

CAUSE NO. 2023-77012

MJM INVESTMENTS, LLC  
*Plaintiff,*

v.

FAY SERVICING, LLC  
*Defendant.*

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IN THE DISTRICT COURT

HARRIS COUNTY, TEXAS

281<sup>ST</sup> JUDICIAL DISTRICT

**DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

Defendant, Fay Servicing, LLC (“**Fay**” or “**Defendant**”) files this Motion for Summary Judgment (the “**Motion**”) on all claims of Plaintiff MJM Investments, LLC (“**Plaintiff**” or “**Borrower**”) and in support thereof would respectfully show unto the Court as follows:

**INTRODUCTION**

1. This matter relates to a commercial loan in default that is past due for the November 1, 2021 and all subsequent payments, even though the subject loan was only recently originated in 2020. This is the second lawsuit filed in the last 6 months by the Borrower and Borrower does not and cannot dispute its loan defaults.

2. The prior lawsuit was settled via a written settlement agreement by which Plaintiff released all claims against Defendant. Even though the settlement allowed Borrower additional time to make payment and apply for a loan modification, Plaintiff has not made payment or otherwise met its contractual obligations under the subject loan and was not approved for a loan modification agreement. This lawsuit and the temporary restraining order obtained by Plaintiff were filed without any legal basis and as a stall tactic. Plaintiff has asserted claims for declaratory relief relating to an allegation that notice of default has not been provided as well as injunctive relief. The claim for declaratory relief is not only false in that proper notice of default was

provided, but is precluded by res judicata and by the release in the Settlement Agreement. The claim for injunctive relief fails because there is no basis for injunctive relief in that no probable right of recovery can be shown by Plaintiff.

3. Plaintiff's claims fail under the standards applicable to summary judgment.

### **FACTUAL BACKGROUND**

4. On or about September 29, 2020, Plaintiff executed and delivered a Commercial Promissory Note (the "**Note**") made payable to original lender Loan Funder LLC, Series 15098 ("**Loan Funder**") and its assigns. In the Note, Plaintiff promised to pay the principal amount of \$700,000.00, plus interest as set forth in the Note. See Exhibit 1-A.

5. The above referenced indebtedness was secured by a Commercial Deed of Trust dated September 29, 2020 ("**Deed of Trust**") executed by Plaintiff establishing a first lien on the Property. The Deed of Trust is recorded in the real property records of Harris County, Texas as Instrument No. RP-2020-479556. See Exhibit 1-B. The Note, Deed of Trust and other loan documents shall be referred to herein as the ("**Loan**").

6. The Deed of Trust was assigned to U.S. Bank National Association, not in its individual capacity but solely in its capacity as Trustee for Spartan Funding I Trust (the "**Trust**") via a Corporate Assignment Deed of Trust recorded in the real property records of Harris County, Texas. See Exhibit 1-C. The Trust is the current mortgagee under the Loan. See Exhibits 1 and 1-C.

7. Fay is the mortgage servicer for the current mortgagee under the Loan which is not in dispute.

8. Borrower is past due for the November 1, 2021 payment due under the Loan and all subsequent payments. See Exhibit 1.

9. In addition to prior notices of default, on February 23, 2023, while Plaintiff was in default on its payment obligations under the Loan, a Demand Letter-Notice of Default was sent to Plaintiff via certified mail to the address or addresses indicated, which included the last known address of Plaintiff according to the records of Defendants. See Exhibit 1-D.

10. On April 6, 2023, while the payment obligations under the Loan remained in default, Notice of Acceleration of Maturity was sent to Borrower by certified mail to the address or addresses indicated therein, which includes the last known address for Borrower according to the records of Fay and the Trust. See Exhibit 1-E.

11. On October 5, 2023, while the payment obligations under the Loan remained in default, Notice of Foreclosure was sent to Borrower by certified mail to the address or addresses indicated therein, which includes the last known address for Borrower according to the records of Fay and the Trust. See Exhibit 1-F.

12. On July 10, 2023, Borrower executed a written Settlement and Release Agreement in which it released all claims against Fay and the Trust. See Exhibit 1<sup>1</sup>.

13. Despite the settlement agreement arising from prior and very recent litigation in which Plaintiff released all claims against Defendants, Plaintiff has filed the present action in an attempt to further delay foreclosure without any legal basis to do so. Plaintiff has asserted claims for declaratory relief and injunctive relief alleging that Defendant has failed to provide notice of default and opportunity to cure. As will be shown, Plaintiff's claims fail based on the release in the Settlement Agreement and because its claims are patently false since notice of default and an opportunity to cure were provided in accordance with applicable law. Plaintiff's claims against

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<sup>1</sup> A copy of the written Settlement Agreement Release is available for in camera review by the Court as required if necessary to confirm the release of all claims.

Defendant fail as a matter of law and Plaintiff has not and cannot meet its burden of establishing the elements required for declaratory or injunctive relief.

### **SUMMARY JUDGMENT EVIDENCE**

14. Defendant attaches the following summary judgment evidence which is incorporated herein by reference.

- Exhibit 1 Affidavit of Anthony Younger of Fay Servicing, LLC, as mortgage servicer for the Trust.
- 1-A Commercial Promissory Note dated September 29, 2020
- 1-B Commercial Deed of Trust dated September 29, 2020 as recorded in the Official Real Property Records of Harris County, Texas
- 1-C Assignment to the Trust
- 1-D Notice of Default dated February 23, 2022
- 1-E Notice of Acceleration of Maturity
- 1-F Notice of Foreclosure

### **ARGUMENTS & AUTHORITIES**

#### **A. *Summary Judgment Standard***

15. Summary judgment is appropriate when the record discloses that “there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law . . .”.<sup>2</sup> The purpose of summary judgment in claims such as the one before this Court is to provide a speedy means for the disposition of controversies and/or issues that do not present genuine fact issues.<sup>3</sup> Once a movant establishes its right to summary judgment, the burden shifts to the non-movant to respond to the motion and present to the trial court any issues that would preclude summary judgment.<sup>4</sup> The Court should grant a motion for summary judgment when the movant is able to produce evidence that

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<sup>2</sup> Tex. R. Civ. P. 166a(c).

<sup>3</sup> See *New Jersey Bank, N.A. v. Knuckley*, 637 S.W.2d 920, 921-22 (Tex. 1982).

<sup>4</sup> *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678 (Tex. 1979).

proves, as a matter of law, all elements of its cause of action.<sup>5</sup> To resist summary judgment, a non-movant relying on an affirmative defense must present summary judgment proof sufficient to raise a fact issue on each element of the affirmative defense.<sup>6</sup> The mere pleading of the defense is insufficient to withstand a properly evidenced motion for summary judgment.<sup>7</sup>

**B. Plaintiff's Claim for Declaratory Relief Fails.**

16. The sole basis for Plaintiff's request for declaratory relief is an assertion that Plaintiff was not provided notice of default. This claim fails both because any such claim was released under the Settlement Agreement and additionally because the allegation is false in that proper notice of default was provided in accordance with applicable law. Additionally, declaratory relief is not the proper claim for the relief requested by Plaintiff. Such a claim, if anything would be a breach of contract claim without a breach and Plaintiff has not alleged breach of contract and cannot produce evidence of any breach. For these multiple reasons, Plaintiff's request for declaratory relief fails.

17. The purpose of seeking a declaratory judgment is to settle and afford relief of uncertainty and insecurity about rights, status, and other legal relations.<sup>8</sup> A declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought.<sup>9</sup> "To constitute a justiciable controversy, there must exist a real and substantial controversy involving genuine conflict of tangible interests and not merely a theoretical dispute."<sup>10</sup>

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<sup>5</sup> *Park Place Hospital v. Estate of Milo*, 909 S.W.2d 508 (Tex. 1995).

<sup>6</sup> *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984).

<sup>7</sup> *Seale v. Nichols*, 505 S.W.2d 251, 254 (Tex. 1974).

<sup>8</sup> See Tex. Civ. Prac. & Rem. Code Ann. § 37.002(b) (West 2008); *Bright v. Addison*, 171 S.W.3d 588, 606 (Tex. App.-Dallas 2005, pet. denied).

<sup>9</sup> *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995).

<sup>10</sup> *Id.*

18. First, it is clear that Plaintiff was provided notice of default in compliance with Texas law. See Exhibit 1-D. Actual receipt of the notice of default by Borrower is not required. The notice requirements in § 51.002 provide “a minimum level of protection for the debtor, and provides for only constructive notice of the foreclosure.”<sup>11</sup> Instead, “service of a notice under [§ 51.002] by certified mail is complete when the notice is deposited in the United States mail, postage prepaid and addressed to the debtor at the debtor's last known address.”<sup>12</sup> Furthermore, “[t]he affidavit of a person knowledgeable of the facts to the effect that service was completed is *prima facie* evidence of service.”<sup>13</sup>

19. Second, Plaintiff released any potential claims relating to such issues by executing a written Settlement Agreement and Release after the subject Notice of Default had been provided. See Exhibits 1 and 1-D. Further, although these notice allegations by Plaintiff were and are patently false, even if the allegations were true, to the extent Plaintiff is attempting to assert a claim under Section 51.002(d) of the Texas Property Code, which relates to the requirement for a mortgage servicer to send notice of default, the case law is clear that there can be no claim for Section 51.002(d) when no foreclosure has occurred.<sup>14</sup>

20. Further, since no foreclosure sale has or is alleged to have occurred, Plaintiff cannot come forward with any evidence of damages stemming from any alleged failure to provide notice of default as Plaintiff continues to maintain possession of the Property while making no payments

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<sup>11</sup> *Gossett v. Fed. Home Loan Mortg. Corp.*, 919 F. Supp. 2d 852, 859–60 (S.D. Tex. 2013) quoting *Onwuteaka v. Cohen*, 846 S.W.2d 889, 892 (Tex. App.–Houston [1st Dist.] 1993, no pet.). “Actual receipt of the notice is not necessary.” *WMC Mortgage Corp. v. Moss*, No. 01–10–00948–CV, 2011 WL 2089777, \*7 (Tex. App.–Houston [1st Dist.] May 19, 2011).

<sup>12</sup> Tex. Prop. Code § 51.002(e).

<sup>13</sup> Tex. Prop. Code § 51.002(e).

<sup>14</sup> *Tovar v. JPMorgan Chase Bank, N.A.*, No. 7:18-CV-222, 2018 WL 4220850, at \*5 (S.D. Tex. Sept. 4, 2018) citing *Suarez v. Ocwen Loan Servicing, LLC*, 2015 WL 7076674, at \*3 (W.D. Tex. Nov. 12, 2015) (“Failure to comply with Texas Property Code §§ 51.002 (b) and (d) does not provide Plaintiff with a cause of action prior to an actual foreclosure sale.”) (citing *Crucci v. Seterus, Inc.*, 2013 WL 6146040, at \*3 (W.D. Tex. Nov. 21, 2013)).

on the Loan. Plaintiff has not otherwise alleged facts and cannot come forward with evidence establishing a right to declaratory relief from this Court. For these multiple and alternative reasons, Plaintiff's claims for declaratory relief fail.

**C. Plaintiff's Claim for Injunctive Relief Fails.**

21. The party seeking injunctive relief must show that the defendant committed a wrongful act, a probable right to relief, probable injury, imminent harm and a lack of an adequate remedy at law.<sup>15</sup> No temporary injunction may issue unless the applicant offers competent evidence in support of his or her application to the trial court at the hearing on the temporary injunction, according to the standard Rules of Evidence.<sup>16</sup>

22. In the context of temporary injunction orders, the Texas Supreme Court has clearly recognized the risk of injustice in the immobilization of a defendant from a course of conduct he may have the legal right to pursue; and that this calls for the further rule that the trial court abuses its discretion when the law is misapplied to established facts, or when the evidence does not reasonably support the conclusion that the applicant has a probable right of recovery.<sup>17</sup>

23. As established above, Plaintiff cannot come forward with evidence of the essential elements of any claim, including his claim for declaratory relief. Plaintiff has not and cannot establish evidence supporting a probable right of recovery on any cause of action alleged, therefore his claim for injunctive relief fails. Based on the foregoing, all claims of Plaintiff fail based on the standards applicable to summary judgment.

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<sup>15</sup> See, *Sun Oil Co. v. Whitaker*, 424 S.W.2d 216, 218 (Tex. 1968); *Fasken v. Darby*, 901 S.W.2d 591, 592 (Tex. App.- El Paso 1995, no writ).

<sup>16</sup> *Millwrights Local Union No. 2484 v. Rust Eng'g Co.*, 433 S.W.2d 683, 686-87 (Tex. 1968) (citing Tex. R. Civ. P. 680).

<sup>17</sup> *State v. Southwestern Bell Tel. Co.*, 526 S.W.2d 526, 529 (Tex. 1975) citing *City of Spring Valley v. Southwestern Bell Tel. Co.*, 484 S.W.2d 579 (Tex. 1972); *Camp v. Shannon*, 162 Tex. 515, 348 S.W.2d 517 (1961); *Southland Life Ins. Co. v. Egan*, 126 Tex. 160, 86 S.W.2d 722 (1935).

**PRAYER**

WHEREFORE, PREMISES CONSIDERED, Defendant Fay Servicing, LLC respectfully prays that its Motion for Summary Judgment be granted, that the Court enter summary judgment in its favor on each and all of Plaintiff's claims, and for such other and further relief, at law or in equity, to which the Court deems Defendant to be justly entitled.

Respectfully submitted,

HIRSCH & WESTHEIMER, P.C.

By: /s/ Michael F. Hord Jr.

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**ATTORNEYS FOR DEFENDANT**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 5<sup>th</sup> day of January 2023, a true and correct copy of Defendant's Motion for Summary Judgment was served on each attorney of record or party in accordance with the Texas Rules of Civil Procedure as follows:

David M. Medearis  
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**Via E-File**

/s/ Michael F. Hord Jr.

Michael F. Hord Jr.



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