

FRANK CORNISH, IV and
ROBIN CORNISH,

Plaintiffs,

vs.

WASHINGTON MUTUAL BANK, FA,
and WELLS FARGO BANK (TEXAS), NA

Defendants.

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IN THE DISTRICT COURT OF

TARRANT COUNTY, TEXAS,

17TH JUDICIAL DISTRICT

DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT

COME NOW Washington Mutual Bank, f/k/a Washington Mutual Bank, FA , and Wells Fargo Bank (Texas), NA , Defendants herein, and file this their motion for summary judgment with respect to Plaintiffs’ First Amended Petition, stating as follows:

Background facts

In 1993, the Plaintiffs purchased a home at 305 Sheffield Drive, Southlake, Texas with a mortgage loan owned by Wells Fargo and serviced by Washington Mutual. They have continued to live in that home ever since. The surprising things about their continued residence are, first, that they have gone for years without paying anything on their mortgage note or any rent, (a situation that has obliged Defendants, in order to protect their collateral, to pay the Plaintiffs’ homeowner’s insurance and taxes, an obligation which has conveniently provided the Plaintiffs with cost-free housing for years), and, second, that Plaintiffs lost title to the house in March of 2004 by foreclosure. The only way that Plaintiffs have been able to continue to reside in this house is by abusing the legal process. They have filed bankruptcy three times, in 2001, 2004 and 2005. Bankruptcy Judge Lynn of the

Northern District of Texas dismissed their last bankruptcy filing as having been filed in bad faith. His patience with Plaintiffs' blatant manipulations of the bankruptcy laws and prevarications under oath having been totally exhausted, Judge Lynn forbade the Plaintiffs from filing any other bankruptcy proceeding until after the final, unappealable disposition of this case or any other litigation either regarding the house at 305 Sheffield Drive or between the parties to this suit. DuBose Affidavit Exhibit A.

Procedural Posture of the Case

Plaintiffs filed their Plaintiff's Original Petition on Suit for Wrongful Foreclosure and Suit to Try Title (the "Original Petition") in this court on July 21, 2005. Shortly thereafter Defendants removed the case to the United States Bankruptcy Court for the Northern District of Texas because Plaintiffs had made claims that certain orders of the bankruptcy court had been violated. In order to have their case remanded to state court, the Plaintiffs agreed to replead, eliminating all federal or bankruptcy claims, and not thereafter to raise any such claims. A true and correct copy of the agreed order embodying that agreement is attached as Exhibit B to the DuBose Affidavit. In conformity with that order, Plaintiffs filed a First Amended Petition on Suit for Wrongful Foreclosure and Suit to Try Title (the "Amended Petition"), a true and correct copy of which is Exhibit C to the DuBose Affidavit.

The Amended Petition therefore supercedes the Plaintiffs' Original Petition and is now the live pleading in this action. The Amended Petition claims that the Defendants wrongfully foreclosed on their home on March 2, 2004. The sole allegations of wrongful behavior in that pleading are, first, that Defendants did not receive the notice required by §51.002(d) of the Texas Property Code. Amended Petition ¶¶ 6(A), 6(C), second, that the house sought to be foreclosed is the Plaintiffs'

homestead. Amended Petition ¶¶ 6(B).

Plaintiffs' Lamentable History

The Plaintiffs have a long history of inability to pay their mortgage. It is a sad history of a couple which has been unable to reconcile their expectations with reality.

Mr. Cornish had a career of 6 years in the NFL, playing with the Cowboys in the 1992 and 1993 seasons when they won two Super Bowls in a row. DuBose Affidavit, Exhibit D; Cornish Deposition, page 22, line 24 through page 23, line 12, and Deposition Exhibit A attached to DuBose Affidavit as Exhibit E (hereinafter "Cornish Deposition"). He made \$400,000 a year under each of his two one-year contracts, to which were added a \$125,000 signing bonus and extra pay due to playoff success. DuBose Affidavit, Exhibit F; Cornish Deposition, page 23, line 13 through page 24, line 13 and Deposition Exhibits B1 & B-2. Before his second year with the Cowboys, Cornish and his wife bought their home at 305 Sheffield Drive, Southlake, Texas, with a mortgage note of \$279,150.00. DuBose Affidavit, Exhibit G; Cornish Deposition, page 24, line 23 through page 25, line 16 and Deposition Exhibit C. In their application for this loan, Plaintiffs showed a monthly income of \$33,333. DuBose Affidavit, Exhibit H; Cornish Deposition, Page 27, lines 2-4 and Deposition Exhibit D. After the 1993 season, however, Cornish left the Cowboys, and his career went quickly downhill. Playing for three different teams in the next two years, he only played in only 12 games out of the 32 regular season and started none. By 1996, he was out of football.

Plaintiffs' mortgage troubles began quickly thereafter. By late 1997 they were already showing delinquencies on mortgage payments. Their house was posted for foreclosure several times prior to their 2001 bankruptcy filing, and on at least two occasions Plaintiffs paid substantial amounts, \$16,741.44 and \$21,477.13, to bring themselves current. DuBose Affidavit, Exhibit I;

Cornish Deposition page 33, lines 14-17; page 36, lines 14-17 and Deposition Exhibits E-1 & E-2. But the salary income was no longer there. In 2000, with both Mr. Cornish and his wife working, their income had fallen from the \$33,333 a month when they applied for their loan to \$3300. DuBose Affidavit, Exhibit J; Cornish Deposition, page 38, lines 11-17 and Deposition Exhibit F.

By this time, it should have been apparent to the Plaintiffs that they had more house than they could afford. Their monthly mortgage payments were the same amount as what they stated their monthly income was. On September 27, 2001, a few days prior to a scheduled foreclosure of their home, they filed for protection under Chapter 13 of the Bankruptcy Code. *In re: Frank Cornish and Robin Cornish*, Case No. 01-37918-saf13, U.S Bankruptcy Court, N.D. Tex., Dallas Division.

In bankruptcy they substantially overestimated the income that they would have available to pay their debts: another triumph of hope over experience. Although the Plaintiffs admitted in 2000 that their income was \$3300 a month, their Schedule J projected their take home to be \$6,963. DuBose Affidavit, Exhibit K. Because of that overestimate, the Plaintiffs' payment record once they were in bankruptcy was predictably desultory, and by August 1, 2003, the Plaintiffs' postpetition arrearage in their mortgage payments was \$35,055.36. They entered into a wholly unrealistic agreement to catch themselves up on their mortgage payments that required them, in addition to their \$2,707.64 regular monthly payment on their mortgage note, to pay \$2,190.86 per month to extinguish the postpetition arrearage. DuBose Affidavit, Exhibit L; Baker Affidavit, Exhibit B. They promptly breached this agreement, and foreclosure followed on March 2, 2004. DuBose Affidavit, Exhibit M. On March 29, 2004, the Plaintiffs' Chapter 13 proceeding was dismissed for their failure to perform their obligations under the Bankruptcy Code. DuBose Affidavit, Exhibit N.

After the foreclosure sale, Plaintiffs avoided eviction by rapidly returning to Bankruptcy

court. On April 7, 2004, a mere nine days after the dismissal of their Chapter 13 proceeding, Plaintiffs, now using Phillip Layer as their attorney, filed a bankruptcy petition under Chapter 7, Case No. 04-34103-hdh7 which was closed, after discharge, on September 14, 2004. On April 28, 2005, after several fits and starts and a reopening of the case, Judge Hale issued an order that the eviction was not barred by the automatic bankruptcy stay. Exhibit O, DuBose Affidavit. When on July 21, 2005, Plaintiffs were about to be evicted, they filed this action to set aside the foreclosure and on August 18, 2005, filed yet another Chapter 13 bankruptcy proceeding, *In Re Frank Cornish*, Case No. 05-48377-dml13, this time in the Fort Worth Division of the United States Bankruptcy Court for the Northern District of Texas. It was this last proceeding which was dismissed as a bad faith filing. DuBose Affidavit, Exhibit A.

This present case is their last gasp to retain the cost-free housing that they have enjoyed for so long. Their claims are utterly without merit. The court should grant this motion for summary judgment.

I.

ALL REQUIRED NOTICES WERE GIVEN

Plaintiffs complaint that the foreclosure went forward without the statutory notice required by Section 51.002(d) having been given. They are dead wrong; all notices required by the Texas Property Code and Plaintiffs' deed of trust were given.

Mr. Cornish himself has no idea what notices he is alleging he did not receive. In his deposition he testified as follows:

2 Q And what did you understand was wrong about the way the

3 mortgage lender was dealing with you?
4 A It was just explained that there was – I believe
5 illegal foreclosure.
6 Q And what did you understand was illegal about that
7 foreclosure?
8 A I can't recall the specific details, but that I wasn't
9 give the appropriate notices, I believe would be the . . .
10 Q And what notice that you should have received did you
11 not receive?
12 A I'm not sure. I couldn't explain that.

Cornish Deposition at page 59.

The foreclosure in this case was handled by the law firm of Barrett Burke Wilson Castle Daffin & Frappier, L.L.P. The affidavit of Becky Howell, the firm's Director of Foreclosure Operations states as follows:

2. In 1998, Washington Mutual Bank, the servicer of the Plaintiffs' loan, engaged Barrett Burke to foreclose its lien on the Plaintiffs' home 305 Sheffield Drive, Southlake, Texas. Barrett Burke was finally able to perform that task in 2004, conducting the foreclosure sale on March 2, 2004. I am a custodian of records of Barrett Burke. The documents attached as Exhibits A, B, C D, and E are documents prepared and kept by Barrett Burke in the ordinary course of business, and it was the regular course of business of Barrett Burke for an employee or representative of Barrett Burke with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto as Exhibits A, B, C, D and E are exact duplicates of the original documents, except that, consonant with Barrett Burke's normal record keeping processes, evidence of the certified mailing has been added where the document was mailed by certified mail.

3. Exhibits A and B are true and correct copies of the Notice of Default and Intent to Accelerate that Barrett Burke on November 28, 2003, sent via US Postal Service certified mail to Frank E. Cornish, IV, and his wife, Robin B. Cornish, respectively, antecedent to the foreclosure of their home at 305 Sheffield Drive, Southlake, Texas. This notice comports with all the requirements for notice contained in Section 51.002(d) of the Texas Property Code and in the Cornishes' deed of trust for their home. The records of Barrett Burke (a) show no communication from the Cornishes or from any of their representatives in response to these letters and (b) show that neither letter was returned to us.

4. Exhibits C and D are true and correct copies of letters that on February 4, 2004, Barrett Burke sent via US Postal Service certified mail to Frank E. Cornish, IV, and his wife, Robin B. Cornish, respectively, informing them of the foreclosure of their home which was scheduled to take place on March 2, 2004. Exhibit E is a true and correct copy of the Notice of Substitute Trustee Sale that was filed with the Deed Records of Tarrant County, Texas, the county in which the Cornishes' home is situated. A true and correct copy of Exhibit E – but without the County Clerk's receipt stamp that appears on Exhibit E – was mailed to each of the Cornishes as an enclosure to Exhibits C and D. The notices sent to the Cornishes in Exhibits C, D and E, satisfy all the requirements for notice of foreclosure sale contained in Section 51.002 of the Texas Property Code and in the Cornishes' deed of trust on their home. The records of Barrett Burke (a) show no communication from the Cornishes or from any of their representatives in response to these letters, Exhibits C and D, and (b) show that neither letter was returned to us.

It is clear that all notices required by the Texas Property Code were given.

The only evidence in the records is that they were received. Mr. Cornish testified that he was present at the foreclosure sale on the steps of the Tarrant County Courthouse. Cornish Deposition, page 54, line 10 through page 55, line 7; page 60, lines 11-14. Conveniently, he cannot recollect how he learned that the sale would be that day at that place. Cornish Deposition, page 54, lines 13 - 15. In addition, his attorney in this cause, Phillip Layer, faxed letters to Washington Mutual in the days prior to the foreclosure offering it a payout of the Cornishes' arrearage. See DuBose Affidavit, Exhibit P. If it were in fact true that the Cornishes had not received the required notices under the Texas Property Code and their deed of trust, Mr. Layer certainly would have raised that issue when contacting Washington Mutual and, if Washington Mutual did not respond, go into court to get a temporary restraining order. No court in Texas would fail to grant a TRO if the borrower had not received the required notices. Indeed it is curious that this claim that the Plaintiffs did not receive statutorily adequate notice didn't ripen into a lawsuit until more than 16 months after the foreclosure. It would appear to the cynical that the Cornishes' attorney, Mr. Layer, has just been dribbling out his

meritless claims over as long a time span as he could – with any eye primarily towards extending as long as possible the Plaintiffs’ marvelous tenancy without mortgage payments, without rental payments, without real estate tax payments and without insurance payments.

The formal notices required by the Texas Property Code and Plaintiffs’ deed of trust were not the only notices of their delinquency and the impending foreclosure that the Plaintiffs received. By not later August 1, 2003, when the bankruptcy court entered the order conditioning stay, they knew they had an arrearage in the truly breathtaking amount of \$35,055.36 the amount set out in the agreed order. That order required the Plaintiffs to make up their arrearage over a period of months and conditioned the automatic stay as follows:

Should Debtors default on any of the terms of this Order, Movant shall mail notice of the default, to Debtors and their attorney by certified mail, return-receipt-requested. Should Debtors not cure the default within ten (10) days of the date Movant mails the notice, the Automatic Stay of 11 U.S.C. Sec. 362 shall be and is hereby ordered lifted with respect to Movant. After Movant has sent two (2) such notices and the defaults have been cured, then upon the third default of the terms of this Order the automatic stay shall terminate without further notice or action by the Court. In the event of termination of the automatic stay, Movant, or its successor in interest, shall be authorized to enforce its lien rights and pursue its statutory and contractual remedies to gain possession of the following described property:

LOT 4, BLOCK 5, STONE LAKES, PHASE ONE, AN ADDITION
TO THE CITY OF SOUTHLAKE, TARRANT COUNTY, TEXAS,
ACCORDING TO PLAT RECORDED IN CABINET A, PAGES
915 & 916, PLAT RECORDS, TARRANT COUNTY, TEXAS.

DuBose Affidavit, Exhibit L.

Predictably, the Plaintiffs breached their agreement, and on October 17, 2003, Defendants through their counsel, Brown & Shapiro, gave Plaintiffs notice of their delinquency. Baker Declaration, Exhibit C, attached as Exhibit Q to the DuBose Affidavit. The notice unambiguously stated that the bankruptcy stay “will automatically lift in ten (10) days, if you fail to cure this

default.” There was no response; there was no cure. The Cornishes failed to make the payments due on August through October of 2003. Baker Declaration ¶2. On November 3, 2003, Defendants, again through counsel, filed a Certificate of Default reciting these facts and stating that “the stay has automatically lifted/terminated,” which they served both on Plaintiffs and on their bankruptcy counsel. Baker Declaration, ¶2 and Exhibit E thereto.

There is no question but that Plaintiffs had ample notice that they were mightily in arrears on their mortgage and, similarly, no doubt that they did nothing in response to that information.

II.

PLAINTIFFS’ DEBT IS A PURCHASE MONEY MORTGAGE AND HOMESTEAD LAW DOES NOT BAR FORECLOSURE

Plaintiffs appear to be making the argument that Defendants’ foreclosure was barred because the house at 305 Sheffield Drive was their homestead. The argument is without merit.

Homestead law in Texas derives from Article XVI, Section 50 of the Texas Constitution.

In relevant part, that section reads:

- (a) The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for:
 - (1) the purchase money thereof, or a part of such purchase money

Defendants’ records regarding the Plaintiffs’ loan make it crystal clear that this was a purchase money mortgage, DuBose Affidavit, Exhibit R, as does the deed of trust, DuBose Affidavit Exhibit S. The last page of the Plaintiffs’ note is an affidavit from the Plaintiffs certifying that they will occupy 305 Sheffield Drive as their primary residence. DuBose Affidavit, Exhibit G. The Plaintiffs’ loan and its lien against their home are exempt from the homestead provisions of the Texas

Constitution.

This claim is without merit.

Conclusion

This court should grant Defendants' motion for summary judgment.

Respectfully submitted

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ATTORNEY FOR DEFENDANTS

Certificate of Conference

A face-to-face conference was held on September 15, 2006 with Phillip Layer on the merits of this motion. A reasonable effort has been made to resolve the dispute without the necessity of court intervention and the effort failed. Therefore it is presented to the court for determination.

Eugene Zemp DuBose

FIAT

Please take notice that this motion will be heard in the courtroom of the 17th Judicial District Court, Tarrant County Justice Center, _____ Floor, 401 West Belknap, Fort Worth Texas at _____ m. on the _____ day of _____, 2006.

JUDGE PRESIDING

Certificate of Service

The undersigned attorney hereby certifies that he served the attached document on counsel for Plaintiffs this ____ day of September, 2006, by certified mail, return receipt requested, at the following addresses:

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