrongful foreclosure rests on the alleged “unreasonable” attorney’s fees associated with the foreclosure. There is no evidence that the associated attorney’s fees are unreasonable. To date, the Plaintiff has not produced nor garnered any evidence to support that contention. Moreover, the Court’s docket control order places the deadline for expert designations on August 29, 2023. To date, Plaintiffs have not designated any experts. Because there is no evidence of one or more of these essential elements of Plaintiff’s claim, the Court must grant summary judgment as to the Post Oak on Plaintiff’s wrongful foreclosure claim.

D. Violation of Tex. Civ. Practice and Remedies Code Section 12.002(a)

Plaintiff sues the Post Oak for violation of the Texas Civil Practice and Remedies Code Section 12.002(a). Section 12.002(a) provides:

A person may not make, present, or use a document or other record with:

¹³ *Houston Chronicle Pub. Co. v. Thomas*, 196 S.W.3d 396, 401 (Tex. App.—Houston [1st Dist.] 2006, no pet.)

¹⁴ *Morris v. Deutsche Bank Nat’l Tr. Co.*, 528 S.W.3d 187, 197 (Tex. Ap.—Houston [14th Dist.] 2017, no pet.)

(1) knowledge that the document or other record is a fraudulent court record or a fraudulent lien or claim against real or personal property or an interest in real or personal property;

(2) intent that the document or other record be given the same legal effect as a court record or document of a court created by or established under the constitution or laws of this state or the United States or another entity listed in Section 37.01, Penal Code, evidencing a valid lien or claim against real or personal property or an interest in real or personal property; and

(3) intent to cause another person to suffer:

(A) physical injury;

(B) financial injury; or

(C) mental anguish or emotional distress.¹⁵

Plaintiff cannot succeed on this claim because there is no evidence to support that the lien was fraudulent or that the Post Oak had knowledge regarding the alleged fraudulent lien. The foreclosure sale was conducted under the authority of the Post Oak's governing documents and the Texas Property Code. Moreover, there is no evidence to support that the Post Oak had an intent to cause the Plaintiff any financial injury, physical injury, mental anguish, or emotional distress. Because there is no evidence of one or more of these essential elements of Plaintiff's claim, the Court must grant summary judgment as to the Post Oak on Plaintiff's claim for violation of the Texas Civil Practice and Remedies Code Section 12.002(a).

PRAYER

For the above reasons, the Post Oak asks the Court to grant this Motion and sign an order granting summary judgment against Plaintiff as to each of his pled causes of action. The Post

¹⁵ *Nationstar Mortgage LLC v. Barefoot*, 654 S.W.3d 440 (Tex. App.—Houston [14th Dist.] 2021, pet. denied), reconsideration en banc denied (Oct. 11, 2022)

Oak also asks the Court to grant the Post Oak any further relief to which the Post Oak may show itself justly entitled both at law and in equity, including but not limited to attorneys' fees.

Respectfully submitted,



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**ATTORNEYS FOR DEFENDANT
POST OAK CROSSING COUNCIL OF CO-
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing document has been served upon Plaintiffs' counsel on the 25th day of October 2023 *via* electronic service in accordance with the TEXAS RULES OF CIVIL PROCEDURE:

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