

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

**MARC CUNNINGHAM,**

*Plaintiff,*

v.

**AMERIHOM MORTGAGE  
COMPANY, LLC,**

*Defendant.*

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**Civil Action No. 4:23-cv-3424**

**DEFENDANT’S MOTION TO DISMISS**

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendant AmeriHome Mortgage Company, LLC (“Defendant” or “AmeriHome”) files this Motion to Dismiss Plaintiff Marc Cunningham’s (“Plaintiff”) Original Petition and Application for Temporary Restraining Order and Injunctive Relief [Doc. 1-4] (the “Complaint”) and in support thereof, respectfully shows the Court as stated below.

**I. NATURE AND STAGE OF PROCEEDING**

1. On August 30, 2023, Plaintiff Marc Cunningham sued AmeriHome Mortgage Company, LLC in order to stop the foreclosure sale scheduled foreclosure on the property located at 24698 Country Oaks Blvd, Montgomery, Texas 77316 (“Property”). [Doc. 1-4]. Plaintiff obtained an ex-parte temporary restraining order (“TRO”) to prevent the foreclosure sale of the Property. *Id.*

2. On September 13, 2023, AmeriHome removed the case to this Court. [Doc. 1]. AmeriHome filed its Certificate of Interested Parties and Corporate Disclosure Statement on September 13, 2023. [Doc. 2]. The Parties have not exchanged initial disclosures.

## II. STATEMENT OF THE ISSUES

3. Plaintiff filed this lawsuit in order to stop foreclosure of the Property based upon alleged claims for violation of the Texas Property Code and breach of contract. *See* Plaintiff's Complaint [Doc. 1-4]. Defendant asserts that both of Plaintiff's claims fail as a matter of law and are ripe for dismissal under Rule 12(b)(6).

4. **Rule 12(b)(6) Standard of Review.** In order to survive a Rule 12(b)(6) motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007). A 12(b)(6) motion is proper if either the Petition fails to assert a cognizable legal theory, or the facts asserted are insufficient to support relief under a cognizable legal theory. *Stewart Glass & Mirror, Inc. v. U.S.A. Glas, Inc.*, 940 F.Supp. 1026, 1030 (E.D. Tex. 1996). "However, conclusory allegations, unwarranted deductions of fact, or legal conclusions masquerading as factual allegations will not suffice to prevent the granting of a motion to dismiss." *Percival v. American Home Mortgage Corp.*, 469 F.Supp.2d 409, 412 (N.D. Tex. 2007). "[A] plaintiff must plead specific facts, not mere conclusional allegations, to avoid dismissal for failure to state a claim." *Kane Enters v. MacGregor (USA), Inc.*, 322 F.3d 371, 374 (5th Cir. 2003). While the allegations need not be overly detailed, a plaintiff's pleadings must still provide the grounds of his entitlement belief, which "requires more than labels and conclusions, and a formulaic recitation of the elements will not do." *Twombly*, 127 S. Ct. at 1964-1965; see also *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995). Plaintiff must allege "enough facts to state a claim to relief that is plausible on its face" and "raise a right to relief above the speculative level." *Id.*; *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 140 (5th Cir. 2007).

### III. SUMMARY OF THE ARGUMENT

5. Defendant files this Motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure and state that Plaintiff's Complaint should be dismissed for failure to state a claim. In this lawsuit, Plaintiff requests injunctive relief and asserts claims for violation of the Texas Property Code and breach of contract. However, Plaintiff fails to state a claim upon which relief can be granted, specifically:

- a. There is no private right of action under the Texas Property Code for violation of its provisions. *Rucker v. Bank of Am., N.A.*, 806 F.3d 823, 830 (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.");
- b. Plaintiff cannot maintain an action for breach when (1) he was in breach of his payment obligations under the loan agreement and has not shown performance (*Villarreal v. Wells Fargo Bank, N.A.*, 814 F.3d 763, 767 (5th Cir. 2016)); (2) when no foreclosure has occurred (*Foster v. Deutsche Bank Nat'l Trust Co.*, 848 F.3d 403, 406-407 (5th Cir. 2017), and (3) he has no damages attributable to breach as he remains in possession of the Property and notices were provided in accordance with the Note and Deed of Trust *De La Mora v. CitiMortgage, Inc.*, No. 7:17-cv-468, 2015 WL 12803712, at \*2 (S.D. Tex. Jan. 26, 2015).

### IV. STATEMENT OF FACTS

6. Plaintiff filed this suit to stop AmeriHome's foreclosure of its Deed of Trust secured by the Property. On December 30, 2019, Cunningham executed a Note ("Note") in the original principal amount of \$173,655.00 and a Deed of Trust in the same amount, secured by the Property. The deed of trust and note are collectively referred to herein as the "loan agreement." AmeriHome is the holder of the Note and the beneficiary of the Deed of Trust pursuant to assignment.

7. Due to Plaintiff's failure to maintain timely payments under the loan agreement, AmeriHome had the Property posted for the September 5, 2023 foreclosure sale. *See* Plaintiff's Complaint at ¶ 7 [Doc. 1-4]. Plaintiff's lawsuit and the Temporary Restraining Order prevented that sale from moving forward.

## V. ARGUMENT AND AUTHORITIES

### A. Violation of Texas Property Code Not a Valid Cause of Action.

8. First, Plaintiff attempts to assert a claim for violation of Chapter 51 of the Texas Property Code as to Defendant, complaining about Defendant's alleged failure to provide notice of default, notice of acceleration and notice of sale. *See* Plaintiff's Complaint at ¶¶ 11-15 [Doc. 1-4]. However, Plaintiff's claim has no basis in law or fact and fails as a matter of law.

9. First, the Texas Property Code does not create a private right of action for alleged violations thereof. *Obey v. SN Servicing Corp.*, No. 4:22-cv-04000, 2023 WL 4714074 (S.D. Tex. July 24, 2023) citing *Rucker v. Bank of Am., N.A.*, 806 F.3d 828, 830 (5th Cir. 2015). Along those lines, allegations based upon notices related to foreclosure sale allegedly under Tex. Prop. Code §51.002 do not give rise to an independent action under the Texas Property Code. *Id.*<sup>1</sup>

10. To the extent Plaintiff's claim for violation of the Texas Property Code is deemed a claim for wrongful foreclosure, that foreclosure was cancelled by the TRO obtained in this suit and it is undisputed that the foreclosure has not taken place. When there is no foreclosure sale, there is no cause of action for wrongful foreclosure as no cause of action exists for *attempted wrongful foreclosure*. *Foster v. Deutsche Bank Nat'l Trust Co.*, 848 F.3d 403, 406-407 (5th Cir. 2017);

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<sup>1</sup> 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. The federal courts of Texas have all spoken to this issue and have all found no cause of action under §51.002. *See Fairweather v. Amegy Bank*, H-19-2799, 2021 WL 665904 (S.D. Tex. Jan. 26, 2021)(following majority of other District Courts in finding no independent cause under §51.002 and granting Amegy summary judgment); *see also Rucker*, 806 F.3d at 831 (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."); *Bixler v. MidFirst Bank*, No. 22-cv-00090, 2022 WL 19076394 (W.D. Tex. Dec. 19, 2022); *Penta v. Cenlar Capital Corp.*, No. 1:19-CV- 0915-DAE, 2020 WL 7695831, at \*3 (W.D. Tex. Dec. 28, 2020); *Vinson v. AmeriHome Mtg. Co.*, 4:22-cv-0928-P, 2023 WL28955252 (N.D. Tex. Apr. 11, 2023) citing *Mitchell v. PHH Mort. Co.*, 4:21-cv-1258, 2022 WL 6950351, (N.D. Tex. Oct. 12, 2022)("there is no independent cause of action for breach of §51.002"); *Robinson v. PennyMac Loan Services, LLC*, No. 4:22-cv-00016, 2022 WL 17823974 (E.D. Tex. Dec. 19, 2022); *Kovalchuk v. Wilmington Savings Fund Society, FSB*, 528 F. Supp. 3d 647, (E.D. Tex. Mar. 16, 2021).

*EverBank, N.A. v. Seederger Ventures, Inc.*, 499 S.W.3d 534, 544 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

11. In Texas, a claim for wrongful foreclosure requires a plaintiff to show: (1) a defect in the foreclosure proceedings; (2) a grossly inadequate selling price; and (3) a causal connection between the defect and grossly inadequate selling price. *Foster at 406*. A completed foreclosure sale is *pre-requisite* to this claim as a wrongful foreclosure claim cannot survive if the party asserting the claim never lost the property in question. *Id.* (emp. added); citing *Motten v. Chase Home Fin.*, 831 F. Supp. 2d 988, 1007 (S.D. Tex. 2011); *see also Filgueira v. U.S. Bank Nat'l Ass'n*, 734 F.3d 420, 423 (5th Cir. 2013); *Biggers*, 767 F.Supp.2d at 730 (“Because under Texas Law an inadequate selling price is a necessary element of a wrongful foreclosure action, a foreclosure sale is a precondition to recovery.”). Since there has not been a foreclosure sale, Plaintiff’s complaints – whether true or false factually – do not support a wrongful foreclosure claim.

**B. Plaintiff’s Breach of Contract Claim Fails as a Matter of Law.**

12. Plaintiff’s Complaint additionally asserts a claim for breach of contract, alleging that Plaintiff was not allowed to reinstate the loan, lender failed to provide notice of change to loan servicer, and failed to provide notice of acceleration. *See Plaintiff’s Complaint at ¶ 16-21 [Doc. 1-4]*. Plaintiff’s Complaint fails to plead facts sufficient to support his claim and/or the claim simply fails as a matter of law.

13. 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).

14. Plaintiff has failed to allege anywhere in his Complaint that he performed under the loan agreement. As Plaintiff's loan is in default, he 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 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 *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 he is in default and cannot establish that he was excused from performance under the Loan Agreement.

15. To the extent Plaintiff's claim for breach is one for attempted wrongful foreclosure (based upon the failure to provide notices), this claim fails as moot. No foreclosure has taken place and there simply is no cause of action for attempted wrongful foreclosure as the completion of the foreclosure is a required element to that claim. *Foster*, 848 F.3d at 406-407.

16. In addition, even if Plaintiff was to re-plead and allege he performed under the loan agreement, Plaintiff has not suffered damages stemming from the alleged breach. Plaintiff has not been dispossessed of the Property. The foreclosure has not taken place due to Plaintiff obtaining the TRO, 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.). No foreclosure has occurred and Plaintiff cannot establish damages. Accordingly, Plaintiff failed to allege a plausible breach of contract claim in this case.

**C. Plaintiff Not Entitled to Injunctive Relief.**

17. Finally, Plaintiff 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. *Smith v. Wells Fargo Bank, N.A.*, No. H-14-283, 2014 WL 3796413, at \*2 (S.D. Tex. July 31, 2014); *Barcenas v. Fed. Home Loan Mortg. Corp.*, No. H-12-2466, 2013 WL 286250, at \*9 (S.D. Tex. Jan. 24, 2013) (holding claim for injunctive relief failed because plaintiff did not adequately plead any of their substantive legal claims); *Cheaton v. JPMorgan Chase Bank, N.A.*, No. H-11-1777, 2012 WL 298533, at \*2 (S.D. Tex. Feb. 1, 2012) (dismissing petition requesting injunctive relief without other viable cause of action). 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.

## VI. CONCLUSION

Plaintiff fails to state a claim upon which relief can be granted for breach of contract or violation of the Texas Property Code. Accordingly, Defendant respectfully requests that its Motion to Dismiss be granted and Plaintiff's claims be dismissed with prejudice. Defendant further requests all relief, at law or in equity, to which it is entitled.

Respectfully submitted,

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**CERTIFICATE OF CONFERENCE**

I certify that on September 18, 2023, I contacted Counsel for Plaintiff requesting that Plaintiff dismiss the suit or amend the Complaint due to the issues with Complaint as addressed herein. As of the date of filing of this Motion, Counsel for Plaintiff has not responded to that request.

/s/ Shelley L. Hopkins  
Shelley L. Hopkins

**CERTIFICATE OF SERVICE**

I hereby certify that on the 19th day of September 2023, 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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