

**Affirmed and Memorandum Opinion filed August 25, 2011.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-10-00249-CV**

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**SHELTON R. MODELIST, Appellant**

**V.**

**DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR AAMES  
FUNDING CORPORATION, COUNTRYWIDE HOME LOANS, INC., AND REX L.  
KESLER, Appellees**

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**On Appeal from the 129th District Court  
Harris County, Texas  
Trial Court Cause No. 2008-34011**

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**MEMORANDUM OPINION**

This is an appeal from a summary judgment dismissing claims asserted against various defendants by an individual whose home was the subject of a mortgage foreclosure. On appeal, the *pro se* appellant asserts that the trial court erred by denying his application for a temporary restraining order, granting appellees' motion for summary

judgment, denying appellant due process, and depriving him of an adequate record on appeal. We affirm.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

In 2001, plaintiff/appellant Shelton R. Modelist obtained a home equity loan in the amount of \$40,000, secured by a lien. Modelist later went into default, and the holder of the lien pursued foreclosure of the lien. On June 3, 2008, the day of the scheduled foreclosure sale of Modelist's property, Modelist filed this lawsuit, including an application for a temporary restraining order ("TRO") against defendants/appellees Deutsche Bank National Trust Company, as trustee for Aames Funding Corporation ("Deutsche Bank"), Countrywide Home Loans, Inc., and Rex Kesler (collectively "Defendants"). Modelist asserted that foreclosure on his home was barred by a statute of limitations. Modelist sought a TRO to prevent the foreclosure sale from occurring as scheduled on June 3, 2008.

Modelist did not obtain a TRO, and on June 3, 2008, Deutsche Bank purchased the property at the foreclosure sale. On February 3, 2009, the trial court signed an order denying Modelist's application for a TRO. In his amended petition, Modelist alleged that the Defendants engaged in fraudulent activities surrounding the foreclosure sale and that Deutsche Bank purchased the property at the foreclosure sale without notice to Modelist. Modelist alleged that the Defendants conspired with one other to defraud Modelist. Modelist asserted claims for trespass to try title, fraud, and breach of contract. The Defendants filed a motion for summary judgment, asserting traditional and no-evidence grounds. Modelist did not file a summary-judgment response, and the trial court granted a final summary judgment in the Defendants' favor.

Modelist filed a Motion for New Trial and, in the alternative, a Motion to Vacate Void Judgment ("Motion for New Trial"), alleging, among other things that he was denied due process because he allegedly was not provided with notice of the summary-

judgment hearing or a copy of the Defendants' summary-judgment motion. Modelist's motion was overruled by operation of law.

## **II. ISSUES AND ANALYSIS**

On appeal, Modelist contends that the trial court erred by (1) denying his application for a TRO, (2) granting the Defendants' summary-judgment motion, (3) denying his Motion for New Trial, and (4) depriving him of an adequate record on appeal by failing and refusing to deliver the reporter's record from a June 3, 2008 hearing on Modelist's application for TRO.

### **Did the trial court abuse its discretion and deny Modelist due process of law by denying his application for a temporary restraining order?**

In his first issue, Modelist argues that the trial court abused its discretion and denied him due process of law by denying the application for TRO that he filed on the day of the foreclosure sale. The trial court apparently held a hearing on this application on June 3, 2008, but did not rule on that date. The trial court denied Modelist's application for TRO on February 3, 2009. Because the foreclosure sale already has occurred, Modelist's appellate challenge to the denial of his TRO application is moot. *See Serv. Fin. Corp. v. Grote*, 131 S.W.2d 93, 93–94 (Tex. 1939); *Schulze v. EMC Mortg. Corp.*, No. 04-08-00010-CV, 2008 WL 2116277, at \*1 (Tex. App.—San Antonio May 21, 2008, no pet.) (mem.op.). Accordingly, we lack jurisdiction over Modelist's first appellate issue.

### **Did the trial court abuse its discretion by denying Modelist's motion for new trial?**

Under his third issue, Modelist argues that the trial court abused its discretion in denying his Motion for New Trial because he was not given notice of the hearing on the Defendants' summary-judgment motion and because he was not served with a copy of this motion. The record reflects, and Modelist concedes, that the Defendants served a copy of their summary-judgment motion and timely notice of hearing on that motion

upon the attorney who had signed Modelist's live petition at the time. If that attorney was Modelist's attorney of record when this motion and notice of hearing were served, then Modelist's claims lack merit.

The law presumes that a trial court will grant summary judgment only after proper notice to the parties. *See Jones v. Texas Dept. of Public Safety*, 803 S.W.2d 760, 761 (Tex. App.—Houston [14th Dist.] 1991, no writ). To rebut this presumption, Modelist had the burden to affirmatively show a lack of notice. *See id.* The attorney upon whom the Defendants served the motion and notice of hearing had signed Modelist's live petition. Our record contains no motion to withdraw, order granting withdrawal, or anything else that would indicate that this attorney was not Modelist's attorney of record in the trial court at the relevant time. Nothing attached to Modelist's timely Motion for New Trial rebuts the presumption of notice or indicates that this attorney was not Modelist's attorney of record at the relevant time.

Documents attached to Modelist's Motion for New Trial indicate that on July 2, 2009, this same attorney withdrew as attorney of record for Modelist in his separate appeal in this court from a forcible-detainer judgment. *See Modelist v. Deutsche Bank National Trust Company*, No. 14-09-00134-CV, 2010 WL 3002099, at \*1–4 (Tex. App.—Houston [14th Dist.] Aug. 3, 2010, pet. denied) (mem. op.). But evidence that this attorney withdrew from representing Modelist in a separate appeal in this court does not prove that this counsel withdrew in the trial court in the case under review. *See TEX. R. CIV. P. 10*. In the evidence attached to his Motion for New Trial, Modelist did not rebut the presumption that he received proper notice.<sup>1</sup> *See Jones*, 803 S.W.2d at 761–62. Because the record reflects that the Defendants timely served Modelist's attorney of

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<sup>1</sup> Modelist also relies upon a supplement to his Motion for New Trial and accompanying evidence that he filed more than thirty days after the trial court's final judgment. Because this supplement was untimely, it preserved nothing for this court's review. *See Moritz v. Preiss*, 121 S.W.3d 715, 720–21 (Tex. 2003).

record with the summary-judgment motion and notice of hearing, the trial court did not abuse its discretion by rejecting Modelist's notice arguments in his Motion for New Trial.

Under his third issue, Modelist also asserts that the trial court lacked subject-matter jurisdiction because Deutsche Bank does not exist and because the foreclosure allegedly was barred by the statute of limitations. Modelist does not cite to any proof that Deutsche Bank does not exist. In any event, even if Deutsche Bank did not exist and even if the foreclosure were the barred by statute of limitations, this would not deprive the trial court of subject-matter jurisdiction in the case under review. *See Modelist*, 2010 WL 3002099, at \*4.

Because the arguments under the third issue lack merit, we overrule this issue.

**Was appellant deprived of an adequate record on appeal?**

Under his fourth issue, Modelist asserts that, he was deprived of an adequate record on appeal and the right to be heard because the trial court and the court reporter failed and refused to prepare and deliver the reporter's record from the hearing conducted on June 3, 2008, regarding Modelist's application for TRO. The record does not reflect that appellant paid the court reporter's fee, made satisfactory arrangements with the court reporter to pay the fee, or is entitled to appeal without paying the fee. *See Tex. R. App. P. 35.3(b)(3)*. Therefore, Modelist's fourth issue lacks merit and is overruled.

**Did the trial court err in granting summary judgment?**

Under his second issue, Modelist contends that the trial court erred in granting the Defendants' summary-judgment motion. In this motion, the Defendants asserted no-evidence grounds against at least one essential element of each of Modelist's claims. Modelist did not file a summary-judgment response before the trial court granted summary judgment. Therefore, the trial court did not err in granting summary judgment, and we overrule Modelist's second issue. *See Lee v. Palacios*, No. 14-06-00428-CV,

2007 WL 2990277, at \*1–3 (Tex. App.—Houston [14th Dist.] Oct. 11, 2007, pet. denied) (mem. op.).

Having found that Modelist’s first issue is moot and that his other issues lack merit, we affirm the trial court’s judgment.

/s/     Kem Thompson Frost  
          Justice

Panel consists of Chief Justice Hedges and Justices Frost and Christopher.