

Cause No. 2021-76268

**ZIONS BANCORPORATION, N.A. DBA
AMEGY BANK
Plaintiff,**

v.

**CHRISTINE R. BOONE AND THE
HEIRS AT LAW OF
ANNA CHERYL EARLES-LOPEZ
A/K/A CHERYL EARLES, DECEASED
Defendant(s).**

**In Re: 2102 MASSEY TOMPKINS RD,
BAYTOWN, TEXAS 77521**

§ IN THE DISTRICT COURT

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OF HARRIS COUNTY, TEXAS

190th JUDICIAL DISTRICT

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Synopsis: Plaintiff moves for summary judgment against Defendant, Christine R. Boone and the unknown heirs of Anna Cheryl Earles-Lopez a/k/a/ Cheryl Earles that: (1) declares plaintiff has a valid lien created under TEX. CONST. art. XVI, §50(a)(6) against the Property; (2) includes an order authorizing plaintiff to foreclose its lien in compliance with the Loan Agreement and TEX. PROP. CODE § 51.002; (3) plaintiff is authorized to enforce the home equity security agreement against the Property; (4) all the heirs-at-law were made parties of this suit; and (5) divests the Mortgagor, Mortgagor's putative estate and heirs of all right, title, and interest in the Property securing the Loan Agreement upon foreclosure.

INTRODUCTION

Plaintiff filed its original petition on November 20, 2021 to enforce its security interest in a certain 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 real property and improvements commonly known as 2102 Massey Tompkins Rd., Baytown, Texas 77521 (the "Property"), and legally described as:

BEING A 0.4347 ACRE TRACT OR PARCEL OF LAND SITUATED IN THE CHRISTIAN SMITH SURVEY, ABSTRACT NO. 69, HARRIS COUNTY, TEXAS.

1. Anna Cheryl Earles-Lopez a/k/a Cheryl Earles is the person obligated to pay the loan agreement. The debt was created in compliance with Tex. Const. art XVI, Section 50(a)(6) and secured by the Property.
2. Defendant, Christine R. Boone was served with Citation and a copy of plaintiff's original petition by personal service. Defendant, Boone filed her Answer disclaiming any interest in the Property.
3. This Court appointed Andrea Roth, as Attorney Ad Litem, to represent the unknown heirs-at-law of Decedents not named in this matter.

SUMMARY JUDGMENT EVIDENCE

4. In support of this Motion, plaintiff relies upon and incorporates by reference the following evidence:
 - a. The pleadings and other documents on file with this Court;
 - b. Affidavit of Plaintiff's Representative ("Affidavit"), with attachments marked as Exhibit "A"
 - c. Texas Estates Code and Texas Civil Practices and Remedies Code;
 - d. Note marked as Exhibit "A-1" attached to the Affidavit;
 - e. Deed of Trust marked as Exhibit "A-2" attached to the Affidavit;
 - f. Notice of Default and Notice of Acceleration collectively marked as Exhibit "A-3" to the Affidavit.
 - g. Plaintiff's Brief in Support is contained herein.

BACKGROUND

5. Decedent executed a note dated October 9, 2013 in the original principal sum of \$80,000.00 (the “Note”) to obtain a home equity loan created under article XVI, § 50(a)(6) of the Texas Constitution. The Note is secured by a security instrument encumbering the Property. (See Exhibits “A” and “A-2”). Plaintiff is the beneficiary of the security instrument.

6. According to plaintiff’s records, payments have not been made in accordance with the terms of the loan agreement and the note is currently due for the October 5, 2020 and subsequent payments. Prior to the filing of this petition, the requisite notice or notices to cure the default have been mailed to each person as required under applicable law and the loan agreement and the opportunity to cure has expired. Plaintiff accelerated the maturity of the debt evidenced by the loan agreement for the failure to cure the default. (See Exhibit “A-3”). No persons have stepped forward to assert any claim to the property or attempt to refinance the debt or sell the property and pay off the lien held by Plaintiff.

7. Under the terms and conditions of the Deed of Trust, plaintiff is entitled to attorney fees incurred in the prosecution of and, if necessary, appeal of this suit as to collection of the past due indebtedness. Plaintiff seeks judgment for attorney’s fees and costs of collection as authorized under the Deed of Trust to quiet title because of Decedent’s failure to pay for the Property while enjoying the use, benefit and possession of the Property.

STANDARD FOR SUMMARY JUDGMENT

A. Standard under Rule 166a

8. To succeed on a traditional motion for summary judgment plaintiff must show there is no genuine issue of material fact and that it is entitled to summary judgment as a matter of law. See Tex. R. Civ. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844 (Tex. 2009); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546,548 (Tex. 1985). To meet this burden, the plaintiff must conclusively prove all essential elements of its claim. *MMP, Ltd. v. Jones*, 710 S.W.2d 59 (Tex.1986). A matter is conclusively established if reasonable people could not differ on the conclusion to be drawn from the evidence. *City of Keller v Wilson*, 168 S.W.3d 802,816 (Tex. 2005). If the plaintiff established its right to summary judgment as a matter of law, the burden shifts to the defendant to present evidence that raises a genuine issue of material fact. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22 (Tex. 2000).

ARGUMENT AND AUTHORITIES

A. Attorney Ad Litem

9. On April 12, 2022, this Court appointed Andrea Roth as Attorney ad Litem to defend this action on behalf of the unknown heirs at law of Decedent. Andrea Roth filed an Answer on April 28, 2022. Andrea Roth's Affidavit confirms that no additional necessary parties were located. Plaintiff is of the belief that all the proper parties are before the Court. Plaintiff respectfully request the Court to grant Andrea Roth's attorneys fees as costs of court. Filed with this Motion is a proposed statement of the evidence according to Tex.R.Civ.P. 244.

B. Plaintiff is entitled to Declaratory Judgment for Non Judicial Foreclosure

10. Plaintiff is entitled to a final order declaring it may proceed with a non-judicial foreclosure sale on the Property. The undisputed facts conclusively establish:

- A. a debt exists;
- B. the debt is secured by a lien created under TEX Const.art.XVI, Section 50(a)(6);
- C. a default under the Note and Deed of Trust exists;

D. Plaintiff is the beneficiary of the Deed of Trust, has the requisite authority to conduct a non-judicial foreclosure; and;

E. the Loan Agreement is in default and repayment of the money secured by the security instrument is in default.

11. There are no genuine issues of material fact and a declaratory judgment authorizing plaintiff to non-judicially foreclose its lien according to the Loan Agreement and Tex. Prop. Code Section 51.002 that divests the Decedent's putative estate and Heirs of all right, title and interest in the Property upon foreclosure and conveyance by a trustee's deed should be entered.

12. Because of a material breach of the Loan Agreement, Tex Const. art XVI, Section 50 (a)(6)(D) and the terms of the Loan Agreement with respect to all defendants who are obligors or acquire the Property subject to Decedent's debts authorized Plaintiff to file a suit seeking a final judgment which includes an order allowing non-judicial foreclosure. Plaintiff is entitled to such a judgment and order authorizing Plaintiff to proceed with foreclosure under the Security Instrument and Tex. Prop. Code Section 51.002.

C. Ownership of the Property when the Mortgagor is Deceased

13. The Property is subject to payment of the home equity debt made by Decedent, even though equitable title vested immediately in the heirs-at-law upon the Decedent's death. *Casey v. Kelley*, 18 S.W.2d 492 (Tex. Civ. App. – Ft. Worth 1945, writ ref'd n.r.e.). The heirs-at-law are not personally liable for the debt of the Decedent. *Low v. Felton*, 84 Tex. 378, 19 S.W. 693 (Tex. 1892).

14. While the defendants hold a title interest in the property, that title interest is subject to the lien held by Plaintiff.

15. Since the Deed of Trust is recorded in the real property records of the county where the property is located, anyone having an interest in the property has constructive notice of the

existence of the Lien held by the Plaintiff. TEX. PROP. CODE ANN. Sections 13.001 and 13.002. Thus, defendants have constructive notice that default in payment of the Lien can result in foreclosure.

16. Unless the defendants do equity and cure the default under the Deed of Trust, they should be divested of all right, title and interest in the property for failure to cure the default.

17. The language recited in the Deed of Trust clearly provides authority for the Court to declare, under the provisions of the Texas Uniform Declaratory Judgment Act, TEX.CIV.PROC. & REM.CODE ANN. Section 37.001 et seq., that due to the default under the Deed of Trust, Plaintiff is entitled to a declaratory judgment to foreclose its lien as provided in the terms of the Deed of Trust and TEX.PROP.CODE ANN. Section 51.002.

WRIT OF POSSESSION

18. If any person occupies or claims possession of the Property after transfer of all right, title, and interest after foreclosure, Plaintiff should have judgment for a writ of possession against all occupants under TEX.R.CIV.P. 310.

CONCLUSION

19. Plaintiff is entitled to summary judgment as a matter of law because there is no genuine issue of material fact. Plaintiff is the beneficiary of the Deed of Trust. A default under the Deed of Trust exists. All parties who possess a title interest in the Property have been made defendants. The requested foreclosure of the lien will operate to vest the purchaser at sale with the right of title and interest in the property previously held by the defendants as the heirs at law of Decedent.

20. Plaintiff is not asking for unliquidated damages, therefore no hearing is necessary to prove damages. Plaintiff is asking the Court for declaratory judgment quieting title and an order

authorizing plaintiff to proceed with foreclosure under the Deed of Trust and TEX.PROP.CODE ANN. Section 51.002.

21. Furthermore, Plaintiff is entitled to summary judgment as a matter of law, as there are no issues of material fact. The evidence shows there was a valid Loan Agreement between Plaintiff and Decedent, said Loan Agreement is in default, and all heirs of Decedent made defendants in this suit.

22. Plaintiff further requests that the Court dismiss Andrea Roth from her appointment as Attorney Ad Litem for Christine R. Boone, and the unknown heirs-at-law of Decedent and assess any fees and costs associated with Andrea Roth's representation as costs of court to be paid by Plaintiff.

PRAYER

Plaintiff asks this court to sign a judgment granting the relief requested in Plaintiff's Original Petition. Furthermore, Plaintiff seeks reasonable attorney's fees under the Declaratory Judgment Act; for costs of court herein and for such other and further relief, at law or in equity, to which Plaintiff may show itself justly entitled.

Respectfully submitted,

LAW OFFICE OF ERIC GOULD

/s/ Eric Gould

Eric Gould
State Bar No.: 08234500
5773 Woodway #184
Houston, Texas 77057
(713) 213-3781
(281) 596-4449 (Facsimile)
egoac99@gmail.com

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion and proposed Final Judgment have been furnished to the following via electronic transfer and/or certified mail, return receipt on this the 22nd day of November, 2022.

Andrea Roth
Attorney ad Litem
SORRELS LAW
5300 Memorial Drive, Suite 270
Houston, Texas 77007

Negin Roberts
Attorney for Defendant, Christine R. Boone
9607 Plaza Point Drive
Missouri City, Texas 77459

/s/ Eric Gould

Eric Gould

Unofficial Copy Office of Marilyn Burgess District Clerk

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling 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.

eric gould on behalf of eric gould
Bar No. 08234500
egoac99@gmail.com
Envelope ID: 70407633
Status as of 11/22/2022 2:16 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Eric Gould	8234500	egoac99@gmail.com	11/22/2022 1:54:34 PM	SENT
Negin Roberts	24081892	negin.roberts@gmail.com	11/22/2022 1:54:34 PM	SENT
Andrea Roth		andrea@sorrellslaw.com	11/22/2022 1:54:34 PM	SENT

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