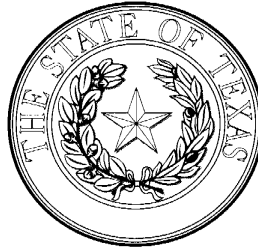


Opinion issued August 27, 2020



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-18-01047-CV

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**GEORGE W. CAMPBELL AND SHEILA SMITH, Appellants**

**V.**

**DLJ MORTGAGE CAPITAL, INC., ITS SUCCESSORS AND/OR ASSIGNS,  
Appellee**

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**On Appeal from the 295th District Court  
Harris County, Texas  
Trial Court Case No. 2016-10304**

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**MEMORANDUM OPINION**

Appellants, George W. Campbell and Sheila Smith (collectively, “appellants”), challenge the trial court’s judgment, entered after a bench trial, in favor of appellee, DLJ Mortgage Capital, Inc., its successors and/or assigns (“DLJ Mortgage”), on its suit for trespass to real property, trespass to try title, and

injunctive relief. In two issues, appellants contend that the trial court erred in rendering judgment in favor of DLJ Mortgage.

We affirm.

### **Background**

In its first amended petition, DLJ Mortgage alleged that in October 2007, Campbell obtained a loan to buy a house at 3434 Southmore Boulevard, Houston, Texas 77004 (the “property”). In doing so, Campbell signed two documents in favor of his lender, Bravo Credit: (1) a Texas Home Equity Note (the “Note”), which set out the terms of the loan, and (2) a Texas Home Equity Security Instrument (the “Deed of Trust”), which secured the loan with a lien on the property.<sup>1</sup> The Deed of Trust was later assigned to DLJ Mortgage.<sup>2</sup>

After Campbell defaulted on the loan, DLJ Mortgage initiated an expedited home-equity foreclosure proceeding and the Harris County District Court issued an expedited home-equity foreclosure order in May 2013. In September 2013, DLJ

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<sup>1</sup> Campbell’s ex-wife, Julia Browder, also signed the Deed of Trust.

<sup>2</sup> At trial, the trial court admitted into evidence a copy of the Deed of Trust. The Deed of Trust included a “Power of Sale” provision by which Campbell and Browder agreed to “immediately surrender possession of the Property to the purchaser” at a foreclosure sale, and if not, they would be “tenant[s] at sufferance” who could be “removed by a writ of possession or other court proceeding.” Campbell and Browder also agreed that any recitals in the foreclosure sale deed would “be prima facie evidence of the truth of the statements made therein.”

Mortgage purchased the property at a foreclosure sale. At the time of the foreclosure sale, Smith was Campbell's tenant at the property.

A series of trials and appeals followed the foreclosure sale. On March 18, 2014, DLJ Mortgage brought a forcible detainer action against Campbell and obtained a final judgment of possession for the property. In 2015, Campbell was evicted from the property pursuant to a writ of possession. DLJ Mortgage then brought a forcible detainer action against Smith and obtained a final judgment of possession for the property.<sup>3</sup>

According to DLJ Mortgage, appellants "have been provided multiple demands to surrender possession of the [p]roperty to no avail." And Smith "has elected to holdover and . . . [is] attempting to exercise a phantom option to renew or extend the terms of her lease despite DLJ[] [Mortgage's] cancellation of all leases and tenancy agreements" related to the property.

DLJ Mortgage brought claims against appellants for trespass to real property and injunctive relief. DLJ Mortgage also brought a claim for trespass to try title against Smith. As to its trespass to real property claim, DLJ Mortgage alleged that it had owned the property since September 3, 2013, appellants "physically, intentionally, and voluntarily entered DLJ[] [Mortgage's] property without [its]

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<sup>3</sup> Smith appealed the trial court's judgment, which our sister appellate court affirmed. *See Smith v. DLJ Mortg. Capital, Inc.*, 558 S.W.3d 726, 730–32 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

consent to enter or maintain possession,” and appellants’ trespass caused injury to DLJ Mortgage. As to its trespass to try title claim, DLJ Mortgage alleged that it owned the property, it had been awarded possession of the property, and it was entitled to possession. But Smith, despite the award of the property and termination of all rights of possession, unlawfully entered the property, and dispossessed DLJ Mortgage. As a result of Smith’s refusal to surrender possession of the property, DLJ Mortgage was damaged. Finally, as to its claim for injunctive relief, DLJ Mortgage alleged that when it had attempted to take possession of the property, appellants refused to surrender it and insisted that they had a greater right to the property. Appellants had “trespassed, entered the [p]roperty, made waste to the [p]roperty and [were] attempting to extend an expired lease and terminated tenancy.” DLJ Mortgage sought temporary and permanent injunctive relief against appellants.

Appellants answered, generally denying the allegations in DLJ Mortgage’s petition. Appellants also asserted counterclaims against DLJ Mortgage for trespass to try title, wrongful foreclosure, breach of contract, and a declaratory judgment. Appellants alleged that DLJ Mortgage did not have superior title to the property because the foreclosed home-equity loan was constitutionally infirm under Article XVI, section 50 of the Texas Constitution and “foreclosure proof.” *See* TEX. CONST. art. XVI, § 50(c) (“No . . . lien on the homestead shall ever be valid unless it secures a debt described by this section[.]”). More specifically, appellants asserted that

Bravo Credit, Campbell’s original lender, had violated the constitutional limitations on the forced sale of a homestead by failing to (1) provide the written notice regarding extensions of credit specified in Article XVI, section 50(g); (2) provide a copy of the “final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing” at least one day in advance, as required by Article XVI, section 50(a)(6)(M)(ii); and (3) obtain the signature of Campbell’s ex-wife, Browder, on a “written acknowledgement as to the fair market value of the homestead property on the date the extension of credit is made” under Texas Constitution Article XVI, section 50(a)(6)(Q)(ix).<sup>4</sup> According to appellants, any violation of these provisions required reinstatement of title in Campbell’s favor.

The trial court entered an agreed temporary injunction that prohibited appellants from interfering with DLJ Mortgage’s possession of the property, save and except for a portion of the property that Smith was still permitted to occupy.<sup>5</sup> Campbell was enjoined from “further occupation, possession or trespass . . . whether

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<sup>4</sup> Appellants erroneously identify the provision requiring the owner’s and lender’s signatures on an affidavit of fair market value as Texas Constitution Article XVI, section 50(a)(6)(B). That section provides that an extension of credit must not “exceed 80 percent of the fair market value of the homestead on the date the extension of credit is made.” TEX. CONST. art. XVI, § 50(a)(6)(B). The signature requirement for an affidavit of fair market value is stated in section 50(6)(Q)(ix). *See* TEX. CONST. art. XVI, § 50(6)(Q)(ix).

<sup>5</sup> At the time the trial court ordered the temporary injunctive relief, the judgment awarding DLJ Mortgage possession against Smith was not yet final. *See Smith*, 558 S.W.3d at 729.

as resident, occupier, or tenant of any person lawfully or unlawfully in occupancy or possession of the whole or any portion of the property,” and ordered to immediately remove all his personal property from the property. Both appellants were enjoined from “taking any action to alter, amend, destroy, or change the character of the property or any of its improvements except to comply with the terms of th[e] Temporary Injunction or complete routine, non-altering maintenance to the property and its improvements.”

At trial, Ashley Hutchinson, the evictions coordinator for Selene Finance, testified that Selene Finance is DLJ Mortgage’s mortgage service provider. She explained that numerous post-foreclosure attempts to obtain full possession of the property for DLJ Mortgage had been unsuccessful and that, as of the date of trial in August 2018, appellants continued to occupy the property.

Brenda Ames, a real estate agent retained by Selene Finance, testified that she had checked on the property weekly since 2014 and documented its condition in photographs. She had observed Campbell at the property after he was evicted and after the trial court enjoined his occupation or possession of the property. Ames explained that her real estate practice was focused exclusively on bank-owned properties. And according to Ames, in the normal course of her business, possession of a foreclosed property is secured and the property is prepared for listing, but the property at issue here could not be marketed or listed because of its continued

occupation by appellants. Ames also testified, based on a comparative market analysis, that the property's deteriorating condition had led to reduced market and rental values.

Campbell testified about the closing of his home-equity loan in October 2007 and the alleged constitutional infirmities in the closing documents. Campbell stated that an affidavit regarding the property's fair market value in the closing documents was not signed by his ex-wife, Browder. Campbell also testified that the affidavit acknowledging receipt of the final United States Department of Housing and Urban Development ("HUD") settlement statement was signed on the day of closing, not the day before closing. But the affidavit, admitted into evidence at trial, certifies that "the undersigned[ ] received a final itemized disclosure of the actual fees, points, interest, costs and charges, (HUD Statement) at least one business day prior to the loan closing date." And although Campbell testified that he signed a notice regarding extensions of credit on the day of closing, not twelve days before closing, the Notice Concerning Extensions of Credit was not admitted into evidence.

During trial, the evidence admitted by the trial court included the Note, the Deed of Trust and recorded assignment to DLJ Mortgage, the Home Equity Foreclosure Order and Foreclosure Sale Deed, affidavits regarding fair market value and receipt of the final HUD statement, and various photographs showing the condition of the property.

The trial court rendered judgment in favor of DLJ Mortgage, awarding it \$65,000 in damages. The trial court also ordered that appellants take nothing on their counterclaims against DLJ Mortgage. The trial court's judgment declared that DLJ Mortgage's title to the property is fee simple absolute, and it granted DLJ Mortgage the right of exclusive possession. Appellants were "permanently enjoined from further occupation, possession or trespass in any capacity, whether as invitee, guest, resident, occupier, or tenant of personal lawfully or unlawfully in occupancy or possession of the whole or any portion of the property."

The trial court also entered certain findings of fact and conclusions of law.

The findings of fact include:

1. This proceeding concerns the real property and improvements commonly known as 3434 Southmore Blvd., Houston, Texas 77004, referred to herein as the "property," described more particularly as:

**TRACT I: THE WEST 50 FEET OF LOT EIGHT (8) IN BLOCK[ ] EIGHT (8) OF SOUTHWOOD ADDITION, A SUBDIVISION IN HARRIS COUNTY, TEXAS, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN VOLUME 9, PAGE 12, OF THE MAP RECORDS OF HARRIS COUNTY, TEXAS. TRACT II: LOT NINE (9) AND THE ADJOINING EAST 10 FEET OF LOT EIGHT (8) IN BLOCK EIGHT (8) OF SOUTHWOOD ADDITION, A SUBDIVISION IN HARRIS COUNTY, TEXAS, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN VOLUME 9, PAGE 12, OF THE MAP RECORDS OF HARRIS COUNTY, TEXAS[.]**



2. . . . DLJ Mortgage . . . is a mortgage investor that obtained fee title to the property at foreclosure, which occurred on September 3, 2013.
3. [DLJ Mortgage's] "Real Estate Owned" (REO) property manager is Selene Finance, LP.
4. . . . Campbell is the former mortgagor, whose rights in the property were foreclosed.
5. . . . Campbell's right to possession of the [p]roperty was terminated by judgment from the Harris County Court of Law Number Three on April 27, 2015.
6. This Court signed an agreed temporary injunction on August 8, 2016 wherein, among other things, . . . Campbell was enjoined from further occupation and possession of the property.
7. Evidence at trial showed that . . . Campbell continued to occupy and possess all or part of the property following the entry of the temporary injunction in spite of the prohibitions contained in the temporary injunction.
8. . . . Smith was a tenant of . . . Campbell's on September 3, 2013, the date of foreclosure.
9. . . . Smith's final right of occupancy was terminated by [DLJ Mortgage], which demanded possession of the property. Despite termination and expiration of her lease agreement and demand for possession, . . . Smith remained in possession of the property. [DLJ Mortgage] gave no consent to . . . Smith's continued possession of the property.
10. On September 27, 2016, Harris County Court at Law number three signed a Final Judgment for Possession in case number 1082501, styled *DLJ Mortgage, Inc., its Successors and Assigns v. Sheila Smith, and/or all occupants of 3434 Southmore Blvd., Houston, Texas [77004]-6349* awarding possession of the property made the basis of this proceeding to [DLJ Mortgage]. The judgment dispossessed . . . Smith.

11. . . . Smith appealed the Final Judgment for Possession. The Final Judgment for Possession was affirmed by the 14th Court of Appeals. The appellate court issued its mandate on October 11, 2018.

12. [DLJ Mortgage] brought this suit with claims against [appellants] in trespass to realty, trespass to try title, and for injunctive relief. [DLJ Mortgage] requested relief in the form of temporary and permanent injunctions and damages.

13. [Appellants] filed counterclaims for trespass to try title based on allegations that the home equity loan foreclosed on September 3, 2013 failed to conform to provisions in the Texas Constitution providing for home equity loans. [Appellants] further counterclaimed for wrongful foreclosure and for a judgment declaring that [DLJ Mortgage's] foreclosure was wrongful. [Appellants] sought possession of the property, attorney[']s fees and costs.

14. Evidence introduced and admitted at trial was that [DLJ Mortgage] incurred damages of \$65,000.

The trial court's conclusions of law include:

1. This Court has subject matter jurisdiction over the controversy. Venue is mandatory in Harris County under Texas Civil Practice & Remedies Code section 15.011 because this is a suit for damages to real property. Harris County is the county where all of the property is located.

2. [DLJ Mortgage] owns the property and has owned it since September 3, 2013. [DLJ Mortgage's] title to the property is fee simple absolute.

3. At the time of foreclosure, . . . Campbell's possessory interest in the property became that of a tenant at sufferance.

4. Upon expiration and termination of her lease, and after demand for possession, . . . Smith continued to occupy the property. . . . Smith is a tenant who, although once in lawful possession of the property, wrongfully remained in possession of the property after the termination

or expiration of any right to do so and demand to vacate the property. . . . Smith is a trespasser. *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 915–16 (Tex. 2013).

5. Under Texas’[s] common law holdover rule, a landlord may elect to treat a tenant holding over as either a trespasser[ ]—that is, a tenant at sufferance—“or as a tenant holding under the terms of the original lease”—that is, a tenant at will. *Bockelman v. Marynick*, 788 S.W.2d 569, 571 (Tex. 1990). Since [DLJ Mortgage] never provided any consent to either [of appellants] to remain in possession of the property, [appellants] physically, intentionally, and wrongfully retained possession of the property.

6. [Appellants’] trespass caused injury to [DLJ Mortgage] including:

- Loss of use of the [p]roperty;
- Loss of expected profits from use of the [p]roperty; [and]
- Loss of market value of the [p]roperty.

7. [Appellants] are guilty of trespass to [DLJ Mortgage’s] realty, thereby entitling [DLJ Mortgage] to recover in damages.

8. [DLJ Mortgage] is entitled to an award of \$65,000.00 in damages against [appellants]. As the prevailing party, [DLJ Mortgage] is entitled to . . . have its costs.

9. Based on the evidentiary record, [appellants] committed a wrongful act. Without injunctive relief, an imminent threat that [appellants] will continue to occupy or seek to reenter the property exists. Further based on the record, if [appellants] remain in possession of the property, [DLJ Mortgage] will continue to suffer further and irreparable injury. [DLJ Mortgage] has no adequate remedy at law to guard against [appellants] continuing and future trespass on the property. [DLJ Mortgage] is entitled to equitable relief permanently enjoining [appellants] from re-entry into the property.

10. [Appellants] are not entitled to recover on their claims of trespass to try title.
11. [Appellants] are not entitled to possession of the property.
12. [DLJ Mortgage's] foreclosure was not wrongful and [appellants] are not entitled to declaratory relief.
13. [Appellants] are not entitled to recover attorney[']s fees or costs of court.

### **Standard of Review**

In a bench trial, legal-sufficiency challenges to the trial court's findings of fact are reviewable under the same standards that are applied in reviewing the evidence supporting a jury's verdict. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994). When the appellate record contains a reporter's record, findings of fact on disputed issues are not conclusive and may be challenged for the sufficiency of the evidence. *Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 52 (Tex. 2003). We defer to unchallenged findings of fact that are supported by some evidence. *Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 437 S.W.3d 518, 523 (Tex. 2014).

When appellants attack the legal sufficiency of an adverse finding on an issue on which they did not have the burden of proof, they must demonstrate on appeal that no evidence supports the adverse finding. *Exxon Corp. v. Emerald Oil & Gas, Co., L.C.*, 348 S.W.3d 194, 215 (Tex. 2011). We will sustain a no-evidence challenge if the record shows (1) a complete absence of evidence of a vital fact, (2) the court is barred by the rules of law or evidence from giving weight to the only

evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of a vital fact. *See City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005). In contrast, when appellants attack the legal sufficiency of a finding on which they bore the burden of proof, they must show not only that no evidence supports finding, but also that the evidence conclusively proves the contrary. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001). Under this standard, we reject the challenge unless the evidence proves all vital facts in support of the challenger's position as a matter of law. *Id.* at 624.

We are mindful that the trial court, as fact finder, was the sole judge of the credibility of the witnesses and the weight to be given their testimony. *See City of Keller*, 168 S.W.3d at 819; *McKeehan v. Wilmington Savings Fund Society, FSB*, 554 S.W.3d 692, 698 (Tex. App.—Houston [1st Dist.] 2018, no pet.). So the trial court may choose to believe one witness and disbelieve another. *See City of Keller*, 168 S.W.3d at 819. It is the fact finder's role to resolve conflicts in the evidence, and we may not substitute our judgment for that of the fact finder. *See McKeehan*, 554 S.W.3d at 698.

### **Legal Sufficiency of Evidence**

In their first issue, appellants argue that the trial court erred in rendering judgment in favor of DLJ Mortgage on its trespass to real property and trespass to

try title claims because DLJ Mortgage “is unable to demonstrate a superior right of title.” In their second issue, appellants argue that the trial court erred in rendering judgment in favor of DLJ Mortgage on their counterclaims for trespass to try title, wrongful foreclosure, and a declaratory judgment because they have “demonstrated that they prevail as a matter of law” on their counterclaims as there is conclusive evidence that the home-equity loan on which DLJ Mortgage foreclosed was constitutionally infirm.

We presume, under a liberal construction of appellants’ brief, that these issues challenge the legal sufficiency of the evidence to support the trial court’s judgment in favor of DLJ Mortgage.<sup>6</sup> So even though appellants have not challenged any specific finding of fact or conclusion of law by the trial court, we will consider their

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<sup>6</sup> Our presumption is drawn from consideration of appellants’ brief as a whole, including their request for a rendition of judgment—an appropriate remedy for a successful legal-sufficiency challenge—and these statements summarizing their assertions:

[DLJ Mortgage] has failed to produce at trial any evidence that proves that the lien it foreclosed complied with the Texas Constitution. Conversely, the undisputed evidence presented by [appellants] shows that it does not. [DLJ Mortgage] failed to provide a Notice Concerning Extension of Credit complying with the Texas Constitution, a Settlement Statement one day prior to closing in compliance with the Texas Constitution, and failed to obtain an Affidavit of Fair Market Value in compliance with the Texas Constitution[.] [DLJ Mortgage] cannot demonstrate a superior title . . . . This alone is sufficient to demonstrate that [DLJ Mortgage] cannot prevail on its trespass or trespass to try suits and that [appellants] have proven that they prevail on their trespass to try, wrongful foreclosure, and declaratory judgment suit.

first and second issues together as requesting a review of the legal sufficiency of the evidence supporting the trial court’s findings that DLJ Mortgage obtained a fee simple absolute title to the property at the foreclosure sale and that Campbell’s rights in the property were foreclosed by the sale.<sup>7</sup> *See Regal Fin. Co., Ltd. v. Tex. Star Motors, Inc.*, 355 S.W.3d 595, 603 (Tex. 2010) (noting evidence is legally insufficient when it conclusively establishes opposite of vital fact); *McKeehan v. Wilmington Savs. Fund Society, FSB*, 554 S.W.3d 692, 698 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (concluding appellant challenged legal sufficiency of evidence based on review of brief and prayer for rendition of judgment).

The gist of an action for trespass to real property is the injury to the right of possession. *Lighthouse Church of Cloverleaf v. Tex. Bank*, 889 S.W.2d 595, 598 n.3 (Tex. App.—Houston [14th Dist.] 1994, writ denied). Appellants have not

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<sup>7</sup> Appellants also assert in a portion of their first issue that it is “noteworthy that none of the findings of fact and conclusions of law . . . made any mention of the fact that [DLJ Mortgage’s] claims were barred as unconstitutional, and, therefore, barred as a matter of law.” To the extent this assertion may be construed as a complaint that the trial court did not make any express findings of fact and conclusions of law on the constitutional infirmity of the home-equity loan obtained from Bravo Credit, that complaint is waived. When, as here, a trial court files findings of fact and conclusions of law, any party may timely request that the trial court make specified additional or amended findings and conclusions. TEX. R. CIV. P. 298. The failure to do so, as in this case, waives the right to complain on appeal of any omitted findings or conclusions. *See, e.g., Uluh v. Uluh*, No. 14-09-00394-CV, 2011 WL 167268, at \*2 (Tex. App.—Houston [14th Dist.] Jan. 20, 2011, pet. denied) (mem. op.) (appellant waived complaint trial court erred in not concluding appellee had wasted community assets by failing to request additional or amended findings and conclusions).

challenged the trial court’s findings of fact and conclusions of law that their rights of possession were terminated in prior litigation and that both they both had “physically, intentionally, and wrongfully retained possession of the property.” Because the trial court’s disposition of the trespass-to-real-property claim in favor of DLJ Mortgage can be sustained on these unchallenged findings and conclusions, we consider only the DLJ Mortgage’s claim for trespass to try title.

On a trespass-to-try-title claim, the “element” a plaintiff must prove is the title it claims in the disputed property. *Vernon v. Perrien*, 390 S.W.3d 47, 54 (Tex. App.—El Paso 2012, pet. denied) (“To maintain an action of trespass to try title, the person bringing the suit must have title to the land sought to be recovered” and “right to recover depends on the strength of his or her own title, not the weaknesses of the title of his or her adversary.”); *see* TEX. PROP. CODE ANN. § 22.002 (evidence of legal right to located and surveyed land sufficient to maintain trespass-to-try-title action); TEX. R. CIV. P. 783 (stating requirements of petition for trespass to try title). The plaintiff may recover by proving (1) a regular chain of conveyances from the sovereign, (2) a superior title out of a common source, (3) title by limitations, or (4) prior possession that has not been abandoned. *Rogers v. Ricane Enters., Inc.*, 884 S.W.2d 763, 768 (Tex. 1994).

As evidence of its title under the second manner—proof of a superior title out of a common source—DLJ Mortgage presented the Note issued by Bravo Credit, the



Deed of Trust containing the power of sale, the recorded assignment of the Deed of Trust from Bravo Credit to DLJ Mortgage, the Home Equity Foreclosure Order issued by the Harris County District Court, and the Foreclosure Sale Deed, which includes express language “GRANT[ING], SELL[ING], and CONVEY[ING] to [DLJ Mortgage], [its] heirs and assigns, all of the Property” and thus reflects a conveyance of the property from Campbell to DLJ Mortgage. This is some evidence to sustain the trial court’s finding that DLJ Mortgage obtained title to the property at the foreclosure sale and that Campbell’s rights to the property were terminated. *See Am. Sav. & Loan Ass’n of Hous. v. Musick*, 517 S.W.2d 627, 630 (Tex. App.—Houston [14th Dist.] 1974) (holding trustee’s deed satisfied trespass-to-try-title element of superior title from common source), *rev’d on other grounds*, 531 S.W.2d 581 (Tex. 1975).

Appellants do not dispute that DLJ Mortgage purchased the property at the foreclosure sale or challenge the authenticity of any of the evidence presented by DLJ Mortgage at trial, including the Foreclosure Sale Deed. Instead, they assert that the trial court could not have found that DLJ Mortgage held superior title because there was conclusive evidence at trial that the home-equity loan through which Campbell purchased the property was constitutionally infirm and “foreclosure proof.” Assuming appellants can raise the alleged constitutional non-compliance as either a defense in a trespass-to-try-title action or a basis for their own counterclaims,

we disagree the record conclusively establishes their assertions of constitutional non-compliance.<sup>8</sup>

As for the allegation that Campbell was not provided the requisite notice about extensions of credit, *see* TEX. CONST. art. XVI, § 50(g) (permitting lien against homestead if extension of credit is not closed “before the 12th day after the lender provides the owner” with written notice set out therein), appellants rely exclusively on Defendants’ Exhibit 1. Because the record does not include a Defendants’ Exhibit 1, we presume that this citation was in error and that appellants intended to reference Defendants’ Exhibit 3, which the reporter’s record indicates is a Notice Concerning Extensions of Credit. That exhibit, however, was not admitted into evidence at trial, and appellants have not challenged the exclusion of this evidence on appeal.

In addition, Plaintiff’s Exhibit 29, a sworn Affidavit of Facts and Receipt of Documents signed by Campbell, recites that “[m]ore than twelve (12) days have lapsed since (i) we submitted our Loan Application to Lender for this Loan, and

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<sup>8</sup> DLJ Mortgage states that appellants’ assertions regarding constitutional non-compliance cannot be raised in this appeal for more than one reason. DLJ Mortgage, citing *Garofolo v. Ocwen Loan Servicing, L.L.C.*, 497 S.W.3d 474 (Tex. 2016), asserts that Texas Constitution Article XVI, section 50 “has no applicability outside of foreclosure.” DLJ Mortgage also asserts that any defense or claim to title Campbell has based on application of the constitutional provisions could have been asserted in previous litigation and is barred by preclusion doctrines. We do not reach these assertions given our disposition of this appeal on other grounds. *See* TEX. R. APP. P. 47.1.

(ii) the date Lender provided us with the Notice of Extension of Credit.” The record also includes a sworn Texas Home Equity Affidavit and Agreement, signed by Campbell, asserting:

The Note and Security Instrument [Deed of Trust] have not been signed before the twelfth (12th) day after the later of the date the owner of the Property submitted an application to the Lender, or the Lender’s representative for the Extension of Credit, or the date that the Lender, or the Lender’s representative provided the owner with a copy of the Notice Concerning Extensions of Credit defined by Section 50(a)(6).

These sworn affidavits contradict Campbell’s testimony that he did not receive the requisite notice under Texas Constitution Article XVI, section 50(g), and the trial court reasonably could have found that Campbell’s testimony was not credible. *See City of Keller*, 168 S.W.3d at 819.

As for the assertion that Campbell did not timely receive a copy of the final settlement statement, *see* TEX. CONST. art. XVI, § 50(a)(6)(M)(ii) (permitting lien against homestead if closing is not before “one business day after the date that the owner of the homestead receives a . . . final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing”), Campbell testified that he signed an Affidavit of Receipt of Final HUD on the day of closing. But he did not address the content of his sworn affidavit in either his testimony or briefing on appeal. But the affidavit makes clear Campbell’s agreement that he “received a final itemized disclosure of the actual fees, points, interest, costs and charges, (HUD Statement) at least one business day prior to the loan closing date.”

Campbell’s testimony that he signed the affidavit on the date of closing is, thus, not conclusive evidence of a violation of Texas Constitution Article XVI, section 50(a)(6)(M)(ii).

In addition, the Texas Home Equity Affidavit and Agreement signed by Campbell recites that neither the Note nor the Deed of Trust was signed “before one business day after the date that the owner of the Property received a final itemized disclosure of the actual fees, points, interest, costs, and charges that would be charged at closing[.]”

And in regard to the assertion that the home-equity loan was constitutionally non-compliant because a fair market value affidavit in the closing documents was unsigned by Browder, *see* TEX. CONST. art. XVI, § 50(a)(6)(Q)(ix) (permitting lien against homestead if “the owner of the homestead and the lender sign a written acknowledgment as to the fair market value of the homestead property on the date the extension of credit is made”), appellants rely exclusively on Defendants’ Exhibit 4, an Affidavit of Fair Market Value of Homestead Property. As noted in Campbell’s trial testimony, the affidavit is signed by Campbell but not by Browder. Like Campbell, however, Browder signed the sworn Texas Home Equity Affidavit and Agreement, which instructs at the top of the first page in bold print that it should not be signed before execution of “an Acknowledgement Regarding Fair Market Value” and recites that the “Lender and each owner of the Property have signed a

written acknowledgement as to the fair market value of the Property on the date the Extension of Credit is made.” As is true with respect to the other assertions, Campbell did not address these conflicting documents at trial or offer any explanation on appeal. On this record, we cannot conclude that the evidence conclusively establishes the purported constitutional violations.

We hold that the trial court did not err in rendering judgment in favor of DLJ Mortgage.

We overrule appellants’ first and second issues.

### **Conclusion**

We affirm the judgment of the trial court.

Julie Countiss  
Justice

Panel consists of Justices Goodman, Hightower, and Countiss.