IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

RUSSEL A. COX,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No. 4:22-cv-310-ALM-KPJ**
	§	
FIRST UNITED BANK & TRUST,	§	
	§	
Defendant.	§	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant First United Bank & Trust ("Defendant") files this Motion for Summary Judgment requesting that the Court deny the claims asserted against it in Plaintiff's Original Petition, Application for Temporary Restraining Order, Temporary Injunction, Permanent Injunction, and Request for Disclosures (the "Complaint") [Doc. 3], and would respectfully show unto the Court as follows:

I.
SUMMARY

1. This is a foreclosure matter where Plaintiff Russel Cox ("Plaintiff" or "Cox"), filed suit to stop the foreclosure of a Property he no longer owns. Plaintiff failed to make his mortgage payments for years and after his two successive bankruptcies were dismissed, Plaintiff filed this suit to stop the property commonly known as 60 Trailridge Drive, Melissa, Texas 75454 (the "Property"). Though Plaintiff no longer owns the Property,[1] he filed this meritless lawsuit after his most recent bankruptcy was dismissed with prejudice to re-filing in order to stop the foreclosure.

[1] Prior to filing this suit, Plaintiff and his wife executed a Special Warranty Deed conveying the Property to ZP-1 Investments, LLC on April 2, 2022. The Special Warranty Deed is recorded in the Official Public Records of Collin County, Texas at No. 2022000077090 and a copy is attached hereto as Exhibit B.

2. In this current lawsuit, Plaintiff asserts claims and damages for: (1) negligence; (2) violations of the Texas Prop. Code. Ann. Sec. 51.002 et. seq.; (3) breach of contract; and (4) injunctive relief. All of Plaintiff's claims fail legally as a matter of law. Specifically:

a. Plaintiff's claim for negligence is barred as there is no special relationship creating a duty between a mortgagor and mortgage. That claim, and Plaintiff's attempted negligent misrepresentation claim, are barred by the economic loss doctrine;

b. There is no private right of action under the Texas Property Code for violation of its provisions, however, subject thereto, Defendant's evidence establishes compliance with all Texas Property Code requirements;

c. Plaintiff cannot maintain an action for breach when he was in breach of his payment obligations under the loan agreement. Further, Plaintiff's loan is not insured by HUD and Defendants did not breach the contract as the evidence illustrates compliance with all terms of the Note and Deed of Trust; and

d. Plaintiff has no viable cause of action, so he is therefore not entitled to injunctive relief.

3. The summary judgment evidence conclusively negates Plaintiff's claims and as a result, the Court should deny all of Plaintiff's claims for relief and enter judgment that Plaintiff take nothing against Defendant. Further, Plaintiff is no longer the owner of the Property, and though still legally obligated to pay according to the terms of the Note, he no longer has an ownership interest in the Property that will be extinguished by any foreclosure. Plaintiff's filing was in bad faith and must be dismissed.

II.
STATEMENT OF FACTS

4. On April 28, 2015, Plaintiff executed an Adjustable Rate Note ("Note) in the original principal amount of $422,647.00 in order to purchase the Property.[2] To secure repayment of the Note, Plaintiff and his non-party spouse (Whitney Cox) executed a Deed of Trust in the

[2] *See* Exhibit A and A-1.

same amount.[3] The Deed of Trust is recorded in the Official Public Records of Collin County, Texas. First United Bank & Trust Company is the holder of the Note and the beneficiary of the Deed of Trust.[4]

5. Plaintiff ceased making his required payments under the Note, the Note now being due for the July 1, 2019 payment and all subsequent payments.[5] After failing to maintain his payments on the loan, Plaintiff twice filed for bankruptcy protection and both bankruptcies were dismissed. Plaintiff concedes the Property was noticed for foreclosure sale on August 2, 2022. However, Plaintiff filed this lawsuit to stop the foreclosure sale and obtained a temporary restraining order which prevented that foreclosure sale. *See* Plaintiff's Complaint [Doc. 1-4]. As opposed to Plaintiff's claims, Defendant has complied with all applicable laws, provided the proper notice of default and notice of acceleration under the Texas Property Code and the Deed of Trust.[6]

III.
SUMMARY JUDGMENT EVIDENCE

6. Defendant attaches hereto and incorporates by reference the following exhibits in support of its Motion for Summary Judgment:

Exhibit A: Declaration of Representative of Defendant;

Exhibit A-1: Note;

Exhibit A-2: Deed of Trust;

Exhibit A-3: Notice of Default;

Exhibit A-4: Notices of Acceleration and Notice of Sale;

Exhibit B: Recorded copy of the Special Warranty Deed[7] from Russel and Whitney Cox to ZP-1 Investments, LLC; and

[3] *See* Exhibit A and A-2.
[4] *See* Exhibit A, A-1 and A-2.
[5] *See* Exhibit A.
[6] *See* Exhibits A, A-3, and A-4.
[7] Defendant requests the Court take judicial notice of Exhibit B as it is a publicly filed document. Fed. R. Evid. 201.

Exhibit C: Plaintiff's Bankruptcy Dockets from Case No. 20-40352 in the U.S. Bankruptcy Court for the Eastern District of Texas – Sherman Division and Case No. 21-41127 in the U.S. Bankruptcy Court for the Eastern District of Texas – Sherman Division.[8]

IV.
ARGUMENT AND AUTHORITIES

A. SUMMARY JUDGMENT STANDARD

7. Summary judgment is proper under Rule 56 of the Federal Rules of Civil Procedure when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of demonstrating that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the non-movant bears the burden of proof at trial, the movant need only point to the absence of evidence to support an essential element of the non- movant's case; the movant does not have to support its motion with evidence negating the non- movant's case. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

8. If the movant succeeds, the nonmovant must come forward with evidence "such that a reasonable party could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The non-movant "must come forward with 'specific facts showing there is a genuine issue for trial.'" *Matsushita Elec. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "A factual dispute is deemed 'genuine' if a reasonable juror could return a verdict for the

[8] Defendant requests the court take judicial notice of the dockets and all pleadings in Case No. 20-40352 in the U.S. Bankruptcy Court for the Eastern District of Texas – Sherman Division and Case No. 21-41127 in the U.S. Bankruptcy Court for the Eastern District of Texas – Sherman Division as they are all public record. Fed. R. Evid. 201; *See Krystal One Acquisitions, LLC v. Bank of Am., N.A.*, 805 F. Appx. 283, 287 (5th Cir. 2020) (permitting district court to take judicial notice of filings from prior lawsuits because such documents were public records); *Funk v. Stryker Corp.,* 631 F.3d 777, 783 (5th Cir. 2011). A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id.*

nonmovant, and a fact is considered 'material' if it might affect the outcome of the litigation under the governing substantive law." *Cross v. Cummins Engine Co.*, 993 F.2d 112, 114 (5th Cir. 1993).

9. The non-movant "cannot defeat summary judgment with conclusory, unsubstantiated assertions, or 'only a scintilla of evidence.'" *Turner v. Baylor Richardson Med. Center*, 476 F.3d 337, 343 (5th Cir. 2007). Conjecture, conclusory allegations, unsubstantiated assertions and speculation are also not adequate to satisfy the non-movant's burden. *Little*, 37 F.3d at 1079; *Ramsey v. Henderson*, 286 F.3d 264, 269 (5th Cir. 2002). Pleadings are not competent summary judgment evidence. *Little*, 37 F.3d at 1075. A "district court may not make credibility determinations or weigh evidence when deciding a summary judgment motion." *EEOC v. Chevron Phillips*, 570 F.3d 606, 612 n. 3 (5th Cir. 2009). The court does not have to sift through the record in search of evidence to support opposition to summary judgment. *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998).

B. Plaintiff's Negligence Claims Fails

10. Plaintiff first asserts a claim for negligence and/or negligent misrepresentation, alleging that Defendant is liable, as it is unclear which claim, for what can only be described as Plaintiff's attempt to obtain additional damages for alleged breach of the terms of the deed of trust. *See* Complaint at ¶12-18 [Doc. 3]. Plaintiff supports this clam alleging that Defendant failed to: (1) provide notice of transfer, assignment or sale of the note, (2) properly manage the loan and escrow amount, (3) comply with the notice provisions contained in the deed of trust before accelerating the note and foreclosing on the property, and (4) when applying for a mortgage assistance, to protect his rights and not mislead him.

11. In order to sustain a cause of action for negligence in Texas, Plaintiff must establish: (1) the existence of a legal duty; (2) a breach of that duty; and (3) damages proximately caused by

that breach. *Boudreaux v. Swift Transp. Co., Inc.,* 402 F.3d 536, 540–41 (5th Cir.2005). "To show there is a duty in tort based on a contract, a plaintiff must show there is a special relationship between the parties." *Carrington v. Bank of Am., N.A.,* 2013 WL 265946, at *7 (S. D. Tex. Jan. 17, 2013).

12. No Special Duty. First, Plaintiff must be able to establish the existence of a legal duty, but here he is unable to do so. *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 404 (Tex. 2009). To show there is a duty in tort based on a contract, a plaintiff must show there is a special relationship between the parties. *Farah v. Mafridge & Kormanik, P.C.*, 927 S.W.2d 663, 675 (Tex. App.—Houston [1st Dist.] 1996, no writ). There is no legal duty because there is no special relation between him and the mortgagee and mortgage servicer. *Lovell v. Western Nat. Life Ins. Co.*, 754 S.W.2d 298 (Tex. App.—Amarillo, 1988). Not only does no special relationship exist between a mortgagor and a mortgagee, but courts have held that "'there is no duty of care' between them that would give rise to a negligence claim." *UMLIC VP LLC v. T&M Sales and Environ. Sys., Inc.,* 176 S.W.3d 595, 613–15 (Tex. App.—Edinburg 2005); *Holloway v. Wells Fargo Bank, N.A.,* 2013 WL 1187156, at *21(N.D. Tex. 2013); *see also Milton v. U.S. Bank Nat. Ass'n,* 508 Fed. Appx. 326, 329 (5th Cir. 2013)(finding servicer did not have special relationship with borrower to give rise to duty to support negligence claim). It is clear in this cause that Defendant owed Plaintiff no duty of care, as there is no special relationship between a mortgagor and a mortgagee under Texas law. *Miller v. CitiMortgage, Inc.*, 970 F. Supp. 2d 568, 585 (N.D. Tex. 2013) (citing *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962)).

13. Herein, even if there could be a special duty between the Parties, Plaintiff failed to show that Defendant owed him any duty. Plaintiff claims that the duties of Defendant are prescribed by the Department of Housing and Urban Development ("HUD"), however, Plaintiff's

loan is a not a HUD loan and there is no incorporation of any HUD requirements in the subject Deed of Trust. *See* Exhibit A and A-2.

14. Economic Loss Doctrine Bars Negligence Claim. Next, Plaintiff's negligence claim is barred by the economic loss doctrine. "Simply stated, a duty in tort does not lie under the economic loss rule when the only injury claimed is one for economic damages." *Pugh v. General Terrazzo Supplies, Inc.,* 243 S.W.3d 84, 90 (Tex. App.—Houston [1st Dist.] 2007) (citing *Trans-Gulf Corp. v. Performance Aircraft Servs., Inc.,* 82 S.W.3d 691, 695 (Tex. App.—Eastland 2002, no pet.)); *see also Murray v. Ford Motor Co.,* 97 S.W.3d 888, 891 (Tex. App.—Dallas 2003, no pet.) and *Esty v. Beal Bank S.S.B.,* 298 S.W.3d 280, 301 (Tex. App.—Dallas 2009, no pet.). The Texas Supreme Court held that when the injury is only the economic loss to the subject of the contract itself, the action sounds in contract alone. *Jim Walter Homes, Inc. v. Reed,* 711 S.W.2d 617 (Tex. 1986); *see also Southwestern Bell Telephone Co. v. DeLannev*, 809 S.W.2d 493, 494 (Tex. 1991) and *Wansev v. Hole*, 379 S.W.3d 246, 248 (Tex. 2012) (per curiam).

15. To the extent Plaintiff has any claim against Defendant (which is denied), the claim arises out of the express terms of a written contract. As a result, Plaintiff's claims sound in contract alone. Here, all of Plaintiff's complaints for his attempted negligence action relate solely to the parties' contractual relationship under the terms of the Note and Deed of Trust, and cannot, as a matter of law, form the basis of a negligence claim as they are barred by the economic loss doctrine.

16. However, even if not barred, the negligence claims simply fail as a matter of law. First, there simply has not been any transfer, assignment or sale of the Note in which to provide Plaintiff notice (Defendant was lender and beneficiary under the Note and Deed of Trust).[9] Second,

[9] *See* Exhibit A, A-1, and A-2.

Defendant's summary judgment evidence clearly establishes that Defendant complied with all notice provisions of the loan and under all applicable law.[10]

C. No Claim for Negligent Misrepresentation

17. As part of his attempted negligence cause of action, Plaintiff also seeks damages as to Defendant based upon a claim for alleged negligent misrepresentation. *See Plaintiff's Complaint* at ¶13-17 [Doc. 3]. Plaintiff claims Defendant failed to use reasonable care in communication loss mitigation options to Plaintiff, thus causing Plaintiff alleged damages for a barrage of claims including slander of title, harm to credit reputation, credit worthiness, credit history, actual damages, and value of Plaintiff's lost time. *Id.* Even if Plaintiff has sustained damages, those damages (if any) are directly the result of his failure to pay his mortgage and not due to any action of Defendant. Plaintiff's claim for negligent misrepresentation fails as a matter of law because (a) Plaintiff's claim is barred by the application of the economic loss rule, (b) Plaintiff pleads no misrepresentations made by Cenlar, and (c) Plaintiff cannot establish justifiable reliance.

18. The elements of a cause of action for negligent misrepresentation are: (1) the defendant made a representation to the plaintiff in the course of defendant's business or in a transaction which defendant had an interest in; (2) the defendant supplied false information for the guidance of others; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; (4) the plaintiff justifiably relied upon the representation; and (5) the defendant's negligent misrepresentation proximately caused the plaintiff's injury. *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787. 791 (Tex. 1999); *see also Johnson v. Baylor Univ.*, 188 S.W.3d 296, 302 (Tex. App.—Waco 2006, pet. denied).

[10] *See* Exhibit A, A-1, A-2, and A-3.

19. Economic Loss Doctrine Bars Recovery for Negligent Misrepresentation. As detailed above in regard to negligence, negligent misrepresentation is a cause of action recognized in lieu of a breach of contract claim, not usually available where a contract was actually in force between the parties. *Airborne Freight Corp. Inc. v. C.R. Lee Enters., Inc.,* 847 S.W.2d 289, 295 (Tex. App.—El Paso 1992, writ denied); *see Scherer v. Angell,* 253 S.W.3d 777, 781 (Tex. App.—Amarillo 2007, no. pet) (explaining that "there must be an independent injury, other than breach of contract, to support a negligent misrepresentation finding."). Here, any complaints by Plaintiff about Defendant's failure to relay loss mitigation options under the Deed of Trust obviously relate to the party's contractual relationship under the terms of the Note and Deed of Trust, and cannot, as a matter of law, form the basis of a negligent misrepresentation claim. The foreclosure proceedings were based upon the contract, and Plaintiff's failure to pay thereunder. The economic loss doctrine bars Plaintiff's attempted claim of negligent misrepresentation.

20. Plaintiff fails to plead any misrepresentation made by Defendant. In order to establish a claim for negligent misrepresentation, Plaintiff must show: (1) the representation is made by a defendant in the course of his business or in a transaction in which the defendant has a pecuniary interest; (2) the defendant supplies "false information" for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers a pecuniary loss by justifiably relying on the representation. *Biggers v. BAC Home Loans Serv., LP*, 767 F. Supp. 2d 725, 734 (N.D. Tex. 2011). Plaintiff has not shown any misrepresentation made by Defendant in regard to loss mitigation. Plaintiff complains that Defendant allegedly "avoided and evaded Plaintiff's inquiries about an appeal of their modification application." *See* Plaintiff's Complaint at ¶ 14 [Doc. 3]. However, Plaintiff provides no details as to when he applied for loss mitigation assistance,

when he was denied, detailed of any communication, or details of any time in which he inquired about loss mitigation. *See generally,* Plaintiff's Complaint [Doc. 3]. Quite to the contrary, prior to filling this suit, Plaintiff did not apply for loss mitigation assistance as he was in bankruptcy from February 3, 2020 to July 28, 2021 and then again from August 9, 2021 to January 7, 2022.[11]

21. All of Plaintiff's claims, no matter how they are pleaded, arise from mortgage contracts between the parties, and the damages claimed by Plaintiff flow from alleged requirements under the loan agreement. Therefore, the economic loss rule applies to bar Plaintiff's claims for negligence and negligent misrepresentation. *Id.*

22. Plaintiff cannot establish justifiable reliance as a matter of law. Even if Defendant made a representation regarding loss mitigation that was incorrect (which it did not), Plaintiff would have to illustrate justifiable reliance on the statement. The Texas Supreme Court has held that reliance on statements made by opposing counsel in an adversarial context is not justifiable reliance. Specifically, the Supreme Court stated,

> One must consider the nature of the relationship between the attorney, client, and non client. Generally, courts have acknowledged that a third party's reliance on an attorney's representation is not justified when the representation takes place in an adversarial context. *See, e.g., Mehaffy*, 892 P.2d at 235, 237 (business transaction); *L & H Airco, Inc. v. Rapistan Corp*., 446 N.W.2d 372, 378–79 (Minn.1989) (arbitration proceeding); *Garcia*, 750 P.2d at 122–23 (N.M.1988) (litigation); *Beeck v. Kapalis*, 302 N.W.2d 90, 96–97 (Iowa 1981) (litigation) ... This adversary concept reflects the notion that an attorney, hired by a client for the benefit and protection of the client's interests, must pursue those interests with undivided loyalty (within the confines of the Texas Disciplinary Rules of Professional Conduct), without the imposition of a conflicting duty to a non client whose interests are adverse to the client.

McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787 (Tex. 1999). Plaintiff cannot establish justifiable reliance and his claims fails as a matter of law.

[11] *See* Exhibit C - Dockets from *In re Russell Alan Cox,* In the U.S. Bankruptcy Court for the Eastern District of Texas, Sherman Division, Case No. 20-40352 and Case No. 21-41127.

D. Violation of the Texas Property Code is Not a Cause of Action.

23. Plaintiff further attempts to assert an individual claim for "violation of Tex. Prop. Code §51.002(b)(3)"[12] as to Defendant. Specifically, Plaintiff asserts that Defendant was not authorized to send notices under the property code, did not send property notices, and that Plaintiff had questions regarding his loan history. *See* Plaintiff's Complaint at ¶¶ 18-22 [Doc. 3]. Plaintiff's claim has no basis in law or fact and fails as a matter of law.

24. First, allegations based upon defects in notice of foreclosure sale under Tex. Prop. Code §51.002 do not give rise to an independent action for declaratory relief under the Texas Property Code. Tex. Prop. Code § 51.002(d) does not provide a private right of action. *Rucker v. Bank of Am., N.A.,* 806 F.3d 823, 830 (5th Cir. 2015).[13]

25. However, as detailed below, even if a private right of action was available, Defendant complied with the Deed of Trust and Texas Property Code.[14] Plaintiff failed to pay according to the terms of the Note, thereafter Defendant (as the holder of the Note and beneficiary under the Deed of Trust from inception) properly sent notices of default, providing him additional opportunity to bring his loan current.[15]

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[12] *See* Plaintiff's Complaint at ¶¶ 20-24 [Doc. 3].

[13] Though the Texas Supreme Court has not spoken to this issue, a majority of the federal Courts to consider the issue have concluded that § 51.002 of the Texas Property Code provides no private cause of action. *Penta v. Cenlar Capital Corp.*, No. 1:19-CV-0915-DAE, 2020 WL 7695831, at *3 (W.D. Tex. Dec. 28, 2020); Nelson v. Wells Fargo Bank, N.A., No. 4:17–CV–298–A, 2017 WL 3405525 * 2 (N.D. Tex. Aug, 7, 2017); *Solis v. U.S. Bank*, N.A., Civil Action No. H–16–00661, 2017 WL 4479959 *2 (S.D. Tex. June 27, 2017); *Palomino v. Wells Fargo Bank, N.A.*, Civil Action No. 6:15–CV–00375–RWS–KNM, 2017 WL 989300 *3 (E.D. Tex. Feb. 17, 2017); *Carey v. Wells Fargo Bank, N.A.*, Civil Action H–15–1666, 2016 WL 4246997 *3 (S.D. Tex. Aug. 11, 2016); *Reed v. Bank of America, N.A.*, Civil Action No. H–15–2005, 2015 WL 7736642 *4 (S.D. Tex. Nov. 30, 2015); *May v. Ocwen Loan Servicing, LLC*, No. 4:12–CV–581, 2014 WL 2586614 *4 n.2 (E.D. Tex. June 9, 2014); *Anderson v. CitiMortgage*, Inc., No. 4:13–CV–369, 2014 WL 3983366 *5 (E.D. Tex. July 1, 2014); *Ashton v. BAC Home Loans Servicing, LP*, Civil Action No. 4:13–CV–810, 2013 WL 3807756 *4 (S.D. Tex. July 19, 2013); *Hill v. Wells Fargo Bank, N.A.*, No. V–12–11, 2012 WL 2065377 *7 (S.D. Tex. June 6, 2012); *see also Rucker v. Bank of America, N.A.*, 806 F.3d 828, 831 (5th Cir. 2015) (recognizing that District Courts that have considered the issue have "conclude[d] that Section 51.002(d) does not intend an independent private cause of action.").

[14] *See* Exhibits A, A-1, A-2, A-3, and A-4.

[15] *See* Exhibits A and A-3.

26. Pursuant to Texas Property Code §51.002(e), service of the notice of default under Tex. Prop. Code. 51.002 is complete when the notice is deposited in the United States mail. Delivery of the notice is not required, thus proper notice was given to Plaintiff when notice of default was deposited into the mail.[16] Plaintiff has failed to bring the loan current and the notice of default is effective. Absent a showing that the Note was reinstated by Plaintiff after the notices of default,[17] Defendant was not required to serve new notice of default. *Thompson v. Chrysler First Bus. Credit Corp.,* 840 S.W.2d 25, 30-31 (Tex. App.—Dallas 1992, no writ); *Herrera v. Emmis Mortgage*, 1995 WL 65461 *4 (Tex. App.—San Antonio, Nov. 8, 1995); *Ogden v. Gibraltar Savings Association,* 640 S.W.2d 232 (Tex. 1982).

27. When Plaintiff failed to remedy his default, Defendant, through its foreclosure counsel, sent a notice of acceleration and notice of substitute trustee's sale. That notice thereby accelerated the loan agreement and was sent in compliance with the Deed of Trust, Texas Property Code and the Texas Rules of Civil Procedure.[18] Effective acceleration requires two acts: (1) notice of intent to accelerate and (2) notice of acceleration. *Holy Cross Church of God in Christ*, 44 S.W.3d 562, 566 (Tex. 2001). "Both notices must be clear and unequivocal." *Id.* Pursuant to the Texas Property Code, notice is deemed sufficient when notice of default and acceleration are sent by certified mail to the borrowers. Service of a notice under Tex. Prop. Code § 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. Tex. Prop. Code § 51.002(e). When Defendant caused the notice of acceleration and notice of substitute trustee's sale to be served on Plaintiff, they were in compliance with all the Note, Deed of Trust and the Texas Property Code.[19]

[16] *See* Exhibits A and A-3.
[17] *See* Exhibit A-3.
[18] *See* Exhibits A, A-3 and A-4.
[19] *See* Exhibits A and A-4.

E. Plaintiff's Breach of Contract Claim Fails as a Matter of Law

28. Plaintiff's Complaint alleges that Defendant is liable for breach of contract for failure to follow alleged HUD regulations governing a FHA loan. *See* Complaint at ¶23-29 [Doc. 3]. The deed of trust securing the Property in this case is not a FHA loan, but rather a conventional loan, not insured by FHA.[20] Plaintiff identifies paragraphs 21-22 of the Deed of Trust for Defendant's alleged violations. *See* Complaint at ¶25 [Doc. 3]. These sections deal not with HUD regulations but rather Section 21 relates to "Hazardous Substances" and Section 22 relates to "Acceleration" and remedies unrelated to HUD.[21]

29. Even if those sections, or any section of the Deed of Trust provided additional requirements for Defendant, Defendant complied with all terms of the Deed of Trust and Plaintiff's breach of contract claim fails, as detailed below and supported by the summary judgment evidence.

30. Under Texas Law, to prevail on his breach of contract claim Plaintiff must plead and prove that: (1) Plaintiff and Defendant are parties to a valid and enforceable contract; (2) Plaintiff performed, tendered performance, or was excused from performing under the contract; (3) Defendant breached the contract; and (4) Defendant's breach caused Plaintiff injury. *Hovorka v. Cmty. Health Sys., Inc.*, 262 S.W.3d 503, 508-09 (Tex. App.—El Paso 2008, no pet.); *Doss v. Homecoming Financial Network*, Inc., 210 S.W.3d 706, 713 (Tex. App.—Corpus Christi 2006, pet. denied).

31. Additionally, Plaintiff admits that he is in default under the Loan Agreement and therefore Plaintiff lacks the ability to establish an essential element of his breach of contract claim. See *Metcalf v. Deutsche Bank Nat'l Tr. Co*., 2012 WL 2399369 *10 (N.D. Tex. June 26, 2012); *Owens v. Bank of Am., N.A*., 2012 WL 912721 *4 (S.D. Tex. Mar. 16, 2012); *Lewis v. Bank of*

[20] *See* Exhibits A and A-2
[21] *See* Exhibits A and A-2.

Am., N.A., 3434 F.3d 540, 544-45 (5th Cir. 2003). Texas law is clear that where, as here, a plaintiff is in default on a contract due to his own failure to perform, that plaintiff may not assert a claim for breach of a contract. E.g., *See Juarez v. Wells Fargo*, No. 5:17-cv-00756-FB-RBF, 2018 WL 835211 at *4 (W.D. Tex. Feb. 12, 2018), adopted by 2018 WL 1895549 (W.D. Tex. Mar. 5, 2018). ("Having failed to perform his obligations pursuant to the Promissory Note and Deed of Trust, it is difficult (perhaps even impossible) to see how Juarez could ever prevail on a breach of contract claim of the type he describes.") (citing *Vera v. Bank of Am., N.A*., 569 F.App'x. 349, 352 (5th Cir. 2014)); *Villarreal v. Wells Fargo Bank, N.A.*, 814 F.3d 763, 767 (5th Cir. 2016) (affirming trial court's dismissal of breach of contract claim because borrower was in default on the mortgage and "failed to allege any facts showing her own performance" under the loan contract); *Lewis v. U.S. Bank Nat'l Ass'n*, No. 1:17-CV-1162-RP, 2018 WL 3544797, at *2 (W.D. Tex. July 3, 2018), adopted by 2018 WL 3543497 (W.D. Tex. July 23, 2018) (dismissing breach of contract claim because "Plaintiff affirmatively states that he has breached the loan agreement rather than pleading that he has performed under the agreement."). Plaintiff's breach of contract claim fails because Plaintiff has admitted his prior default and cannot establish that he was excused from performance under the Loan Agreement.

32. Even if Plaintiff could maintain a breach of contract claim, Defendant complied with the Note, Deed of Trust and Texas Property Code regarding the notice provisions. Due to Plaintiff's failure to pay according to the terms of the Note, Defendant sent to Plaintiff notice of default on January 19, 2022.[22] When the loan was not brought current and the default cured, counsel for Defendant sent Notice of Acceleration and Notice of Substitute Trustee's Sale.[23] The Notice of Substitute Trustee's Sale were mailed to Plaintiff via certified mail on March 7, 2022.

[22] *See* Exhibits A and A-3.
[23] *See* Exhibits A and A-4.

Id. Plaintiff's breach of contract claim fails as the summary judgment evidence conclusively establishes Defendant's compliance with the contract.

33. As his final portion of his alleged breach of contract claim, Plaintiff asserts that there were additional charges to his loan balance and escrow account due to the breach. However, Plaintiff is also barred from contesting the amounts due and owing or charges to the loan due to his failure to address same in bankruptcy. In his most recent bankruptcy filings in 2020 and 2121, Plaintiff failed to file any objection to the claim of Defendant and the calculation of payoff and/or arrearage, nor did he list any claim as to Defendant for this alleged misapplication. *See* Exhibit C.

34. Plaintiff Has No Damages Stemming from Alleged Breach. Even if Plaintiff was somehow able to establish that the notice of default and notice of acceleration were defective (they were not), or that new notices were required at any time, Plaintiff has not suffered damages. Plaintiff willingly deeded the Property to a third party, is no longer in possession of the Property, and has still not made payments on the Loan Agreement. Plaintiff does not dispute that foreclosure has not taken place, and therefore any damages are "speculative" and do not satisfy the damage element required for a breach of contract claim. Where foreclosure has not occurred, Plaintiff's damages are at most a threat of damages as opposed to actual damages that would satisfy the damages element of a breach of claim contract. *See De La Mora v. CitiMortgage, Inc.*, No. 7:17-cv-468, 2015 WL 12803712, at *2 (S.D. Tex. Jan. 26, 2015) ("Plaintiff cannot show damages resulting from any such breach because no foreclosure sale has occurred."). When a party alleges that the breach of a mortgage contract would result in an improper foreclosure, he or she cannot recover damages if no foreclosure has taken place. *See Wells Fargo Bank, N.A. v. Robinson*, 391 S.W.3d 590, 594 (Tex. App.—Dallas 2012, no pet.).

35. When the defendant complied with the terms of the contract (as is the case herein) and the plaintiff cannot demonstrate any damages, a breach-of-contract claim cannot stand. *Thompson v. Bank of Am., N.A.*, 13 F. Supp. 3d 636, 646 (N.D. Tex. 2014), *aff'd*, 783 F.3d 1022 (5th Cir. 2015) (citing *Wright v. Christian & Smith*, 950 S.W.2d 411, 412 (Tex. App.—Houston [1st Dist.] 1997, no pet.)). No foreclosure has occurred and Plaintiff cannot establish damages. Accordingly, Plaintiff failed to allege a plausible breach of contract claim in this case.

F. Plaintiff Not Entitled to Injunctive Relief.

36. Though Plaintiff no longer owns the property, he also seeks injunctive relief precluding Defendant from foreclosing on the Property. A request for injunctive relief, however, is not a cause of action itself, but is dependent on an underlying cause of action. *See Brown v. Ke-Ping Xie,* 260 S.W.3d 118, 122 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *Smith v. Wells Fargo Bank, N.A*., 2014 WL 3796413, at *2 (S.D. Tex. July 31, 2014); *Barcenas v. Fed. Home Loan Mortg. Corp*., 2013 WL 286250, at *9 (S.D. Tex. Jan. 24, 2013) (holding claim for injunctive relief failed because plaintiffs did not adequately plead any of their substantive legal claims). Because Plaintiff has not asserted any viable causes of action against Defendant, Plaintiff is not entitled to any injunctive relief and such request should be denied.

G. Plaintiff's Attorneys' Fee Request must fail.

37. To recover attorneys' fees, Plaintiff must prevail on a cause of action for which attorneys' fees are recoverable. *Eason v. Deutsche Bank National Trust Company,* Civil Action No. H-18-717, 2018 WL 3104992, at *3 (S.D. Tex. June 25, 2018) (citing *Green Int'l, Inc. v. Solis,* 951 S.W.2d 384, 390 (Tex. 1997)). The record shows that Plaintiff cannot establish his claims for negligence, negligent misrepresentation, violations of Tex. Prop. Code. Ann. Sec. 51.002, breach of contract, and injunctive relief. Accordingly, Plaintiff is not entitled to attorneys' fees.

CONCLUSION

Pursuant the reasons set out herein, Defendant First United Bank & Trust respectfully requests that the Court grant Defendant's Motion for Summary Judgment and dismiss Plaintiff's Complaint against it with prejudice and further request that the Court grant it any and all additional relief, whether at law or in equity, to which it may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of October 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF filing system, and will send a true and correct copy to the following:

***VIA ECF*:**
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