Opinion issued December 22, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00194-CV

ERNEST RAY KOONCE, Appellant

V.

BARCLAYS CAPITAL REAL ESTATE INC. D/B/A HOMEQ SERVICING AND WELLS FARGO BANK, N.A. AS TRUSTEE UNDER POOLING AND SERVICING AGREEMENT DATED AS OF APRIL 1, 2005 ASSET-BACKED PASS-THROUGH CERTIFICATES SERIES 2005-WHQ2, Appellees

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On Appeal from the 127th District Court
Harris County, Texas
Trial Court Case No. 2007-30212

MEMORANDUM OPINION

Ernest Ray Koonce appeals from the no-evidence and traditional summary judgment in favor of Barclays Capital Real Estate Inc. d/b/a HomEq Servicing

("HomEq") and Wells Fargo Bank, N.A. as Trustee under Pooling and Servicing Agreement Dated as of April 1, 2005 Asset-Backed Pass-Through Certificates Series 2005-WHQ2 ("Wells Fargo"), in his suit as a borrower against the noteholder for damages arising out of alleged violations of the Texas Deceptive Trade Practices Act, common-law fraud, negligence, and breach of contract. In three issues, Koonce challenges (1) whether the trial court erred in granting a final summary judgment based on substantively defective summary judgment evidence; (2) whether appellees owned the note and deed of trust and thus had standing to enforce them; and (3) whether appellees breached or anticipatorily breached the note and deed of trust and are, therefore, precluded from enforcing them against Koonce.

We affirm.

BACKGROUND

In February 2005, Koonce obtained a home loan from Argent Mortgage Company ("Argent") which was evidenced by a promissory note and secured by a deed of trust executed by Koonce.

In January 2007, Argent executed a Limited Power of Attorney that appointed HomEq, as its mortgage servicer. Although disputed, Wells Fargo appears to be the holder of the note, the owner of the note, or both. Koonce's last

live pleading recites: "[t]he note has since been sold to Wells Fargo Bank, N.A. with HomEq Servicing as the loan servicer."

In April 2006, Koonce sought and was granted a deferral of his property taxes. *See* TEX. TAX CODE § 33.06 (West 2008) (authorizing elderly and disabled property owners to defer collection of property taxes). That same month was the first month he was late paying the house note, followed thereafter by late payments in June, July, August, and September 2006. Each late payment resulted in late charges accruing to his future payments as set forth in the Deed of Trust. Koonce accrued yet another fee for his August payment when his check for the loan payment was denied for insufficient funds.

Koonce failed entirely to make his payment due October 1, 2006. On November 13, forty-four days after Koonce's default, HomEq paid Koonce's unpaid property taxes for the first time. On November 15, HomEq sent Koonce a letter demanding that he cure the October 1, 2006 default by December 20, 2006. Koonce wrote a check for the November payment, but according to his response to appellees' motion for summary judgment, he elected to withhold funds for the November payment and that check, too, was denied by the bank. The last payment Koonce made on his loan was September 9, 2006.

The amount Koonce was required to pay increased due to late payments as well as two bounced checks. Appellees claim, however, that the first fee applied to

Koonce's loan as a result of unpaid property taxes did not occur until after December 20, 2006, Koonce's deadline to cure the default. Koonce, on the other hand, insists that, by means of an escrow account disclosure statement dated November 17, 2006, appellees notified him that his monthly payments were being adjusted to cover the increase for the payment of taxes and insurance and the future payment of taxes and insurance.

In May 2007, Koonce filed a *pro se* action against appellees asking for a declaratory judgment "uphold[ing] the provisions of the Texas Property Tax Code, in particular Section 33.06, and instruct[ing] Defendant HomEq, Et. Al., to return to the original amount of the Plaintiff's mortgage" and for injunctive relief preventing appellees from pursuing foreclosure. Koonce also asked for unspecified "real and punitive" damages of $250,000. Appellees filed a general denial in response. In March 2009, Koonce amended his original petition. He removed his request for declaratory judgment and injunctive relief and instead sought damages under the Texas Deceptive Trade Practices Act, for common law fraud, negligence, and breach of contract. He asked for treble damages, exemplary damages, and attorneys' fees.

In June 2009, appellees filed a motion for summary judgment. Koonce filed a response to appellees' motion. The trial court granted appellees' motion for summary judgment on July 17, 2009. Koonce then moved for a new trial on

August 17, 2009. The trial court granted the motion for new trial on October 21, 2009. Thereafter, in February 2010, appellees filed an amended no-evidence and traditional motion for summary judgment, to which Koonce responded. The trial court granted this motion on February 26, 2010, and this appeal followed.

STANDARD OF REVIEW

We review the trial court's grant of summary judgment *de novo*. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). After an adequate time for discovery, a party may move for a no-evidence summary judgment on the ground that no evidence exists of one or more essential elements of a claim on which the adverse party bears the burden of proof at trial. TEX. R. CIV. P. 166a(i); *see Flameout Design & Fabrication, Inc. v. Pennzoil Caspian Corp.*, 994 S.W.2d 830, 834 (Tex. App.—Houston [1st Dist.] 1999, no pet.). The burden then shifts to the nonmovant to produce evidence raising a genuine issue of material fact on the elements specified in the motion. TEX. R. CIV. P. 166a(i); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). The trial court must grant the motion unless the nonmovant presents more than a scintilla of evidence raising a fact issue on the challenged elements. *Flameout Design & Fabrication*, 994 S.W.2d at 834; *see also Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997) ("More than a scintilla of evidence exists when the evidence supporting the finding, as a whole, 'rises to a level that would enable reasonable and fair-minded

people to differ in their conclusions.'" (quoting *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995))). To determine if the nonmovant has raised a fact issue, we review the evidence in the light most favorable to the nonmovant, crediting favorable evidence if reasonable jurors could do so, and disregarding contrary evidence unless reasonable jurors could not. *See Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005)).

To prevail on a traditional summary judgment motion, a movant has the burden of proving that it is entitled to judgment as a matter of law and that there is no genuine issue of material fact. TEX. R. CIV. P. 166a(c); *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). When deciding whether there is a disputed, material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985). Every reasonable inference must be indulged in favor of the non-movant and any doubts must be resolved in its favor. *Id.* at 549. When, as here, the trial court's summary judgment does not state the basis for the court's decision, we must uphold the judgment if any of the theories advanced in the motion are meritorious. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003).

The Summary Judgment Evidence

In his first issue, Koonce challenges the trial court's grant of final summary judgment for appellees on the basis that the summary judgment evidence was substantively defective. He claims that the affidavit of Jill Orrison, the custodian of records for HomeEq, is defective because it fails to state how she has personal knowledge of the facts stated therein. Furthermore, Koonce claims that the fact that the copies of the exhibits referenced in Orrison's affidavit were attached to the motion for summary judgment, and not the affidavit itself, amounts to a substantive defect in the summary judgment evidence. On this basis, Koonce asks that we reverse the trial court's rendition of summary judgment.

A. The Law

In a summary judgment hearing, the trial court's decision is based upon written pleadings and written evidence rather than live testimony. *See* TEX. R. CIV. P. 166a(c). "To constitute competent summary judgment evidence, affidavits must be made on personal knowledge, setting forth such facts as would be admissible in evidence, and must affirmatively show that the affiant is competent to testify to matters stated therein." *Patrick v. McGowan*, 104 S.W.3d 219, 222 (Tex. App.—Texarkana 2003, no pet.); *see* TEX. R. CIV. P. 166a(f); *United Blood Servs. v. Longoria*, 938 S.W.2d 29, 30 (Tex. 1997).

1. Standard of Review for Admission or Exclusion of Summary Judgment Evidence

We review the trial court's rulings concerning the admission or exclusion of summary judgment evidence for an abuse of discretion. *See, e.g., Fairfield Fin. Group, Inc. v. Synnott*, 300 S.W.3d 316, 319 (Tex. App.—Austin 2009, no pet.) (admission of summary judgment evidence); *Cruikshank v. Consumer Direct Mortgage, Inc.*, 138 S.W.3d 497, 499 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (exclusion of summary judgment evidence). An abuse of discretion exists when the court's decision is made without reference to any guiding rules and principles or is arbitrary or unreasonable. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). We must uphold the trial court's evidentiary ruling if there is any legitimate basis for it. *See Owens-Corning Fiberglass Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). Furthermore, we will not reverse a judgment based on a claimed error in admitting or excluding evidence unless the complaining party shows that the error probably resulted in an improper judgment. TEX. R. APP. P. 44.1; *Malone*, 972 S.W.2d at 42. A successful challenge to a trial court's evidentiary ruling requires the complaining party to demonstrate that the judgment turns on the particular evidence excluded or admitted. *Texas Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000).

2. Defects in Substance

Defects in affidavits may be either defects in "form" or "substance." *Stone v. Midland Multifamily Equity REIT*, 334 S.W.3d 371, 374 (Tex. App.—Dallas 2011, no pet.). Defects in the substance of an affidavit are not waived by failure to obtain a ruling from the trial court on an objection and may be raised for the first time on appeal. *McMahon v. Greenwood*, 108 S.W.3d 467, 498 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). A substantive defect is one that leaves the evidence legally insufficient. *See Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 666 (Tex. 2010) (plurality op.). An affidavit showing no basis for personal knowledge is legally insufficient. *Kerlin v. Arias*, 274 S.W.3d 666, 668 (Tex. 2008) (per curiam).

An affidavit must disclose the basis on which the affiant has personal knowledge of the facts asserted. *Radio Station KSCS v. Jennings*, 750 S.W.2d 760, 762 (Tex. 1988). An affiant's position or job responsibilities can qualify the affiant to have personal knowledge of facts and establish how the affiant learned of the facts. *Valenzuela v. State & Cnty. Mut. Fire Ins. Co.*, 317 S.W.3d 550, 553 (Tex. App.—Houston [14th Dist.] 2010, no pet.). A summary judgment affidavit's failure to demonstrate a basis for personal knowledge renders it incompetent summary judgment evidence. *Stone*, 334 S.W.3d at 377. Moreover, conclusory statements, not supported by factual allegations, are insufficient to support

summary judgment. *Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991); *Paselk v. Rabun*, 293 S.W.3d 600, 611 (Tex. App.—Texarkana 2009, pet. denied).

3. Defects in Form

A defect in the form of an affidavit, on the other hand, must be objected to in the trial court and the opposing party must have the opportunity to amend the affidavit. *See* TEX. R. CIV. P. 166a(f); *Stone*, 334 S.W.3d at 374. A complaint that an affidavit contains hearsay, for example, is an objection to the form of an affidavit. *Green v. Indus. Specialty Contractors*, 1 S.W.3d 126, 130 (Tex. App.—Houston [1st Dist.] 1999, no pet.). This includes a complaint that an affidavit of a custodian of records is insufficient to prove up business records, which amounts to a complaint that the trial court admitted documents which were hearsay. To preserve such complaints, it is necessary to obtain a written ruling overruling the objections. *See, e.g.*, *Dulong v. Citibank (S.D.), N.A.*, 261 S.W.3d 890, 893 (Tex. App.—Dallas 2009, no pet.). The rules of evidence do not require that the qualified witness who lays the predicate for the admission of business records be the creator of, or have personal knowledge of, the contents of the records; the witness is only required to have personal knowledge of the manner in which the records were kept. *See* TEX. R. EVID. 803(6), 902(10); *see also In re K.C.P.*, 142 S.W.3d 574, 578 (Tex. App.—Texarkana 2004, no pet.).

B. Application of Law to Facts

Here, appellees' summary judgment was supported by the affidavit of Jill Orrison. Koonce challenges this affidavit on the basis that it fails to state how Orrison obtained personal knowledge of the facts stated therein, and that the exhibits to which her affidavit makes reference were attached to Defendants' Amended Motion for Summary Judgment, and not directly to her affidavit.

1. Personal Knowledge of Affiant

Orrison's affidavit reflects that she was employed as a Litigation Management Liaison for HomEq and as a mortgage servicer and attorney in fact for Wells Fargo. It states further that she is fully qualified and authorized to make the affidavit; that she is the custodian of records for HomEq as servicing agent for Wells Fargo relating to Koonce's home loan; and that she has personal knowledge of the facts stated therein. She then goes on to state that exhibits A, B, C, D, E and G attached to Defendants' Amended Motion for Summary Judgment:

> are true and correct copies of such documents found in HomEq's records. These pages of records are kept by HomEq in the regular course of business, and it was the regular course of business of HomEq for an employee or representative of HomEq, 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 thereafter. The records attached hereto are the originals or exact duplicates of the originals.

Orrison next testifies in her affidavit to the events reflected in the individual documents. From paragraphs 3 to 8, she states what the individual documents reflect and references the pertinent exhibit in each paragraph. Only the last paragraph, 9, contains statements that are not summaries of events reflected by exhibits. In that paragraph, she states that, "Plaintiff failed to remedy the default in accordance with the demands of HomEq and Well[s] Fargo. Accordingly, Wells Fargo and HomEq elected to accelerate the entire debt secured by the Note and Deed of Trust."

In her affidavit, Orrison provides both her position with HomEq (Litigation Management Liason) and one of her pertinent functions (custodian of records). An affiant's position with a company can qualify the affiant to have personal knowledge of facts and establish how the affiant learned of the facts. *See Stone*, 334 S.W.3d at 376. As Orrison was Litigation Management Liaison and custodian of records for HomEq "as servicing agent for Wells Fargo relating to the home loan owed by Plaintiff, Ernest Ray Koonce," the evidence is sufficient to demonstrate that she did, indeed, have personal knowledge of the exhibits referenced in her affidavit. To the extent that her statements in the affidavit reflect knowledge gained from a reading of the documents to which she makes reference, we overrule Koonce's issue on this point.

The last two sentences of Orrison's affidavit, however, do not reference documents as to which she is the custodian and state facts without affirmatively showing her basis for personal knowledge of these facts. Nevertheless, a reversal of the judgment is not warranted in this case because Koonce has not demonstrated that the error resulted in the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1. We overrule this portion of Koonce's first issue.

2. Exhibits Attached to Motion for Summary Judgment

Koonce also complains that, because the exhibits as to which Orrison swears in her affidavit are attached to Defendants' Amended Motion for Summary Judgment, as is her affidavit, and not directly to the affidavit itself, then "the summary judgment evidence relied upon by the Appellee's Motion is substantively defective." Koonce seems to argue that this fact makes the actual documents inappropriate summary judgment evidence. He also contends, based on this same fact, that Orrison's statements in her affidavit regarding these documents are hearsay and conclusory. We disagree.

Rule 166a(f) states that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." TEX. R. CIV. P. 166a(f). Orrison's affidavit made reference to Exhibits A, B, C, D, E and G "[a]ttached to Defendants' Amended Motion for Summary Judgment." The affidavit was likewise attached to Defendants' Amended Motion for Summary

Judgment. Nothing in the record reflects that the affidavit, marked Exhibit F, was detached from the exhibits to which it made reference or in some way separate from them, or was not "served therewith." We conclude that the fact that the referenced exhibits were served with the affidavit as part of the motion for summary judgment, and not specifically attached to the affidavit, does not preclude them from being effective summary judgment evidence. Accordingly, references to these exhibits and/or statements of fact made by Orrison on the basis of these exhibits are neither conclusory nor hearsay.

We overrule this portion of Koonce's first issue.

Standing to Enforce the Note

In his second issue, Koonce claims that the trial court erred in granting summary judgment for appellees because appellees did not have standing to enforce the Note and Deed of Trust.

The petition as to which summary judgment was granted, however, was filed by Koonce, not appellees, and in that petition Koonce obviously did not attempt to enforce the Note and Deed of Trust against himself. Nor did appellees make any such attempt by way of a counter-claim. Instead, Koonce brought suit against

appellees, in their position as owner/holder of the Note and Deed of Trust (or, in the case of HomEq, loan servicer for the owner of the note), for damages.[1]

Furthermore, the petition alleges (1) violations of the DTPA; (2) common law fraud; (3) negligence; and (4) breach of contract. None of these causes of action turns on any finding that appellees had standing to enforce the Note and Deed of Trust. Instead, each involves damages allegedly suffered by Koonce and caused by appellees, without reference to appellees' standing to enforce the Note and Deed of Trust. We fail to see how appellees' standing to enforce the Note and Deed of trust, or lack thereof, bears on the issue of whether the trial court erred in granting summary judgment as to Koonce's claims against appellees.

We overrule Koonce's second issue.

Evidence Concerning Breach or Anticipatory Breach of Contract

In his third issue, Koonce claims that, even if appellees had standing to enforce the Note and Deed of Trust, the trial court nevertheless erred in granting summary judgment for appellees because there was evidence in the record that appellees breached and/or repudiated the Note and/or Deed of Trust first, thereby excusing Koonce's subsequent performance.

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[1] Indeed, on page 3 of the petition, Koonce alleged that "[t]he note has since been sold to Wells Fargo Bank, N.A., with HomEq Servicing as the loan servicer."

A. The Law

To prevail on a breach of contract claim, a plaintiff must establish that (1) there is a valid, enforceable contract; (2) the plaintiff performed, tendered performance of, or was excused from performing its contractual obligations; (3) the defendant breached the contract; and (4) the defendant's breach caused the plaintiff injury. *Wincheck v. American Express Travel Related Servs. Co.*, 232 S.W.3d 197, 202 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

One such excuse for performing contractual obligations is the other party's breach of contract. "It is a fundamental principle of contract law that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance." *BFI Waste Sys. of N. Am. v. N. Alamo Water Supply Corp*., 251 S.W.3d 30, 30–31 (Tex. 2008) (per curiam). However, if after the breach, the non-breaching party continues to insist on performance by the party in default, "the previous breach constitutes no excuse for nonperformance on the part of the party not in default and the contract continues in force for the benefit of both parties." *Chilton Ins. Co. v. Pate & Pate Enters., Inc*., 930 S.W.2d 877, 887 (Tex. App.—San Antonio 1996, writ denied) (quoting *Houston Belt & Terminal Ry. Co. v. J. Weingarten, Inc.*, 421 S.W.2d 431, 435 (Tex. Civ. App.—Houston [1st Dist.] 1967, writ ref'd n.r.e.)); *see also Gupta v. E. Idaho Tumor Inst., Inc.*, 140 S.W.3d 747, 756 (Tex. App.—Houston [14th Dist.]

2004, pet. denied). The non-breaching party must thus elect between two courses of action—continuing performance under the contract or ceasing to perform. *Henry v. Masson*, 333 S.W.3d 825, 840–41 (Tex. App.—Houston [1st Dist.] 2010, no pet.); *Gupta*, 140 S.W.3d at 757, n.7; *Chilton*, 930 S.W.2d at 887.

If the non-breaching party treats the contract as continuing after the breach, he is deprived of any excuse for terminating his own performance. *Long Trusts v. Griffin*, 222 S.W.3d 412, 415–16 (Tex. 2007) (per curiam); *Henry*, 333 S.W.3d at 840–41. The election affects only whether the non-breaching party is required to perform fully after the breach. *Gupta*, 140 S.W.3d at 757, n.7.

Seeking to benefit from the contract after the breach operates as a conclusive choice depriving the non-breaching party of an excuse for his own non-performance. *Henry*, 333 S.W.3d at 840–41; *see also Hanks v. GAB Bus. Services, Inc.*, 644 S.W.2d 707, 708 (Tex. 1982); *Chilton*, 930 S.W.2d at 888. If the non-breaching party elects to treat the contract as continuing after a breach and continues to demand performance, it obligates itself to perform fully. *See Henry*, 333 S.W.3d at 840–41; *see also Long Trusts*, 222 S.W.3d at 415–16 (holding that by claiming share of lawsuit recovery as damages, which was benefit of bargain, non-breaching party treated oil and gas operating agreement as continuing and thus "could not cease to share in the expenses and still insist in sharing in the recovery"); *Hanks*, 644 S.W.2d at 708 (holding that non-breaching party waived

right to partially rescind contract when it chose to treat contract for sale of business as continuing, by retaining all assets of business, and continuing its operation after other party's breach of covenant not to compete); *Gupta*, 140 S.W.3d at 757–58 (holding that party's failure to comply with agreement not excused when non-breaching party elected to treat joint venture agreement in full force and effect after alleged breaches at beginning of agreement and continued to demand performance of opposing party).

Repudiation or anticipatory breach of contract is "a positive and unconditional refusal to perform the contract in the future, expressed either before performance is due or after partial performance." *Van Polen v.* Wisch, 23 S.W.3d 510, 516 (Tex. App.—Houston [1st Dist.] 2000, no pet.). In order to constitute a repudiation or anticipatory breach, the party to the contract must have absolutely repudiated the contract without just cause. *Id.*

An anticipatory repudiation of the contract gives the nonrepudiating party the option to treat the repudiation as a breach, or ignore it and await the agreed upon time of performance. *Bumb v. Intercomp Technologies, L.L.C.*, 64 S.W.3d 123, 124 (Tex. App.—Houston [14th Dist.] 2001, no pet.). If a party chooses to file suit after the time for performance of the contract, he elects to ignore the anticipatory repudiation. *Id.*

> He [the nonrepudiating party] remains subject to all his own obligations and liabilities under it, and enables the other party not only

> to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it.

Id. at 125 (quoting *Pollack v. Pollack*, 39 S.W.2d 853, 857 (Tex. Com. App. 1931, holding approved)).

B. Application of Law to the Facts

Koonce argues that appellees' failure to recognize his right to defer his taxes under section 33.06 of the Texas Property Tax Code in April 2006 amounts to a breach and/or repudiation of the Note and/or Deed of Trust. Koonce further argues that appellees' conduct excused his subsequent performance under the contract and the trial court erred in concluding that he defaulted on the Note when he failed to make his October 2006 mortgage payment and entering a final summary judgment for appellees on that basis.

1. The Initial Breach of Contract

We will presume, without deciding, that appellees' alleged failure to recognize Koonce's right to defer his taxes amounted to a breach and/or repudiation of the Note and/or Deed of Trust. Even so, the issue becomes whether Koonce has presented proof that this breach and/or repudiation on the part of appellees occurred before Koonce defaulted on the Note. If not, then Koonce's performance under the Note was not excused by any breach of appellees following Koonce's default.

The summary judgment evidence and pleadings herein demonstrate as follows:

1. Koonce filed for his tax deferral in April 2006.
2. Koonce failed to make the home loan payment due October 1, 2006.
3. Koonce wrote a check for the November payment, but according to his Corrected Response to Defendants' Amended No-Evidence and Traditional Motion for Summary Judgment, he elected to withhold funds for the November payment and that check, too, was denied by the bank.
4. On November 13, 2006, forty-four days after Koonce's default on the home loan, HomEq paid Koonce's unpaid property taxes for the first time.
5. On November 15, 2006, HomEq sent Koonce a demand letter demanding that he cure the October 1, 2006 default and giving him thirty-five days from the letter, or until December 20, 2006, to do so.
6. The last payment Koonce made on the home loan was September 9, 2006.

The evidence establishes that Koonce's breach of contract occurred in October 2006, and that HomEq first paid Koonce's property taxes in November 2006, well after Koonce's default. Koonce, however, claims that appellees' default did not occur then, but occurred in April when he notified appellees about the deferral and they refused to recognize that right. He alleges that "[t]here is . . . no dispute . . . that they refused to recognize that right on several occasions but certainly in April, 2006 . . . ."

Koonce, however, fails to direct us to any summary judgment proof establishing that appellees "refused to recognize that right" as of April 2006. Appellees' payment of Koonce's taxes, which may be considered a tacit refusal to recognize his right to defer his taxes, did not occur until forty-four days after Koonce's default on the loan. Accordingly, Koonce has failed to present evidence raising a fact issue on whether he was excused from performing his contractual obligations. For this reason, we overrule Koonce's third issue herein.

2. Koonce's Continued Performance Under the Note

Even if Koonce had established that appellees anticipatorily breached their contract in April 2006, Koonce's continued performance under the contract would preclude his using such a breach as an excuse for his own non-performance in the future. As noted above, if the non-breaching party treats the contract as continuing after the breach, he is deprived of any excuse for terminating his own performance. *Long Trusts*, 222 S.W.3d at 415–16. If a party elects to continue his performance under the contract, he chooses to ignore the anticipatory repudiation and he remains "subject to all his own obligations and liabilities under it . . . ." *Bumb*, 64 S.W.3d at 125.

Koonce acknowledges that he made "each and every payment up until the October 1st [2006] payment." Thus it is undisputed that he continued to perform under the Note even after appellees' alleged repudiation in April 2006.

Accordingly, he had no legal excuse for his own default under the Note. For this reason as well, we overrule Koonce's third issue.

CONCLUSION

We affirm the judgment of the trial court.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Sharp and Brown.

Justice Sharp, concurring in the judgment only.