

CAUSE NO. 2024-27605

LINDA S. ALLAN,

Plaintiff,

v.

NATIONSTAR MORTGAGE, LLC,

Defendant.

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IN THE DISTRICT COURT

11TH JUDICIAL DISTRICT

HARRIS COUNTY, TEXAS

DEFENDANT’S ORIGINAL ANSWER AND COUNTERCLAIM

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Nationstar Mortgage, LLC (“Defendant” or “Nationstar”), Defendant in the above-styled and numbered cause, and files this Original Answer with Affirmative Defenses and Counterclaim in response to Plaintiff’s Linda S. Allan (“Plaintiff”) Original Petition (“Petition”). In support of the foregoing, Nationstar would respectfully show the Court the following:

I.
GENERAL DENIAL

1. Pursuant to Rule 92 of the Texas Rules of Civil Procedure, Nationstar generally denies each and every allegation contained within Plaintiff’s Petition and any amendments thereto and demands strict proof thereof as required by the Constitution and the laws of the State of Texas. Defendant further reserves the right to plead further and in greater particularity as the case progresses.

II.
AFFIRMATIVE DEFENSES

- 2. Nationstar asserts that all conditions precedent to Plaintiff’s rights to recover, if any, have not been satisfied, have not occurred or have not been waived.
- 3. Plaintiff’s claims are barred by res judicata, claim preclusion and issue preclusion.

4. Plaintiff's claims are barred by judicial estoppel, judicial admissions and collateral estoppel.
5. Plaintiff's claims are barred by unclean hands.
6. Plaintiff's damages, if any, which Defendant does not admit, were caused in whole or in part by Plaintiff's own acts, negligent or otherwise, and Defendant is thus not liable.
7. Plaintiff's claims are barred due to Defendant's compliance with the terms of the Deed of Trust and all applicable laws.
8. Nationstar asserts any and all limitations on exemplary damages, additional damages and/or punitive damages prescribed by the Texas Rules of Civil Procedure and/or case law and/or Civil Practice and Remedies Code.
9. Plaintiff's claims are barred by her prior breach.
10. Plaintiff's claims are barred as Defendant holds a valid final judgment for foreclosure, affirmed on appeal.

III. COUNTERCLAIM

A. Factual Background

11. This proceeding concerns a home equity loan agreement, as the term "loan agreement" is generally defined under TEX. BUS. & COM. CODE § 26.02, created according to TEX. CONST. art. XVI, § 50(a)(6), secured by the property made subject of this suit and described below. Plaintiff Linda S. Allan is the obligor on a certain Texas Home Equity Note ("Note")¹ and mortgagor of a Texas Home Equity Security Instrument ("Deed of Trust") (together the "Loan Agreement"), recorded in the official public records of the Harris County, Texas² encumbering the

¹ See Exhibit A – Note.

² See Exhibit B – Deed of Trust.

real property commonly known at 7512 Del Monte Drive, Houston, Texas 77063 (the “Property”) and more particularly described as follows:

LOT THIRTY-TWO (32), IN BLOCK ONE (1), OF HAMMERSMITH, SECTION ONE (1), AN ADDITION IN HARRIS COUNTY, TEXAS, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN VOLUME 122, PAGE 63 OF THE MAP RECORDS OF HARRIS COUNTY, TEXAS.

12. Defendant Nationstar is the beneficiary of the Loan Agreement by virtue of assignment and has the authority to enforce the loan agreement.³

13. Plaintiff defaulted on the Loan Agreement for failure to make the required payments.⁴ Plaintiff was promptly notified of her default under the Note and demand was made on her to pay the past due amounts owing thereunder. *Id.* Despite such notice and demand, Plaintiff failed to pay the amounts then due and owing under the Note which has only continued to accrue.

14. Due to Plaintiff’s default, Nationstar obtained a judgment allowing foreclosure on January 5, 2018, which was affirmed on appeal by the Fourteenth Court of Appeals on July 9, 2019. *See Allan v. Nationstar Mortg., LLC*, 2019 Tex. App. LEXIS 5686, 2019 WL 2939746, (Tex. App. – Houston [14th Dist.] July 9, 2019, pet. denied).⁵ Thereafter, the Texas Supreme Court denied review – on April 3, 2020. By the time the mandate issued, the world was struck by the COVID-19 pandemic. The Judgment is not dormant and Plaintiff may execute on the Judgment for ten years from its date of entry prior to the Judgment becoming stale. In the event the prior Final Judgment has become impaired in any manner, Nationstar is entitled to relief as requested in this current lawsuit.

³ See Exhibit C – Assignment.

⁴ See Exhibit D – Notices of Default.

⁵ See Exhibit E – Foreclosure Judgment and Opinion of the Fourteenth Court of Appeals. The judgment and opinion affirming, also dismissed the same claims Plaintiff has made herein.

15. Due to repeat filings of suit, much like this one, and appeals by Plaintiff against Defendant, Nationstar has been unable to foreclose on the Property. Due to demands being sent to Plaintiff, Nationstar's recently filed an Application for Expedited Order Under Rule 736, which resulted in a Home Equity Foreclosure Order entered by the 157th Judicial District of Harris County, Texas on March 8, 2024.⁶ In response, Plaintiff then filed this suit. Defendant Nationstar, in its capacity as the mortgagee, and its successors and assigns, now proceeds with this counterclaim, to the extent necessary and only in the event its prior judgment is unenforceable (which is denied) requesting judgment to allow for non-judicial foreclosure.

B. Declaratory Judgment

16. Because the subject loan is a Texas Home Equity Loan, foreclosure requires a Court order. Tex. Const. art. XVI, § 50(a)(6)(D). While Nationstar believes its prior judgment for foreclosure remains valid, in the event the 2018 Final Judgment is not in all things enforceable, Nationstar files this counterclaim in the alternative.

17. Defendant Nationstar seeks a declaratory judgment allowing it to proceed with the non-judicial foreclosure sale of the Property made subject of this suit. Nationstar seeks a declaratory judgment that establishes (1) that all conditions precedent to foreclose on the Property occurred; (2) that the Plaintiff is in default on the loan; (3) that Nationstar, as mortgagee, is entitled to proceed with its foreclosure proceedings; and (4) that the requisite notices were sent as required by the Deed of Trust and the Texas Property Code.

18. Declaratory Judgment is appropriate when a real controversy exists between the parties, and the entire controversy may be determined by judicial declaration. Furthermore, the trial court is duty-bound to declare the rights of the parties as to those matters and has limited

⁶ See Exhibit F – Home Equity Foreclosure Order.

discretion to refuse a declaratory judgment and may do so only where judgment would not remove the uncertainty giving rise to the proceedings. *Spawglass Construction Corporation v. City of Houston*, 974 S.W.2d 876 (Tex. App – Houston 1998, no writ). Based on the UNIFORM DECLARATORY JUDGMENT ACT, TEX. CIV. PRAC. & REM. CODE §37.001, *et. seq.*, and the Loan Agreement, Defendant Nationstar seeks a Declaratory Judgment from this Court with a judgment for non-judicial foreclosure of the Property pursuant to Tex. Const. art. XVI, § 50(a)(6)(D).

C. Breach of Contract

19. As explained above, in the event the 2018 Final Judgment is not in all things enforceable, Nationstar is now entitled to a judgment for foreclosure of the Property due to Plaintiff's breach of the loan agreement. As described above, on or about June 2, 2008, Plaintiff entered into a binding contract in the form of a Note and Deed of Trust.⁷ Together, the Note and Deed of Trust formed a Texas Home Equity Loan under Tex. Const. Art. 16, §50(a)(6) (the "Loan Agreement").

20. Under the terms of the Note, Plaintiff is obligated to pay the loan amount as prescribed in the Note and Deed of Trust. Nationstar performed completely under the terms of the Loan Agreement. Plaintiff breached the terms of the Loan Agreement by failing to tender payments in accordance with the payment schedule of the Loan Agreement. The Loan Agreement is in default for failure to make payments according to the terms of the Note and Deed of Trust. Therefore, there has been a material breach of the Loan Agreement.

21. In accordance with the Texas Rules of Civil Procedure and Tex. Const. art. XVI, §50(a)(6) Nationstar, as mortgagee, seeks judgment for breach of contract, allowing the non-judicial foreclosure of the lien against the Property. No personal liability is sought against Plaintiff.

⁷ See Exhibits A and B.

All other actions required by law or the terms of the Loan Agreement requisite to foreclosure of the security interest have been performed.

D. Judicial Foreclosure

22. In the event the 2018 Final Judgment is not in all things enforceable, Nationstar is now entitled to a judgment for judicial foreclosure of the Property. Texas law requires a party to secure a court order to foreclose on a home equity loan. Tex. Const. art. XVI § 50(a)(6)(C). Section 51.002 of the Texas Property Code provides for the sale of real property pursuant to a security instrument with a power of sale. A lien subject to non-judicial foreclosure “may also be foreclosed by judgment in an action for judicial foreclosure.” Tex. R. Civ. P. 735.3. Therefore, pleading in the alternative, Nationstar asserts, a cause of action for judicial foreclosure. Nationstar, as the successor in interest to the original lender, has the right to enforce the Note and Deed of Trust. Nationstar has fully performed its obligations under the Loan Agreement; however, Plaintiff did not comply with the Loan by failing to substantially perform material obligations required under its terms (principally, the payment of amounts due under the Loan). Plaintiff was provided with notice of default and intent to accelerate if the default was not cured. The default was not cured.

23. Nationstar has been forced to hire the undersigned attorneys to seek judgment allowing foreclosure as a result of the Plaintiff’s failure to comply with the Loan Agreement. Nationstar is therefore entitled to and seeks judgment for its reasonable attorneys’ fees in this action, both through trial and in the event of a subsequent appeal, as provided by the Deed of Trust and under Texas law. Defendant also seeks a writ of possession.

24. All conditions precedent have been performed or have occurred.

E. Equitable & Contractual Subrogation

25. In the alternative to the foregoing, Nationstar asserts a cause of action against Plaintiffs for equitable and contractual subrogation. To the extent a portion of the proceeds of the Note were used to pay off prior lien interest(s), Nationstar is entitled, by law, to recover from Plaintiffs the amount of the payoff of the previous interest by way of a claim sounding in equitable subrogation.

26. Proceeds from Plaintiff's 2008 Home Equity Loan were used to pay off and discharge prior valid liens, secured by the Property, if the Court declares that the 2008 home equity loan is unenforceable for any reason, Nationstar is entitled to a lien by equitable subrogation in the amount of the payoff of the liens extinguished *LaSalle Bank Nat'l Ass'n v. White*, 246 S.W.3d 616, 620 (Tex. 2008).

27. Plaintiffs will be unjustly enriched if equitable subrogation and/or contractual subrogation is denied. Nationstar therefore requests that if the current home equity loan is found unenforceable, Nationstar be awarded a declaratory judgment awarding it a lien by equitable subrogation against the Property in the amount it expended to discharge prior liens, plus interest accruing from the date of the payoff.

F. Contractual Subrogation – Payment of Taxes.

28. Pleading further, and in the alternative to the extent necessary, Nationstar further asserts that the Deed of Trust creates contractual rights of subrogation in favor of Nationstar in relation to Nationstar's payment of the real property taxes assessed against the Property since origination of the Note. Nationstar seeks enforcement of its right to contractual subrogation against Plaintiff. Nationstar is entitled to a lien by equitable subrogation for each real property tax payment made by Nationstar in an effort to protect its lien interest in the Property.

29. Nationstar seeks a lien by contractual subrogation in amount equal to the amount of all real property taxes advanced on behalf of Plaintiff and paid by Nationstar, which were paid by Nationstar in discharge of any potential tax lien against the Property arising after the origination of the Note.

G. Damages

30. Based on the breach in the respective obligations under the Loan Agreement, Nationstar has been damaged in an amount of at least of the payoff of the Loan Agreement. That amount continues to accrue and Nationstar is further entitled to attorney fees, costs of court, interest, and all other fees and costs allowed to Nationstar under the terms and conditions of the Loan Agreement.

H. Attorney's Fees

31. As a result of the breach of Plaintiff's obligation under the Loan Agreement, Defendant Nationstar has been forced to retain the undersigned legal counsel to institute and prosecute this action.

32. Under the terms of the Note and Deed of Trust, Plaintiff agreed to pay all reasonable attorney's fees and costs of court incurred in enforcing the payment and collection of the Note and Deed of Trust, to include any appeal to a Court of Appeals or an appeal to the Texas or U.S. Supreme Court. Pursuant to the terms of the Deed of Trust, Defendant Nationstar is entitled to recover its reasonable attorney's fees for the services rendered in instituting and prosecuting this action.

IV.
PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant Nationstar Mortgage, LLC prays that Plaintiff's Petition be dismissed and that Plaintiff take nothing by way of her claims. Nationstar

further requests that judgment be granted in its favor with respect to all claims asserted herein, and for all further and other relief, whether at law or in equity, to which Nationstar may be justly entitled.

Respectfully submitted,

By: /s/ Shelley L. Hopkins
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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

Pursuant to Texas Rules of Civil Procedure, I certify that a true and correct copy of the foregoing has been sent on this the 24th day of May 2024 to all parties of record the method indicated below.

VIA E-SERVICE:

Manfred Sternberg
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ATTORNEYS FOR PLAINTIFFS

/s/ Shelley L. Hopkins

Shelley L. Hopkins

Unofficial Copy Office of Marilyn Burgess District Clerk

Automated Certificate of eService

This automated certificate of service was created by the e filing system. The filer served this document via email generated by the e filing system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Shelley Hopkins on behalf of Shelley Hopkins

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Filing Code Description: Counter Claim/Cross

Action/Interpleader/Intervention/Third Party

Filing Description: DEFENDANT'S ORIGINAL ANSWER AND COUNTERCLAIM

Status as of 5/24/2024 1:15 PM CST

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