

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

KINGMAN HOLDINGS L.L.C

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Plaintiff,

v.

Case No. 4:11-cv-00033

BANK OF AMERICA, N.A.

Defendant.

DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Plaintiff Kingman Holdings, LLC ("Kingman") purchased real property subject to Defendant Bank of America, N.A.'s ("BANA") lien. Kingman now brings three claims seeking declaratory relief, the last of which seeks a declaration that BANA's lien "be discharged and extinguished and declared of no force and effect." Alternatively, Kingman seeks declarations that it "has the right to service [BANA's lien]" and the "right to equitable redemption." Kingman's request to declare BANA's lien invalid is wholly unsupported and should be dismissed with prejudice. And Kingman's remaining claims concerning its rights to redeem or service the underlying debt should also be dismissed because they fail to present a justiciable claim.

I. ISSUES PRESENTED

- A. Whether Kingman can obtain a declaration seeking to adjudicate issues of title under the Declaratory Judgments Act.
- B. Whether Kingman can obtain a declaration that it has an equitable right of redemption without showing there is an actual dispute as to whether Kingman has that right.

II. FACTUAL AND PROCEDURAL BACKGROUND

On July 3, 2006, Marinnia Harbin, then known as Marinnia Davis, purchased real property located in Little Elm (the "Property").¹ That same day, Davis executed a Deed of Trust granting a first lien security interest in the Property (the "First Deed of Trust").² The First Deed of Trust, identified Mortgage Electronic Registration Systems, Inc. ("MERS") as beneficiary and "nominee for Lender . . . and Lender's successors and assigns."³ The First Deed of Trust specifically gave MERS power to release or cancel the First Deed of Trust.⁴

Davis's property is part of the Two Sunset Pointe Home Owners Association, Inc. ("association"),⁵ which also had a lien on the property for all association assessments. The association's Declaration of Covenants, Conditions and Restrictions granted the association power to foreclose on its lien for unpaid assessments.⁶ Any foreclosure of the association's lien for assessments was, however, expressly subordinate to *any* bona fide mortgage or deed of trust placed on the property and recorded "prior to recordation of written notice of past due Assessments."⁷

On January 18, 2008, Davis (whose name was then Marinnia Harbin), together with Alex Harbin, executed a second Deed of Trust that granted Countrywide Bank, FSB a first-lien security interest in the Property.⁸ Under the renewal and extension agreement attached to the Second Deed of Trust, the First Deed of Trust "subsists against the Property and that by [the Second Deed of Trust] it is renewed and extended in full force until the Note is paid, even

¹ Plaintiff's Original Petition ¶ 7, attached as Exhibit 1 to Notice of Removal, Docket Entry No. 1.

² Pl. Orig. Pet. ¶ 8; *see also* First Deed of Trust, attached as **EXHIBIT 1**.

³ **Ex. 1**, First Deed of Trust at p. 1.

⁴ *Id.* at p. 2.

⁵ Pl. Orig. Pet. ¶ 6.

⁶ *See* Declaration of Covenants, Conditions, and Restrictions ¶ 4.12(b), attached as **EXHIBIT 2**.

⁷ *Id.*

⁸ Pl. Orig. Pet., ¶ 9; *see also* Second Deed of Trust, attached as **EXHIBIT 3**.

though the [First Deed of Trust] is released and not assigned to Lender."⁹ On February 20, 2008, MERS executed a Release of Lien releasing the First Deed of Trust.¹⁰

After Davis executed the Second Deed of Trust, she failed to pay the association's assessments for 2009 and 2010.¹¹ So, on February 16, 2010, the association issued its Notice of Assessment Lien. Because those amounts remained unpaid, the association foreclosed on its lien for assessments on June 1, 2010.¹² Kingman purchased the property at the association's sale.¹³

Following its acquisition of the Property, Kingman alleges it wrote to Countrywide Bank, FSB and BANA requesting the "claimed lien-holder of record verify its interest in the Property and, subject to said verification, asserted [Kingman's] right of equitable redemption, requesting information on the subject Property loan payoff amount," but received no response.¹⁴

Kingman then filed this suit seeking declaratory relief.¹⁵ Kingman seeks a declaration that the Second Deed of Trust "be discharged and extinguished and declared of no force and effect." According to Kingman, BANA's lien should be extinguished because (1) BANA's lien is really a second mortgage, since MERS lacked authority to release the lien, and was therefore wiped out by the association's foreclosure;¹⁶ (2) there is no evidence of a valid assignment of the Second Deed of Trust, and the note which it secures, to BANA;¹⁷ and (3) BANA is not in

⁹ **Ex. 3**, Second Deed of Trust, Renewal and Extension Exhibit.

¹⁰ Pl. Orig. Pet. ¶ 10.

¹¹ Notice of Assessment Lien ¶ 2, attached as **EXHIBIT 4**

¹² Pl. Orig. Pet. ¶ 12.

¹³ *See id.*; Pet., ¶ 17. Note that the paragraph immediately after 12 is 17. The next paragraph number is 13. Another paragraph 17 appears later in the petition. The reference to paragraph 17 here is in reference to the first paragraph 17.

¹⁴ Pl. Orig. Pet. ¶¶ 13–14.

¹⁵ *Id.*, ¶¶ 15–27.

¹⁶ *Id.*, ¶ 24.

¹⁷ *Id.*, ¶ 25.

possession of the original note secured by the Second Deed of Trust.¹⁸ In the alternative, Kingman seeks a declaration that it has a right of equitable redemption.¹⁹

BANA timely removed Kingman's claims to federal court. BANA now moves to dismiss Kingman's state-court petition, and this action, with prejudice because it fails to state a claim as a matter of law.

III. LEGAL STANDARD

In deciding a motion to dismiss, a court accepts all well-pleaded facts as true, and views them in the light most favorable to the plaintiff. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 742 (5th Cir. 2008). Because this case was removed from state court, Texas law determines whether plaintiffs stated a claim in their state-court petition. *See, e.g.*, Fed. R. Civ. P. 81(c). To state a claim under Texas law, a plaintiff must provide sufficient allegations to satisfy the elements of a claim. *See Nassar v. Hughes*, 882 S.W.2d 36, 38 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (holding that under Texas Rule of Civil Procedure 90, a party's claim should be dismissed if the party fails to plead all of the elements of a cause of action). Texas law also requires a plaintiff to plead sufficient facts to give the defendant "fair notice" of the claim, "which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant." *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000).

In deciding a motion to dismiss, a court may consider not only the allegations made in the plaintiff's complaint, but also any documents incorporated in the pleading and all matters of which judicial notice may be taken. *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017–18 (5th Cir. 1996). All documents referred to in the plaintiff's petition, and which are central to the

¹⁸ *Id.*, ¶ 26.

¹⁹ *Id.*, ¶ 19.

plaintiff's action, are considered "incorporated in the pleading." *See Scanlan v. Tex. A & M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003).

IV. ARGUMENT

Kingman's original petition should be dismissed because each claim is deficient as a matter of law. BANA will first address Kingman's baseless effort to invalidate BANA's lien. BANA will then address why Kingman's request for a declaration concerning its right of equitable redemption fails to state a claim under the Declaratory Judgments Act.

A. Kingman's Effort to Invalidate BANA's Lien Borders on the Frivolous as None of Kingman's Arguments Have Any Legal or Factual Merit.

Kingman's effort to invalidate BANA's lien is of no moment. As a threshold matter, Kingman cannot use the Declaratory Judgments Act (whether state or federal) to adjudicate issues of title. *See, e.g., Kennesaw Life & Accident Ins. Co. v. Goss*, 694 S.W.2d 115, 117 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.). And Kingman cannot extinguish BANA's title merely by showing BANA's claim is deficient; Kingman must show its claim is superior to BANA's. *Fricks v. Hancock*, 45 S.W.3d 322, 327 (Tex. App.—Corpus Christi 2001, no pet.).

1. The Declaratory Judgments Act provides Kingman no relief.

Kingman failed to plead a claim under the Texas Declaratory Judgments Act because the action is one to determine title to real property, and therefore cannot be raised under the Declaratory Judgments Act. Although the Declaratory Judgments Act provides that "[a] person interested under a deed . . . may have determined any question of construction or validity arising under the instrument," Tex. Civ. Prac. & Rem. Code Ann. § 37.004(a), the Texas Property Code provides that "[a] trespass to try title action is *the* method of determining title to lands, tenements, or other real property." Tex. Prop. Code Ann. § 22.001 (emphasis added); *see also*

Martin v. Amerman, 133 S.W.3d 262, 264–65. 267 (Tex. 2004) (construing Tex. Civ. Prac. & Rem. Code Ann. § 37.004(a) and Tex. Prop. Code Ann. § 22.001). "[A] declaratory judgment action therefore cannot be used to adjudicate title . . . because section 22.01 is the exclusive remedy by which to do so." *Jordan v. Bustamante*, 158 S.W.3d 29, 35 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).

The court in *Kennesaw Life & Accident Insurance Co.* applied these principles and reversed the entry of a declaratory judgment entered on behalf of property owners involved in a live title dispute with other parties. 694 S.W.2d at 118. In reaching this conclusion, the court examined the substance of the property owners' pleadings, and rejected their attempt to style their claim as one for declaratory relief. *Id.* The owners brought their suit "to remove a cloud on their title to the property." *Id.* Accordingly, the court held that the parties' substantive rights were governed by trespass-to-try-title statutes, not the Declaratory Judgments Act, and that the trial court had erred in granting relief under the Act. *Id.*

Here, Kingman seeks relief under the Texas Declaratory Judgment Act to remove "a cloud upon the title to the Property now rightfully owned by Plaintiff."²⁰ Thus, as in *Kennesaw Life & Accident Insurance Co.*, the substance of Kingman's petition reveals that this action is one to remove a cloud on title. As such, the trespass-to-try-title statutes are Kingman's sole remedy. *Kennesaw Life & Accident Ins.*, 694 S.W.2d at 118. Kingman's declaratory judgment action is therefore precluded.

2. Kingman's Request to invalidate the Second Deed of Trust lacks merit.

Even if Kingman had raised (or later asks to raise) a quiet title claim or a trespass-to-try-title claim, dismissal would be inevitable. To plead a quiet title or trespass-to-try-title claim,

²⁰ Pl. Orig. Pet. ¶ 22.

Kingman is required to base his claim solely on the strength of his own title and not on the asserted weaknesses of BANA's title. *See, e.g., Fricks*, 45 S.W.3d at 327; *see also Katz v. Rodriguez*, 563 S.W.2d 627, 629 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.) ("[A quiet title] claimant must base his action on the strength of his own title[.]"). "The defendant is not required to show title in [it]self, nor may the plaintiff rely on the defendant's failure to do so." *Wall v. Carrell*, 894 S.W.2d 788, 797 (Tex. App.—Tyler 1994, writ denied). Moreover, "[t]he plaintiff in a suit to quiet title must allege right, title, or ownership in himself or herself with sufficient certainty to enable the court to see he or she has a right of ownership that will warrant judicial interference." *Wright v. Matthews*, 26 S.W.3d 575, 578 (Tex. App.—Beaumont 2000, pet. denied).

Of the three arguments Kingman advances concerning the validity of BANA's claim to title, only one concerns the strength of Kingman's own claim to title. Kingman's arguments that BANA lacks a claim because it lacks an assignment or possession of the original note are not attempts to show why Kingman's claim is superior. Each argument essentially requires BANA to show title in itself, i.e., that it took assignment of the interest in the property or obtained possession of the original note. As such, neither argument can serve as a proper basis for invalidating BANA's claim to title.²¹

²¹ Furthermore, these two arguments each fail as a matter of law. Kingman's allegations concerning the lack of an assignment or the original note fail because they concern merely whether BANA may *enforce* the Second Deed of Trust, not whether the Second Deed of Trust is *enforceable*. Kingman's claim does not support the relief it seeks—a judgment declaring the Second Deed of Trust unenforceable. Another reason Kingman's argument concerning BANA's purported lack of the original note is that the Texas Property Code does not require such possession. Despite Kingman's tacit assertions to the contrary, the foreclosure of a lien is a separate and distinct right from a suit to collect a debt by suing under the note. *See, e.g., Carter v. Gray*, 81 S.W.2d 647, 648 (Tex. 1935) ("[I]t is so well settled as not to be controverted that the right to recover a personal judgment for a debt secured by a lien on land and the right to have a foreclosure of lien are severable"); *Aguero v. Ramirez*, 70 S.W.3d 372 (Tex. App.—Corpus Christi 2002, pet. denied) ("Where there is a debt secured by a note, which is, in turn, secured by a lien, the note and lien constitute separate obligations."). The rules governing both actions are therefore separate and distinct too. And the law applicable to foreclosure—chapter 51 of the Texas Property Code—does not require actual possession of the note to enforce the debtor's default under the note. *See, e.g., Tex. Prop. Code* §§ 51.025 *see also Vogel v. Travelers Indem. Co.*, 966 S.W.2d 748, 753 (Tex. App.—San

The only argument Kingman advances to show why its own claim is superior is its argument that MERS release of the First Deed of Trust was of no force and effect, thus making the Second Deed of Trust a second lien which was then extinguished by the association's foreclosure.²² But this argument has *no* merit on any level.

First, Kingman's argument concerning MERS' purported lack of authority to release the First Deed of Trust is nothing short of frivolous. The First Deed of Trust expressly grants MERS "the right . . . to take any action required of Lender including, but not limited to releasing or canceling this Security Instrument."²³ So MERS release was legally effective, which means BANA's lien is a first lien and is therefore superior to Kingman's claim.

Second, even if the release were defective, and BANA's lien were a second lien, Kingman's claim would still fail: there is no support for Kingman's tacit assertion that the association's foreclosure of its lien for assessments extinguishes second mortgages. The association's Declaration of Covenants, Conditions, and Restrictions expressly state that the association's foreclosure is subordinate to "*any* bona fide mortgage or deed of trust now or hereafter placed upon said real property subject to an Assessment . . . [that] is recorded prior to recordation of written notice of past due Assessments."²⁴ There is no disputing that BANA's lien, recorded January 29, 2008,²⁵ was recorded prior to the association's written notice of past due assessments.²⁶ So regardless of its position, BANA's lien was superior to the association's lien at the time of the foreclosure sale through which Kingman purchased its interest.

Antonio 1998) (holding the UCC does not apply to actions taken to enforce a deed of trust); *Long v NCNB-Texas Nat'l Bank*, 882 S.W.2d 861, 864 (Tex. App.—Corpus Christi 1994, no writ) (same).

²² Pl. Orig. Pet. ¶ 24.

²³ **Ex. 1**, First Deed of Trust at p. 2.

²⁴ **Ex. 2**, *id.* ¶ 4.12(b) (emphasis added).

²⁵ **Ex. 3**, Second Deed of Trust, at first unnumbered page.

²⁶ **Ex. 4**, Notice of Assessment Lien at first unnumbered page.

Finally, even if the association's lien could be superior to a second mortgage, Kingman's claim would still fail because, although the association recorded the declaration authorizing the its lien in 2003, as a matter of law, the association's lien did not attach until Davis defaulted on the payment of her assessments. *See, e.g., Red Rock Properties 2005, Ltd. v. Chase Home Finance, LLC*, Case No. 14-08-00352-CV, 2009 WL 1795037, 2009 Tex. App. LEXIS 4783 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (holding homeowners' association lien attached when homeowner defaulted on assessments, not when declaration recorded). Accordingly, as the association itself indicated, the lien did not attach until Davis failed to pay the assessments due for the "years 2009 and 2010."²⁷ But as Kingman concedes, the Second Deed of Trust was "recorded . . . on January 29, 2008."²⁸ Kingman therefore purchased the Property at the association's foreclosure sale subject to BANA's claim under the Second Deed of Trust, regardless of whether the Second Deed of Trust was actually a second lien. *Mercer v. Blutworth*, 715 S.W.2d 693, 698 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.), *overruled on other grounds, Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 894 (Tex. 1991) (a purchaser takes title subject to the rights and lien of the senior lienholder).

Kingman's effort to extinguish BANA's lien is therefore untenable as a matter of law. Because no amount of re-pleading could save this claim, BANA's motion to dismiss for failure to state a claim on this ground should be granted with prejudice.

B. Kingman's Request to Declare Right to Service Second Deed of Trust and/or Enforce its Equity of Redemption.

Kingman's effort to obtain a declaration concerning its rights of equitable redemption, or "to service any existing, superior lien," is equally unavailing because the petition fails to show why Kingman needs either declaration. "A declaratory judgment action does not vest a court

²⁷ *See id.* ¶ 2.

²⁸ Pl. Orig. Pet. ¶ 9.

with the power to pass upon hypothetical or contingent situations, or to determine questions not then essential to the decision of an actual controversy, although such questions may in the future require adjudication." *Harris County Mun. Util. Dist. No. 156 v. United Somerset Corp.*, 274 S.W.3d 133, 139–40 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (internal quotation marks omitted); *see also Cal. Prods., Inc. v. Puretex Lemon Juice, Inc.*, 160 Tex. 586, 334 S.W.2d 780, 781 (1960) ("The . . . Declaratory Judgments Act does not license litigants to fish in judicial ponds for legal advice." (internal quotation marks omitted)). There must instead be some showing in the plaintiff's petition that "manifests the present 'ripening seeds' of a controversy." *United Somerset*, 274 S.W.3d at 140. In other words, the plaintiff's petition must disclose facts giving rise to a threat of imminent litigation that seems unavoidable unless uncertainties in an instrument, such as a deed, are judicially resolved. *See id.*; *see also Paulsen v. Tex. Equal Access to Justice Found.*, 23 S.W.3d 42, 46 (Tex. App.—Austin 1999, pet. denied) (holding the Declaratory Judgments Act does not give litigants an open-ended invitation to seek abstract interpretations of their contracts). Hypothetical or contingent situations do not manifest the "ripening seeds of a controversy." *United Somerset*, 274 S.W.3d at 140.

Here, there facts alleged in the petition are insufficient to show what dispute will be settled if Kingman obtains a declaration that it has an equitable right of redemption or a right to "service any existing, superior lien." First, that Kingman has an equitable right to redeem the property prior to foreclosure is undisputed. *See Scott v. Schneider Estate Trust*, 783 S.W.2d 26, 28 (Tex. App.—Austin 1990, no writ) (describing the common-law right of equitable redemption). Accordingly, by seeking a declaration of rights BANA concedes the law already recognizes, Kingman's action does not "manifest the present 'ripening seeds' of a controversy." *See Paulsen*, 23 S.W.3d at 46–47 (holding plaintiffs failed to raise a proper declaratory judgment

claim where there was no real dispute as to the relief plaintiffs sought—a declaration that IOLTA is constitutional). So its claim should be dismissed.

Second, the petition fails to make clear what dispute will be settled if Kingman obtains a declaration that it has a right to "service any existing, superior lien." There are no allegations, for example, Kingman is attempted to exercise its right of equitable redemption, and tendered a full pay-off to BANA, but that BANA rejected the payments.

Plaintiff's citation to *Conversion Properties, L.L.C. v. Kessler*, 994 S.W.2d 810 (Tex. App.—Dallas 1999, writ denied), does not alter this conclusion. There the court merely recognized "the general rule . . . that the successful bidder at a junior lien foreclosure takes title subject to the prior liens," and that the junior-lien purchaser "takes the property charged with the primary liability for the payment of the prior mortgage and must therefore service the prior liens to prevent loss of the property by foreclosure of the prior liens." *Id.* at 813. But the court's recognition of a few general rules does not, without more, establish the existence of the ripening seeds of a controversy in this action.

Furthermore, it is unclear what rights such a declaration would provide Kingman in addition to the right of equitable redemption the law already provides Kingman. As *Conversion Properties* noted, the right to "service any existing, superior lien" means merely the right—and obligation—to satisfy prior liens. In other words, *Conversion Properties* merely acknowledged the same equitable right acknowledged in *Scott*—the right to payoff, prior to any foreclosure, "the amount of valid and subsisting liens to which the properties [are] subject" and all "amounts expended by the mortgagee in association with the default." *Scott*, 783 S.W.2d at 28. And because a declaration that Kingman has a right to "service" BANA's lien is virtually the same as

a declaration as to its equitable right of redemption, Kingman's claim should be dismissed for lack of an actual controversy.

CONCLUSION

Kingman's action should be dismissed in its entirety because it lacks any claim upon which Kingman may obtain relief. Kingman is not entitled to a judgment declaring the Second Deed of Trust void for any of the reasons pleaded. The MERS release of the First Deed of Trust was specifically authorized, but even if it had not been, the Second Deed of Trust was "first in time" and, therefore, had its own priority over the association's lien without regard to the First Deed of Trust. Nor do Kingman's allegations regarding the assignment of the Second Deed of Trust or possession of the note secured thereby support a request to invalidate the Second Deed of Trust. Finally, because there is no dispute Kingman has a right to pay BANA's lien in full, Kingman has failed to establish there is a justiciable controversy under the Declaratory Judgments Act. Kingman's action should therefore be dismissed with prejudice.

Dated: February 28, 2011

Respectfully submitted,

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