AFFIRM in Part, REVERSE in Part, and REMAND; Opinion Filed November 1, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00144-CV

LUIS A. SANTIAGO AND LINDA SANTIAGO, Appellants
V.
THE BANK OF NEW YORK MELLON, AS SUCCESSOR TRUSTEE TO JPMORGAN CHASE BANK, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2004-2, NOVASTAR HOME EQUITY LOAN ASSET-BACKED CERTIFICATES, SERIES 2004-2, AND OCWEN LOAN SERVICING, LLC, Appellees

On Appeal from the 296th Judicial District Court
Collin County, Texas
Trial Court Cause No. 296-00749-2016

MEMORANDUM OPINION

Before Justices Bridges, Fillmore, and Stoddart
Opinion by Justice Fillmore

Luis and Linda Santiago[1] defaulted on a home equity loan on their residence located at 5102 Spanish Oaks in Frisco, Texas (the home). The loan was secured by a "Texas Home Equity Security Instrument (First Lien)" (the first lien) on the home, and the Bank of New York Mellon (BONY), as successor trustee to JPMorgan Chase Bank, as trustee for Novastar Mortgage Funding Trust, Series 2004-2, Novastar Home Equity Loan Asset-Backed Certificates, Series 2004-2, the lender, sought to foreclose on the home. After extensive litigation over

[1] Because Luis and Linda Santiago have the same surname, we use their first names in this opinion when it is necessary to refer to either of them individually.

BONY's right to foreclose on the home,[2] the home was sold to BONY at a foreclosure sale on February 2, 2016.

The Santiagos subsequently filed this suit against BONY and Ocwen Loan Servicing, LLC (Ocwen), the servicer on the loan, alleging Linda was not served with notice of the foreclosure sale. The Santiagos requested the foreclosure sale and the substitute trustee's foreclosure deed be set aside; asserted claims for trespass to try title, violation of section 51.002(b)(3) of the property code, and breach of contract; and sought an accounting of the proceeds from the foreclosure sale. BONY and Ocwen filed a motion for traditional summary judgment as to all the Santiagos' claims. The trial court granted summary judgment in favor of BONY and Ocwen, and dismissed the Santiagos' claims with prejudice.

The Santiagos appealed, generally contending in one issue that the trial court erred by granting summary judgment in favor of BONY and Ocwen. The Santiagos also raised, as subpoints, the questions of whether (1) BONY and Ocwen's failure to give Linda notice of the foreclosure sale invalidated the sale and substitute trustee's deed, and created a fact issue on the Santiagos' claims for breach of contract, violation of section 51.002(b)(3) of the property code, and trespass to try title; (2) summary judgment was precluded on BONY and Ocwen's affirmative defenses because they failed "to assert and/or establish any elements"; and (3) the first lien precluded the award of "cost fees" to BONY and Ocwen. We affirm the trial court's summary judgment on the Santiagos' breach of contract claim and request for an accounting. We reverse the trial court's summary judgment on the Santiagos' request that the foreclosure sale

[2] *See Santiago v. Bank of N.Y. Mellon*, No. 05-16-00053-CV, 2017 WL 1326054 (Tex. App.—Dallas Apr. 11, 2017, pet. denied) (mem. op.); *Santiago v. Mackie Wolf Zientz & Mann, P.C.*, No. 05-16-00394-CV, 2017 WL 944027 (Tex. App.—Dallas Mar. 10, 2017, pet. denied) (mem. op.); *Santiago v. Bank of N.Y. Mellon*, No. 05-15-00664-CV, 2016 WL 297383 (Tex. App.—Dallas Jan. 25, 2016, no pet.) (mem. op.); *Santiago v. Novastar Mortg., Inc.*, 443 S.W.3d 462 (Tex. App.—Dallas 2014, pet. denied), *abrogated in part by Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542, 547–51 & n.2 (Tex. 2016).

and substitute trustee's deed be set aside, and on the Santiagos' claims for trespass to try title and violation of section 51.002(b)(3) of the property code.

Background

On May 14, 2004, the Santiagos signed a note in the amount of $999,999 in favor of Novastar Mortgage, Inc., which was secured by the first lien. The note and first lien were subsequently transferred to BONY. After the Santiagos defaulted on the loan, Ocwen, on behalf of BONY, mailed a Notice of Posting and Sale to the Santiagos' home on January 12, 2016, stating the home would be sold at a foreclosure sale on February 2, 2016. The Notice of Posting and Sale was addressed to Luis. BONY purchased the home at the foreclosure sale.

The Santiagos sued BONY and Ocwen, requesting the foreclosure sale and substitute trustee's deed conveying the home to BONY be set aside; asserting claims for breach of contract, trespass to try title, and violation of section 51.002(b)(3) of the property code; and seeking an accounting of the funds paid at the foreclosure sale, including a "break out" of principle, interest, attorneys' fees, fees in general, taxes, and any expenses applied to the purchase price. All of the Santiagos' claims were based on the allegations the first lien defined "Borrower" as Luis and Linda, and required "Borrower" be served with notice of the foreclosure sale under "Applicable Law"; section 51.002(b)(3) of the property code falls within the first lien's definition of "Applicable Law"; and the first lien and section 51.002(b)(3) required notice of the foreclosure sale to be addressed to both Luis and Linda.

BONY and Ocwen filed a traditional motion for summary judgment on all the Santiagos' claims on grounds the Santiagos (1) had actual or constructive knowledge of the foreclosure sale, (2) could not rebut the presumption the foreclosure sale complied with all necessary prerequisites, and (3) were not entitled to rescind the foreclosure sale and gain back title because they had failed to tender the full amount owing on the note. In addition, BONY and Ocwen

sought summary judgment (1) on the Santiagos' breach of contract claim on grounds the Santiagos suffered no harm from any breach of the first lien and failed to comply with their contractual obligations to pay the mortgage on the home, and (2) on the Santiagos' request for an accounting on the ground it was a remedy, rather than a cause of action.

As summary judgment evidence, BONY and Ocwen relied on the declaration of Brandon Wolf, the record custodian of the law firm that represented BONY and Ocwen in the foreclosure proceedings. Attached to Wolf's declaration was the January 12, 2016 Notice of Posting and Sale addressed to Luis. Wolf affirmed the notice was sent to Luis at his last known address via certified mail. The Santiagos responded to the motion for summary judgment and, as relevant to this appeal, relied on (1) Linda's affidavit, in which she stated she had no knowledge of the foreclosure sale and did not receive notice of the sale; (2) the first lien; and (3) the January 12, 2106 Notice of Posting and Sale addressed to Luis. The Santiagos argued these documents created a genuine issue of material fact on whether BONY and Ocwen complied with the first lien and with section 51.002(b)(3) of the property code. The trial court granted BONY and Ocwen's motion for summary judgment without specifying the ground or grounds for the ruling, and dismissed the Santiagos' claims with prejudice.

Standard of Review and Applicable Law

We review a trial court's grant of summary judgment de novo. *Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 680 (Tex. 2017). To prevail on a traditional motion for summary judgment, the moving party must prove there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). When reviewing a summary judgment, we consider the evidence presented in the light most favorable to the non-movant, crediting evidence favorable to the non-movant if reasonable jurors could, and disregarding evidence

contrary to the non-movant unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fieldin*g, 289 S.W.3d 844, 848 (Tex. 2009). We indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Hansen*, 525 S.W.3d at 680. Where, as here, the trial court's order granting summary judgment does not specify the ground or grounds for its ruling, we must affirm the summary judgment if any of the summary judgment grounds are meritorious. *Id.*

Breach of Contract

BONY and Ocwen moved for summary judgment on the Santiagos' breach of contract claim on grounds Linda received sufficient notice of the foreclosure sale; the Santiagos were not entitled to the relief sought; and the Santiagos suffered no harm from any breach of the first lien and failed to comply with their contractual obligations to pay the mortgage on the home. As to the last asserted ground for summary judgment, BONY and Ocwen relied on cases standing for the proposition that individuals who remain in possession of real property following a foreclosure do not sustain any damages.[3] BONY and Ocwen asserted the Santiagos had "enjoyed continuous and uninterrupted use" of the home since they first purchased it, "failed to perform their contractual duties, without excuse," and suffered no injury as a result of BONY and Ocwen's alleged breach.

A general challenge to the grant of summary judgment is sufficient to preserve all possible grounds on which summary judgment could have been denied, *Plexchem Int'l, Inc. v. Harris Cty. Appraisal Dist.*, 922 S.W.2d 930, 930–31 (Tex. 1996) (per curiam), and "to allow argument as to all the possible grounds upon which summary judgment should have been denied," *Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970). However, an

[3] The Santiagos do not dispute they remained in possession of the home following the foreclosure sale.

appellant asserting in a general appellate issue that the summary judgment was erroneous, "must also support that issue with argument challenging all possible grounds on which the summary judgment could have been granted or a reviewing court will affirm the summary judgment." *Ganter v. Indep. Bank*, No. 05-15-00413-CV, 2016 WL 4376284, at *7 (Tex. App.—Dallas Aug. 16, 2016, pet. denied) (mem. op.).

In their appellate brief, the Santiagos argue only that the trial court erred by granting summary judgment on their breach of contract claim because there is a genuine issue of material fact regarding whether BONY and Ocwen breached the first lien by failing to provide notice of the foreclosure sale to Linda. The Santiagos do not contend the trial court erred by granting summary judgment on the grounds they suffered no harm from any breach of the first lien and failed to comply with their contractual obligations to pay the mortgage on the home.[4] Because the Santiagos failed to challenge all possible bases on which the trial court could have granted summary judgment on the breach of contract claim, we must affirm the judgment on the unchallenged ground. *See Ganter*, 2016 WL 4376284, at *7; *see also Malooly*, 461 S.W.2d at 121. Accordingly, we resolve the Santiagos' issue against them as it relates to their breach of contract claim.

Request for an Accounting

As to the trial court's grant of summary judgment on the Santiagos' request for an accounting, the Santiagos argue only that they sought an accounting in equity, and the "request for an accounting is not a cause of action that is subject to dismissal under a motion for summary

[4] In their reply brief, the Santiagos assert their damage occurred when BONY and Ocwen "failed to provide the required notice prior to the foreclosure sale and conducted an invalid foreclosure and issued a voided substitute trustee deed depriving [the Santiagos] of their property, thus causing them injury." We may not, however, consider arguments made for the first time in a reply brief. *In re N.G.G.*, No. 05-16-01084-CV, 2017 WL 655953, at *6 n.2 (Tex. App.—Dallas Feb. 17, 2017, no pet.) (mem. op.); *Dallas Cty. v. Gonzales*, 183 S.W.3d 94, 104 (Tex. App.—Dallas 2006, pet. denied).

judgment[.]" The Santiagos provide no substantive analysis as to why their request for an accounting is not subject to a motion for summary judgment.

The Texas Rules of Appellate Procedure control the required contents and organization of an appellant's brief. *See* TEX. R. APP. P. 38.1; *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 880 (Tex. 2010). An appellant's brief must concisely state all issues or points presented for review and, among other things, must contain a clear, concise argument for the contentions made, with appropriate citations to authorities and to the record. TEX. R. APP. P. 38.1(i). We may not speculate as to the substance of the specific issues asserted by an appellant and may not make a party's argument for him. *Strange v. Cont'l Cas. Co.*, 126 S.W.3d 676, 678 (Tex. App.—Dallas 2004, pet. denied); *Valadez v. Avitia*, 238 S.W.3d 843, 845 (Tex. App.—El Paso 2007, no pet.). And, we have no duty to perform an independent review of the record and the applicable law to determine if the trial court erred. *Strange*, 126 S.W.3d at 678; *see also Lau v. Reeder*, No. 05-14-01459-CV, 2016 WL 4371813, at *2 (Tex. App.—Dallas Aug. 16, 2016, pet. denied) (mem. op.). An appellant's failure to cite legal authority or provide substantive analysis of a legal issue results in waiver of the complaint. *Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 284 (Tex. 1994) (observing that error may be waived by inadequate briefing); *Huey v. Huey*, 200 S.W.3d 851, 854 (Tex. App.—Dallas 2006, no pet.).

Because the Santiagos failed to provide any substantive analysis about why their request for an accounting is not subject to a motion for summary judgment, they waived any complaint about the grant of summary judgment in favor of BONY and Ocwen on the request for an accounting. *See Fredonia State Bank*, 881 S.W.2d at 284; *Huey*, 200 S.W.3d at 854. We, therefore, resolve the Santiagos' issue against them as it relates to their request for an accounting.

Request to Set Aside Foreclosure Sale and Substitute Trustee's Deed, Trespass to Try Title, and Violation of Section 51.002(b)(3)

The Santiagos' request that the foreclosure sale and substitute trustee's deed be set aside, and their claims for trespass to try title and violation of section 52.001(b)(3) of the property code, are premised on the allegation Linda was not served with notice of the foreclosure sale as required by the first lien and section 52.001(b)(3). BONY and Ocwen moved for summary judgment on these claims on the grounds Linda had sufficient notice of the foreclosure sale to meet the requirements of the first lien and of section 52.001(b)(3) and the Santiagos were not entitled to the relief sought because they failed to tender the amount owed on the note.

Notice of Foreclosure Sale

BONY and Ocwen submitted summary judgment evidence establishing notice of the foreclosure sale was mailed to Luis, and the Santiagos do not dispute Luis was served with notice of the foreclosure sale. *See* TEX. PROP. CODE ANN. § 51.002(e) ("The affidavit of a person knowledgeable of the facts to the effect that service was completed is prima facie evidence of service."). BONY and Ocwen submitted no summary judgment evidence establishing Linda was served with notice of the foreclosure sale, but asserted (1) there was a presumption that all prerequisites to the foreclosure sale had been performed, and the Santiagos failed to rebut that presumption; and (2) the January 12, 2016 Notice of Posting and Sale addressed to Luis constituted constructive notice to Linda of the foreclosure sale.

In the first lien, "Borrower" is defined as "Luis A. Santiago and Spouse, Linda A. Santiago." Notice is "deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means," and notice to "any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise." If the lender is exercising its power to sell the property, the first lien requires any notice of intent to foreclose to be mailed "to Borrower in the manner prescribed by "Applicable

Law." "Applicable Law" is defined in the first lien as "all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final non-appealable judicial opinions."

Section 51.002 of the property code governs the sale of real property under deeds of trust or other contract liens, TEX. PROP. CODE ANN. § 51.002 (West 2014); *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 569 (Tex. 2001), and therefore is "Applicable Law" as defined by the first lien. As relevant to this appeal, section 51.002(b)(3) of the property code requires that, other than in the case of an exception not applicable here, notice of a foreclosure sale be given at least twenty-one days before the date of the sale by "serving written notice of the sale by certified mail on each debtor who, according to the records of the mortgage servicer of the debt, is obligated to pay the debt." *Id.* § 51.002(b)(3). "Service of a notice [under section 51.002(b)(3)] by certified mail is complete when the notice is deposited in the United States mail, postage prepaid and addressed to the debtor at the debtor's last known address." *Id.* § 51.002(e).

The purpose of the notice requirements imposed by section 51.002 is to provide "a minimum level of protection to the debtor." *WMC Mortg. Corp. v. Moss*, No. 01-10-00948-CV, 2011 WL 2089777, at *7 (Tex. App.—Houston [1st Dist.] May 19, 2011, no pet.) (mem. op.). Actual receipt of the notice is not necessary, *id.*; rather, section 51.002 requires only that the mortgagee provide constructive notice of an intent to foreclose. *WTFO, Inc. v. Braithwaite*, 899 S.W.2d 709, 720 (Tex. App.—Dallas 1995, no writ); *Onwuteaka v. Cohen*, 846 S.W.2d 889, 892 (Tex. App.—Houston [1st Dist.] 1993, writ denied). "Constructive notice is notice the law imputes to a person not having personal information or knowledge." *Saravia v. Benson*, 433 S.W.3d 658, 666 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *see also Constructive Notice*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Constructive notice" is "notice arising by

presumption of law from existence of facts and circumstances that a party had a duty to take notice of" or "notice presumed by law to have been acquired to a person and thus imputed to that person.").

The summary judgment evidence established Linda was a debtor obligated on the loan. Accordingly, to be entitled to summary judgment on the ground Linda had sufficient notice of the foreclosure sale, BONY and Ocwen were required to prove there was no genuine issue of material fact that she received at least constructive notice of the sale. *See* TEX. PROP. CODE ANN. § 51.002(b)(3); *WTFO, Inc.*, 899 S.W.2d at 720. BONY and Ocwen first argue they met this burden because there is a presumption the foreclosure sale complied with all the required prerequisites, including sufficient notice of the foreclosure sale, and the Santiagos failed to rebut that presumption. Recitals in a deed of trust are prima facie evidence the terms of the trust were fulfilled and the foreclosure sale complied with all required prerequisites, including the prerequisite of timely service of notice of the foreclosure sale on the debtors. *Deposit Ins. Bridge Bank, N.A. v. McQueen*, 804 S.W.2d 264, 266 (Tex. App.—Houston [1st Dist.] 1991, no writ) (recitals in substitute trustee's deed that there had been "compliance with all conditions of the deed of trust" constituted "prima facie evidence of the validity of the foreclosure sale, including the prerequisite of timely service of notice of sale on the debtor(s)"); *see also Houston First Am. Sav. v. Musick*, 650 S.W.2d 764, 767 (Tex. 1983). In this case, section twenty-two of the first lien provides that "recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein." However, the substitute trustee's deed is not part of the summary judgment evidence, and there is no summary judgment evidence that would support a presumption Linda was served with notice of the foreclosure sale.

BONY and Ocwen also contend the trial court properly granted summary judgment because Linda had sufficient notice of the foreclosure sale. Relying on *Martinez v. Beasley*, 616

S.W.2d 689 (Tex. Civ. App.—Corpus Christi 1981, no writ), and *Deposit Insurance Bridge Bank, N.A. v. McQueen*, BONY and Ocwen specifically argue the January 12, 2016 Notice of Posting and Sale addressed to Luis and mailed to the Santiagos' shared home was sufficient notice to Linda to meet the requirements of the first lien and section 51.002(b)(3) of the property code.

In *Martinez*, the court of appeals considered whether one letter addressed to both a husband and a wife at the address where they both resided complied with article 3810 of the revised civil statutes, the predecessor to section 51.002 of the property code.[5] 616 S.W.2d at 690. The debtors contended the statute required a separate letter be addressed and mailed to each spouse. *Id.* The court of appeals disagreed:

> [W]e hold that whether it was actually received or not the one certified letter addressed and mailed to Mr. and Mrs. Joe Martinez, Jr. at their address where they actually resided as husband and wife was sufficient statutory notice of the appellee's intent to foreclose.

Id.[6] *Martinez*, however, does not support the proposition that one letter addressed to only one spouse is sufficient to establish *each* debtor who is obligated on the loan was served with notice of the foreclosure sale.

In *McQueen*, both Michael McQueen and his wife, Terry, signed a promissory note along with a deed of trust conveying certain real property to a trustee for the benefit of the noteholder. *Id.* at 265. The McQueens subsequently defaulted on the note, and the Bank, as the noteholder, foreclosed on the property. *Id.* The proceeds of the foreclosure sale did not satisfy the balance owed on the note, and the Bank filed suit against the McQueens to recover the

[5] *See* Act of May 26, 1983, 68th Leg., R.S., ch. 576, § 51.002, 1983 Tex. Gen. Laws 3475, 3525–26, 3729 (adopting section 51.002 of property code as part of nonsubstantive revision of statutes relating to property and repealing article 3810 of revised civil statutes).

[6] BONY and Ocwen also rely on *Hausmann v. Texas Savings & Loan Ass'n*, 585 S.W.2d 796, 799–800 (Tex. App.—El Paso 1979, writ ref'd n.r.e.), and *Forestier v. San Antonio Savings Ass'n*, 564 S.W.2d 160, 163 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.), in which the El Paso Court of Appeals concluded that one letter addressed to both spouses and mailed to the spouses' shared address was sufficient notice of the foreclosure sale to meet statutory requirements. As a note, in *Forestier*, the spouse asserting the statute required a separate notice of the foreclosure sale to be mailed to her admitted to having actual notice of the foreclosure sale. *Forestier*, 564 S.W.2d at 163.

deficiency. *Id.* at 265–66. The trial court entered judgment in favor of the McQueens, and made findings of fact and conclusions of law that the Bank failed to prove either of the McQueens was given the required notice of acceleration of the debt and of the foreclosure sale. *Id.* at 266. The Bank appealed arguing, as relevant here, that it established the validity of the foreclosure sale by prima facie evidence, and the McQueens failed to rebut that evidence. *Id.*

The substitute trustee's deed, which was introduced into evidence by the Bank, recited there had been "compliance with all conditions of the deed of trust." *Id.* The appellate court concluded those recitals constituted "prima facie evidence of the validity of the foreclosure sale, including the prerequisite of timely service of notice of sale on the debtor(s)." *Id.* After noting this presumption was not conclusive and could be rebutted, the court determined the only evidence admitted at trial relevant to whether the McQueens had timely notice of the foreclosure sale established the Bank mailed a notice of the foreclosure sale addressed to Terry McQueen at the address where the McQueens resided together, and Mike McQueen signed a postal service return receipt for the notice. *Id.* at 267. The record failed to establish that "notice of the foreclosure was not timely *sent* to each of the McQueens," but it did show the notice addressed to Terry "was clearly *received*." *Id.*[7] The court of appeals concluded this evidence was insufficient to "rebut the prima facie evidence contained in the recitals of the substitute trustee's deed that the foreclosure sale met all requirements of law and of the deed of trust." *Id.*

McQueen stands for the proposition that notice of a foreclosure sale addressed to one spouse, but signed for by the other spouse, was insufficient to rebut the prima facie evidence of proper notice established by the recitals in the substitute trustee's deed.[8] It does not, however,

[7] In a bill of exceptions, the Bank proffered evidence that "notice letters were in fact sent to each of the debtors here." *McQueen*, 804 S.W.2d at 267 n.2.

[8] As noted above, there was no prima facie evidence in this case establishing a presumption that Linda was served with notice of the foreclosure sale.

stand for the proposition that, when there is no prima facie evidence of proper notice, a notice of foreclosure sale addressed to one spouse, and mailed to both spouses' shared residence, is sufficient, as a matter of law, to establish compliance with the requirements of section 51.002(b)(3) as to the spouse not named in the letter.

In the context of this case, the first lien required both Luis and Linda to be served with notice of the foreclosure sale pursuant to applicable law, and section 51.002(b)(3) of the property code required that notice of the foreclosure sale be given by "serving written notice of the sale by certified mail on *each* debtor who, according to the records of the mortgage servicer of the debt, is obligated to pay the debt." TEX. PROP. CODE ANN. § 51.002(b)(3) (emphasis added). BONY and Ocwen, as the movants for summary judgment, had the burden of establishing as a matter of law that Linda was served with the required notice. However, there was no summary judgment evidence establishing a prima facie case to support a presumption Linda was properly served, or to establish Linda had actual or constructive notice of the foreclosure sale. Accordingly, BONY and Ocwen failed to establish they were entitled to summary judgment on the ground Linda had sufficient notice of the foreclosure sale to meet the requirements of the first lien and of section 51.002(b)(3).

Tender of Amount Owed

BONY and Ocwen also moved for summary judgment on the ground the Santiagos were seeking equitable relief, and were entitled to such relief only after "doing equity" by tendering the amount owed on the loan. *See Cantu v. Elbar Invs., Inc.*, No. 01-15-00476-CV, 2017 WL 2180715, at *3 (Tex. App.—Houston [1st Dist.] May 18, 2017, no pet.) (mem. op.) (discussing common-law requirement that "tender of the sum owed on a mortgage debt is a condition precedent to the mortgagor's recovery of title from a mortgagee who is in possession and claims title under a void foreclosure sale"). The Santiagos contend the requirement that a plaintiff

seeking to set aside a foreclosure sale must tender the amount owed on the mortgage before being entitled to relief applies only when the mortgagee has taken possession of the property following a void foreclosure sale and, because they remain in possession of the home, they were not required to make such a tender.

BONY and Ocwen moved for a traditional summary judgment and, therefore, assumed the burden of establishing they were entitled to summary judgment as a matter of law. However, the only summary judgment evidence proffered by BONY and Ocwen related to the January 12, 2016 Notice of Posting and Sale addressed to Luis. This document states a default had occurred on the loan, the loan was previously accelerated, and all unpaid principal and accrued interest were due. BONY and Ocwen provided no summary judgment establishing that, following the foreclosure sale, the Santiagos failed to tender any amount due on the loan. Accordingly, even if the Santiagos were required to tender the amount due on the loan prior to pursuing their claims, BONY and Ocwen failed to establish, as a matter of law, that the Santiagos failed to do so. BONY and Ocwen, therefore, failed to establish they were entitled to summary judgment on the basis the Santiagos failed to tender the amount owed on the note. [9]

BONY and Ocwen failed to establish as a matter of law that they were entitled to summary judgment on the Santiagos' request that the foreclosure sale and substitute trustee's deed be set aside, and their claims for trespass to try title and violation of section 52.001(b)(3) of the property code. Accordingly, we resolve the Santiagos' issue in their favor as to these causes of action.

[9] In their briefs on appeal, the parties also address whether the Santiagos have a private cause of action under section 51.002(b)(3) of the property code. However, the only part of BONY and Ocwen's motion for summary judgment that arguably related to this issue is one statement, at the end of a discussion of whether Linda was served pursuant to the requirements of section 51.002(b)(3), that the Santiagos could "point to no remedies that they would be entitled to for the alleged statutory violation[.]" Neither party addressed the circumstances under which a party might have a private cause of action under a statute or applied those circumstances to section 51.002(b)(3) of the property code. We conclude BONY and Ocwen failed to specifically apprise the trial court that they were seeking summary judgment on the ground the Santiagos did not have a private cause of action under section 51.002(b)(3). *See ExxonMobil Corp. v. Lazy R Ranch, LP*, 511 S.W.3d 538, 545–46 (Tex. 2017) ("A motion for summary judgment must state the specific grounds entitling the movant to judgment, identifying or addressing the cause of action or defense and its elements."). Therefore, we will not address this issue on appeal. *See id.* at 546 ("Because the issue of the Ranch's entitlement to any injunctive relief was not properly presented to the trial court, we, like the court of appeals, must decline to address it.").

Conclusion

We affirm the trial court's summary judgment on the Santiagos' breach of contract claim and request for an accounting. We reverse the trial court's summary judgment on the Santiagos' request the foreclosure sale and substitute trustee's deed be set aside, and their claims for trespass to try title and violation of section 52.001(b)(3) of the property code, and remand those causes of action to the trial court for further proceedings. Based on our disposition of these issues, we need not address the Santiagos' complaint the trial court erred by assessing costs against them. *See* TEX. R. APP. P. 47.1.[10]

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

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[10] In one of their subpoints, the Santiagos complain the trial court erred by granting summary judgment based on BONY and Ocwen's affirmative defenses because they failed "to assert and/or establish any elements." The record does not reflect BONY and Ocwen moved for summary judgment based on any of their asserted affirmative defenses. The Santiagos' brief also contains a section complaining the trial court erred by denying their request for an order declaring the foreclosure was invalid. The Santiagos, however, did not move for summary judgment on their request for declaratory relief. Because both of these arguments relate to issues not presented to the trial court, we do not address them on appeal. *See ExxonMobil Corp.*, 511 S.W.3d at 546 (declining to consider on appeal issue that was not properly presented to trial court).

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

LUIS A. SANTIAGO AND LINDA SANTIAGO, Appellants

No. 05-17-00144-CV V.

THE BANK OF NEW YORK MELLON, AS SUCCESSOR TRUSTEE TO JPMORGAN CHASE BANK, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2004-2, NOVASTAR HOME EQUITY LOAN ASSET-BACKED CERTIFICATES, SERIES 2004-2, AND OCWEN LOAN SERVICING, LLC, Appellees

On Appeal from the 296th Judicial District Court, Collin County, Texas,
Trial Court Cause No. 296-00749-2016.
Opinion delivered by Justice Fillmore, Justices Bridges and Stoddart participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** that portion of the trial court's summary judgment on appellants' Luis A. Santiago and Linda Santiago's request the foreclosure sale and substitute trustee's deed be set aside and on their claims for trespass to try title and violation of section 52.001(b)(3) of the property code. In all other respects, the trial court's summary judgment is **AFFIRMED**. We **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 1st day of November, 2017.