

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 CA 1618

*J*  
HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR  
DEUTSCHE ALT-A SECURITIES, INC. MORTGAGE LOAN TRUST,  
SERIES 2005-2

*JEW*  
VERSUS

*WILSON*  
CYRIL G. LOWE, JR.

**DATE OF JUDGMENT: MAY 31 2019**

ON APPEAL FROM THE TWENTY SECOND JUDICIAL DISTRICT COURT  
NUMBER 2016-14158, DIVISION E, PARISH OF ST. TAMMANY  
STATE OF LOUISIANA

HONORABLE WILLIAM H. BURRIS, JUDGE

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ALT-A Securities, Inc. Mortgage Loan  
Trust, Series 2005-2

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BEFORE: WELCH, CHUTZ AND LANIER, JJ.

**Disposition: AFFIRMED.**

## **CHUTZ, J.**

Defendant-appellant, Cyril G. Lowe, Jr., appeals the trial court's judgment, sustaining a peremptory exception raising the objection of no cause of action and dismissing his claims for injunctive relief asserted in these executory proceedings instituted by plaintiff-appellee, HSBC Bank USA, National Association as trustee for Deutsche Alt-A Securities, Inc. Mortgage Loan Trust, Series 2005-2 (HSBC). For these reasons, we affirm.

### **PROCEDURAL BACKGROUND**

On October 4, 2016, HSBC filed a petition for executory process, naming Lowe as a defendant and averring that as of the April 2016 installment payment, he had defaulted on a promissory note in the principal amount of \$143,800 for which HSBC was the holder and that was secured with a mortgage on immovable property located in Covington, Louisiana. On October 5, 2016, a writ of seizure and sale issued, directing the St. Tammany Parish Sheriff to take possession of, advertise, and sell the immovable property.

Lowe filed a petition for injunctive relief on February 13, 2017, seeking to arrest the sheriff's sale based on allegations that PNC Mortgage (PNC), the mortgage servicing company for HSBC, had informed him that he qualified for a loan modification in which the balance of monthly mortgage payments due and owed would be deferred and a new monthly payment would be offered. On February 13, 2017, the trial court signed a judgment granting a hearing on Lowe's entitlement to injunctive relief and issuing a temporary restraining order staying the foreclosure sale scheduled for February 15, 2017.

HSBC subsequently filed a peremptory exception raising the objection of no cause of action, averring that Lowe was not entitled to injunctive relief. After a hearing on April 3, 2018, the trial court sustained the exception of no cause of

action. A judgment in conformity with its ruling was signed by the trial court on May 7, 2018. Lowe lodged this devolutive appeal.<sup>1</sup>

## DISCUSSION

The function of an exception pleading the objection of no cause of action is to test the legal sufficiency of the petition by determining whether the law affords a remedy on the facts alleged in the pleading. *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*, 616 So.2d 1234, 1235 (La. 1993). The exception is triable on the face of the petition, and all well-pleaded allegations of fact must be accepted as true. Furthermore, the facts shown in any documents annexed to the petition must also be accepted as true. *CLB61, Inc. v. Home Oil Co., LLC*, 2017-0557 (La. App. 1st Cir. 11/1/17), 233 So.3d 656, 660. No evidence may be introduced to support or controvert the objection that the petition fails to state a cause of action. La. C.C.P. art. 931. A court should sustain the exception only if the law affords no remedy under any evidence that is admissible under the pleadings. *Knight v. Magee*, 2001-2041 (La. App. 1st Cir. 9/27/02), 835 So.2d 636, 638.

In reviewing a trial court's ruling sustaining an exception raising the objection of no cause of action, the appellate court should subject the case to a de novo review. The exception raises a question of law, and the trial court's decision is based only on the sufficiency of the petition. Any doubts are resolved in favor of the sufficiency of the petition. The question, therefore, is whether, in the light most

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<sup>1</sup> Ex proprio motu, this court issued a show-cause order, directing the parties to address whether the devolutive appeal was timely inasmuch as the appealed judgment denied Lowe's request for a preliminary injunction, which was required to have been lodged within 15 days of the signed order of appeal. See La. C.C.P. art. 3612. Another panel of this court maintained the appeal but reserved to us as the merits panel a final determination as to the timeliness of Lowe's appeal. See *HSCB Bank USA v. Lowe*, 2018-1618 (La. App. 1st Cir. 2/8/19) (an unpublished action). Mindful that the appeal from relief relative to the issuance of a permanent injunction is governed by the same delays afforded in other ordinary proceedings, see e.g., *Brickman v. Bd. of Directors of West Jefferson Gen. Hosp.*, 363 So.2d 86, 87 (La. App. 4th Cir. 1978) (citing *Pier 1 Imports, Inc. v. Pitcher*, 264 So.2d 674 (La. App. 1st Cir. 1972)), and that the matter before us is of an action sustaining an exception of no cause of action, the appeal is maintained. We note that although the judgment also dissolved the temporary restraining order, Lowe has not appealed that portion of the judgment and, thus, it is not before us in this review.

favorable to the party alleging entitlement to relief, and with every doubt resolved in his behalf, the petition states any valid cause of action for relief. *Id.*

Lowe asserts that in concluding that his pleading failed to state a cause of action, the trial court too narrowly construed the provisions permitting injunctive relief to arrest a sheriff's sale in an executory proceeding. Averring that he has stated valid grounds for such injunctive relief, Lowe contends the trial court erred in granting the exception of no cause of action.

La. C.C.P. art. 2751 sets forth the grounds for arresting a seizure and sale of property in an executory proceeding, providing, "The defendant in the executory proceeding may arrest the seizure and sale of the property by injunction when the debt secured by the security interest, mortgage, or privilege is extinguished, or is legally unenforceable, or if the procedure required by law for an executory proceeding has not been followed." The itemization of the grounds for the injunction in Article 2751 is not exclusive. See 1960 official revision comment (b); Patrick S. Ottinger, *Enforcement of Real Mortgages by Executory Process*, 51 La. L. Rev. 87, 135 (1990). Thus, we turn now to a consideration of whether Lowe's pleading for injunctive relief alleges valid grounds to support an order arresting the sheriff's sale of the mortgaged property.

In the pleading, Lowe averred that PNC made representations to him in a September 22, 2016 letter, indicating that during the loan modification process his "property [would] not be referred to foreclosure" and "[would] not be sold at foreclosure sale, if the foreclosure process [had] already been initiated." Thus, he maintains, the parties entered into a contract for which he may demand specific performance. As such, Lowe claims that he has set forth valid grounds to arrest the sale of his property.

A close scrutiny of his pleading shows that Lowe alleged he communicated with PNC representatives "in the latter portion of 2016." He was informed by PNC

that he qualified for a loan and that new terms would be offered “upon a review of [his] application and documents.” When Lowe did not hear from PNC, he contacted the mortgage service company in late December 2016. According to Lowe’s allegations, he was notified that a letter had been sent to him, requesting additional information to evaluate his application, but he did not receive it. PNC advised him that his application file had been closed and he was not able to supplement it. At Lowe’s request, PNC emailed a copy of the letter that had requested the additional information. Lowe also averred that he advised PNC at that time of his intent to initiate another loan modification application.

It was that letter, dated September 22, 2016, which Lowe insists constituted a contract between the parties in which PNC promised not to refer the mortgaged property to foreclosure and to forbear selling it if the foreclosure process had already begun. He attached a copy of the September 22, 2016 letter to his pleading. Lowe suggests that this contract is valid grounds for arresting the sheriff’s sale.

A contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished. La. C.C. art. 1906. A contract is formed by the consent of the parties established through offer and acceptance. La. C.C. art. 1927. An offer that specifies a period of time for acceptance is irrevocable during that time. La. C.C. art. 1928. An irrevocable offer expires if not accepted within the time specified in the offer. See La. C.C. art. 1928.

In addition to PNC’s representations that during the loan modification process Lowe’s “property [would] not be referred to foreclosure” and “[would] not be sold at a foreclosure sale, if the foreclosure process [had] already been initiated,” the September 22, 2016 letter, which Lowe did not receive until sometime after late December 2016, stated the following. On the first page, PNC specified the missing information it needed to complete the loan modification process, expressly stating, “The following information must be received by

October 22, 2016 or we will not be able to proceed further with your request.” In the sentence immediately after the alleged offer of forbearance from pursuit of foreclosure remedies, the letter provided, “However, if we don’t receive the documents indicated above by the required date [October 22, 2016], we’ll consider that you have withdrawn your request” for a loan modification.

Based on the contents of the September 22, 2016 letter and Lowe’s allegations set forth in his pleading seeking injunctive relief, to the extent that PNC’s representations may be construed as an irrevocable offer, the offer expired by its own terms on October 22, 2016. Therefore, Lowe, who conceded that he did not receive the letter until late in December 2016, could not have accepted the offer before it expired. As such, Lowe has failed to allege the requisite consent necessary to support a finding that the parties entered into a contract. Any offer by PNC to forbear the pursuit of foreclosure remedies that it may have made in the September 22, 2016 letter cannot constitute a valid ground to arrest the sale of Lowe’s property under Article 2751 based on the allegations of his pleading, and the trial court correctly sustained the exception of no cause of action.

When the grounds of an exception of no cause of action may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court. If the grounds of the objection raised through the exception cannot be so removed, the action shall be dismissed. See La. C.C.P. art. 934. For the following reasons, we conclude that even if Lowe were able to amend his pleading, he cannot state a cause of action.

A debtor shall not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor. La. R.S. 6:1122. Here, Lowe attempts to use a purported offer to forbear the pursuit of foreclosure remedies as a basis to obtain injunctive relief ordering the arrest of the sheriff’s

sale of the mortgaged property. But absent an agreement signed by the parties, Lowe cannot maintain an action, including one for injunctive relief. See e.g., Vance v. Fed. Nat'l Mortgage Ass'n, 2017-219 (La. App. 5th Cir. 12/20/17), 235 So.3d 1263, 1269, writ denied, 2018-0117 (La. 3/9/18), 237 So.3d 524 (debtor was not entitled to annul the sheriff's sale and recover damages for the wrongful foreclosure of her home based on an oral agreement ostensibly allowing her to participate in a forbearance program to modify her loan since the agreement was not enforceable pursuant to La. R.S. 6:1122, which required credit agreements to be in writing).

The allegations in Lowe's pleading, along with his representations in argument before the trial court and in his appellate brief, clearly indicate that he has been unable to obtain any modification to the parties' loan agreement that has been signed by the parties. Thus, he cannot maintain an action for injunctive relief as a matter of law. And the trial court correctly declined to allow him an opportunity to amend his pleading.<sup>2</sup>

#### **DECREE**

For these reasons, the trial court's judgment is affirmed. Appeal costs are assessed against defendant-appellant, Cyril G. Lowe, Jr.

**AFFIRMED.**

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<sup>2</sup> Although the judgment expressly denied Lowe's requests for preliminary and permanent injunctions, because we have found no error in the trial court's dismissal of his pleading for injunctive relief "in its entirety with prejudice," we pretermitt any discussion on the propriety of that ruling.