

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

**JULIE GRABNER,**

**Plaintiff,**

v.

**FREEDOM MORTGAGE  
CORPORATION**

**Defendant.**

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**Civil Action No. 4:24-cv-00915**

**MOTION TO DISMISS**  
**PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)**

Defendant Freedom Mortgage Corporation (“Freedom” or “Defendant”) files this its *Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6)* and respectfully shows as follows:

**I. SUMMARY**

1. Julie Grabner (“Plaintiff”) filed this action on March 4, 2024, in the 152nd District Court of Harris County, Texas, as cause number 2024-13925 in the matter styled *Julie Grabner v. Freedom Mortgage Corporation* (the “State Court Action”). (ECF Docket No. 1 at Exhibit B-1.) Freedom removed to this Court on March 13, 2024. (ECF Docket No. 1.)

2. The allegations in *Plaintiff’s Original Petition, Application for Temporary Restraining Order, Temporary Injunction, Permanent Injunction, and Request for Disclosures* (“Petition”) relate to Plaintiff’s default under the terms of a loan agreement and the foreclosure of a deed of trust lien on real property commonly known 1918 Laurel Hill Dr, Kingwood, TX 77339 (“Property”). (See ECF Docket No. 1 at Exhibit B-1 at ¶ 9.) Plaintiff alleges that Freedom did not provide proper notice and breached the contract with Plaintiff. (*Id.* at ¶¶ 9-21.) Based on these allegations, Plaintiff requests injunctive relief (*Id.* at ¶¶ 27-39.) and brings claims for

violation of Texas Property Code § 51 (*Id.* at ¶¶ 11-15.) and for breach of contract. (*Id.* at ¶¶ 16-21.) As remedies for these claims, Plaintiff seeks injunctive relief, unspecified damages, attorney’s fees, and costs. (*Id.* at ¶¶ 15, 21, 23, 27-39, and Prayer.)

3. Plaintiff has failed to state a claim upon which relief can be granted against Defendant Freedom. Plaintiff’s claims have already been adjudicated and *res judicata* prevents Plaintiff from relitigating these claims. Plaintiff failed to plead sufficient facts to support any of her claims. Plaintiff’s request for injunctive relief fails because the foreclosure sale that was scheduled for March 5, 2024 has already been cancelled by Defendant, no future foreclosure sale is currently scheduled, and, without another cause of action, the requested injunctive relief cannot stand on its own. Plaintiff’s claim for violation of Texas Property Code § 51 fails as it is a disguised claim for attempted wrongful foreclosure which Texas does not recognize. Plaintiff’s breach of contract claim fails because she failed to plead sufficient facts to prove all elements of a claim for breach of contract and a breach of contract claim based on attempted wrongful foreclosure fails as a matter of law. As such, all of Plaintiff’s claims against Freedom should be dismissed.

## II. RULE 12(b)(6) STANDARD

4. Under Rule 12(b)(6), a case must be dismissed when the allegations asserted in the Complaint “fail[] to state a claim upon which relief may be granted.” FED. R. CIV. P. 12(b)(6). Dismissal pursuant to Rule 12(b)(6) is appropriate when it appears no relief can be granted under any set of facts that could be proven consistent with the allegations. *See Heitschmidt v. City of Houston*, 161 F.3d 834 (5th Cir. 1998); *Korte v. Allstate Ins. Co.*, 48 F. Supp. 2d 647, 650 (E.D. Tex. 1999). A plaintiff must plead specific facts in his Complaint; conclusory allegations are insufficient to survive a Rule 12(b)(6) motion to dismiss. *See Kaiser*

*Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982) (citing *Associated Builders, Inc. v. Ala. Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974)) (stating that “we do not accept as true conclusory allegations in the Petition”). A Rule 12(b)(6) dismissal is proper where there is either a “lack of a cognizable legal theory” or “the absence of sufficient facts alleged under a cognizable legal theory.” See *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). “Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.” *Fernandez-Montes v. Allied Pilots Ass’n*, 987 F.2d 278, 284 (5th Cir. 1993). Accordingly, dismissal is proper when “even the most sympathetic reading of [the] pleadings uncovers no theory and no facts that would subject the present defendants to liability.” *Jacquez v. Procunier*, 801 F.2d 789, 791-92 (5th Cir. 1986).

### III. ARGUMENT AND AUTHORITIES

- a. **All of Plaintiff’s claims should be dismissed as these claims have already been adjudicated and res judicata prevents Plaintiff from relitigating the same or similar claims.**

5. A nearly identical lawsuit was filed by Plaintiff’s husband, Brett Grabner, on August 31, 2023, in the 334th District Court of Harris County, Texas, as cause number 2023-58369 in the matter styled *Brett Grabner v. Freedom Mortgage Corporation* to stop the previous foreclosure sale that was scheduled for September 5, 2023. Defendant removed that matter to federal court on September 8, 2024 as Cause No. 4:23-cv-03360, filed its motion to dismiss on September 15, 2023, and the Court granted said motion to dismiss and entered final judgment with prejudice on October 12, 2023. (See Cause No. 4:23-cv-03360.) Defendant asks the Court to take judicial notice of the prior case filed as Cause No. 4:23-cv-03360 in the United States District Court for the Southern District of Texas, Houston Division. That Court’s Order of

Dismissal and Final Judgment are attached as Exhibit A.<sup>1</sup>

6. For res judicata to apply, the following elements must be present: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) the same parties in each action; and (3) a second action based on the same claims as were raised or could have been raised in the first action. (*Igal v. Brightstar Info. Tech. Grp., Inc.*, 250 S.W.3d 78, 86 (Tex. 2008); *Citizens Ins. Co. v. Daccach*, 217 S.W.3d 430, 449 (Tex. 2007).) Texas courts apply the transactional approach to res judicata, which requires that claims arising out of the same subject matter be litigated in a single lawsuit. (*Hallco Tex., Inc. v. McMullen County*, 221 S.W.3d 50, 58 (Tex. 2006). Under this approach, we examine the factual bases, not the legal theories, presented in the cases to determine whether the cases share the same set of operative facts. (*Samuel v. Federal Home Loan Mortg. Corp.*, 434 S.W.3d 230, 234 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (citing *Pinebrook Props., Ltd. v. Brookhaven Lake Prop. Owners Ass'n*, 77 S.W.3d 487, 496 (Tex. App.—Texarkana 2002, pet. denied)).) In determining whether the facts arose out of a single transaction, we consider whether the facts are related in time, space, origin, or motivation, and whether they form a convenient unit for trial. (*Id.*).

7. With regards to the first element, it is clear that a prior final judgment on the merits was signed by a court of competent jurisdiction. (*See* Exhibit A.)

8. Regarding the identity of the parties, Texas does not require that the parties in both lawsuits be identical if the parties named in the subsequent action are in privity with a party to the prior judgment—that is, a party who is so connected with a party to the prior judgment that

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<sup>1</sup> In considering a motion to dismiss under Rule 12(b)(6), the court may take judicial notice of facts "determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). These include "records of the court." (*Id.* note; *see also Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007).)

the party represented the same legal right. (*See Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971).) As husband and wife, Brett Grabner and Julie Grabner are in privity. (*See Cuauhtli v. Chase Home Finance LLC*, 308 F. App'x 772, 773 (5th Cir. 2009) (holding that husband and wife are in privity for res judicata purposes for claims arising from a mortgage loan).) The second element requiring the same parties in each action is met.

9. The final element, that this action is based on the same claims as the first, is supported by Plaintiff filing a petition that is nearly identical to the petition her husband filed in Cause No. 4:23-cv-03360. (*See* Cause No. 4:23-cv-03360 at ECF Docket No. 1 at Exhibit B-1.) Other than a few minor changes, such as the Plaintiff's name and the date of the foreclosure sale, the petition in the current matter is exactly the same as that in the previous matter. (*Id.*) The same facts supporting the same claims were brought regarding the foreclosure sale of the same Property. Because the petitions are nearly identical, the third element of res judicata is met.

10. As such, all of Plaintiff's claims fail under the theory of res judicata and her case should be dismissed in its entirety.

**b. Plaintiffs' request for injunctive relief fails because the foreclosure sale complained of has been cancelled, no future foreclosure sale is pending, and without another claim, the injunctive relief cannot stand on its own.**

11. Plaintiff requests injunctive relief to stop Defendant from conducting the March 5, 2024 foreclosure sale of the real property that is the subject of his Petition. (*See* ECF Docket No. 1 at Exhibit B-1.) Defendant pulled the property from sale and has not scheduled another sale of the property. Plaintiff's claim that there is an imminent threat of harm from the sale of the property is moot as no current threat exists. Without a threat of imminent harm, injunctive relief is not necessary.

12. Additionally, in the absence of a viable substantive claim, injunctive relief is

unavailable. (*Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., Ltd.* 99 F.3d 746, 752 n. 3 (5th Cir. 1996).) The failure of Plaintiff's other claims would automatically cause her request for injunctive relief to fail.

13. As such, Plaintiff's claim for injunctive relief fails and should be dismissed.

**c. Plaintiff's claim for violation of Texas Property Code § 51 fails because it is a disguised claim for attempted wrongful foreclosure which Texas does not recognize.**

14. Plaintiff's claim that Defendant violated Texas Property Code § 51 are based on a failure to provide notice. (*See* ECF Docket No. 1 at Exhibit B-1 at ¶ 12.)

15. Texas Property Code § 51 does not provide a private right of action. (*Vallier v. Nationstar Mortg., LLC*, 2018 U.S. Dist. LEXIS 42134, 2018 WL 1319166, at \*3 (S.D. Tex. 2018).) When a plaintiff asserts a claim under the Texas Property Code based on improper notice, as is the case here, courts consider the claim to be one for wrongful foreclosure. (*See Nelson v. Wells Fargo Bank, N.A.*, 2017 U.S. Dist. LEXIS 124010, 2017 WL 3405525 \* 2 (N.D. Tex. 2017); *Solis v. U.S. Bank, N.A.*, 2017 U.S. Dist. LEXIS 211711, 2017 WL 4479959 \*2 (S.D. Tex. 2017); *Palomino v. Wells Fargo Bank, N.A.*, 2017 U.S. Dist. LEXIS 36166, 2017 WL 989300 \*3 (E.D. Tex. 2017); *Carey v. Wells Fargo Bank, N.A.*, 2016 U.S. Dist. LEXIS 105933, 2016 WL 4246997 \*3 (S.D. Tex. 2016); *Ashton v. BAC Home Loans Servicing, LP*, 2013 U.S. Dist. LEXIS 100959, 2013 WL 3807756 \*4 (S.D. Tex. 2013).)

16. Under Texas law, a claim for wrongful foreclosure generally requires: (1) "a defect in the foreclosure sale proceedings"; (2) "a grossly inadequate selling price"; and (3) "a causal connection between the defect and grossly inadequate selling price." (*Miller v. BAC Home Loans Servicing, L.P.*, 726 F.3d 717, 726 (5th Cir. 2013) (citing *Sauceda v. GMAC Mortg. Corp.*, 268 S.W.3d 135, 139 (Tex. App. — Corpus Christi 2008, no pet.)). Texas does not recognize a

claim for attempted wrongful foreclosure. (*James v. Wells Fargo Bank, N.A.*, 533 F. App'x 444, 447 (5th Cir. 2013).)

17. In the present case, Plaintiff does not allege that a sale has occurred. (*See* ECF Docket No. 1 at Exhibit B-1.) As such, Plaintiff's claim under Texas Property Code § 51 is a claim for attempted wrongful foreclosure which Texas does not recognize and should be dismissed.

**d. Plaintiff's breach of contract claim fails because she failed to plead sufficient facts to prove all elements of a claim for breach of contract and a breach of contract claim based on attempted wrongful foreclosure fails as a matter of law.**

18. In Texas, a breach of contract claim consists of the following elements: "(1) the existence of a valid contract; (2) that the plaintiff performed or tendered performance; (3) that the defendant breached the contract; and (4) that the plaintiff was damaged as a result of the breach." (*Pegram v. Honeywell, Inc.*, 361 F.3d 272, 288 (5th Cir. 2004).)

19. In the present case, Plaintiff has not plead facts sufficient to support her claim for breach of contract. Plaintiff fails to even mention whether she performed or tendered performance. (*See* ECF Docket No. 1 at Exhibit B-1 at ¶¶ 16-21.) Plaintiff never fully explains what the breach was, when it occurred, or how such breach was the cause of her damages. (*See id.*) The only facts that Plaintiff pleads regarding the breach of contract appear to be that "Lender has failed to provide written notice of any and all changes to the Loan Servicer" and that they "failed to provide all written notices as required in Paragraph 24." (*Id.* at ¶ 17.) Paragraph 24 of the Deed of Trust refers to notices required to be sent to the borrower upon default. (Cause No. 4:23-cv-03360 at ECF Docket No. 1 at Exhibit B-2 at ¶ 24.)

20. As stated above, a failure to provide such notices is a claim for attempted wrongful foreclosure which Texas does not recognize. (*James v. Wells Fargo Bank, N.A.*, 533 F.

App'x 444, 447 (5th Cir. 2013).) Furthermore, a breach of contract claim based on alleged attempted wrongful foreclosure fails as a matter of law because no foreclosure sale has occurred and no injury could have occurred. (*Graham v. Christiana Tr., a Div. of Wilmington Sav. Funds Soc'y, FSB*, No. A-17-CV-292-LY-ML, 2017 WL 7921227, at \*5 (W.D. Tex. Aug. 10, 2017), report and recommendation adopted sub nom. *Graham v. Christiana Tr. a division of Wilmington Sav. Funds Soc'y, FSB*, No. 1:17-CV-292-LY, 2017 WL 8181003 (W.D. Tex. Aug. 30, 2017).

21. As Plaintiff has failed to plead facts sufficient to support a breach of contract claim and because the breach of contract claim is based on an alleged attempted wrongful foreclosure, Plaintiff's claim fails and should be dismissed.

#### **PRAYER**

For these reasons, defendant Freedom Mortgage Corporation respectfully prays that all of Plaintiff's claims against it in this case be dismissed with prejudice and that the Court grant it all other relief to which it may be entitled.

Respectfully submitted,

/s/ Bradley Conway

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 18, 2024 a true and correct copy of the foregoing was served via ECF service on the following counsel:

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*Attorney for Plaintiff*

*/s/ Bradley Conway*  
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**BRADLEY CONWAY**