

**Affirmed and Memorandum Opinion and Memorandum Concurring Opinion
filed August 16, 2022.**



In The

Fourteenth Court of Appeals

NO. 14-21-00339-CV

AMELIA COLVIN, Appellant

V.

**ARK-LA-TEX FINANCIAL SERVICES, LLC D/B/A BENCHMARK
MORTGAGE, AND DEUTSCHE BANK TRUST COMPANY, Appellees**

**On Appeal from the 239th District Court
Brazoria County, Texas
Trial Court Cause No. 67142**

MEMORANDUM OPINION

A borrower sued her lender and the lender's successor in interest, alleging among other things that they were liable for damages arising out of a wrongful foreclosure. The trial court disposed of the borrower's case through a ruling on a motion for summary judgment, as well as a ruling on a combined special exceptions and motion to dismiss. We affirm the trial court's judgment because the borrower has failed to show that the trial court reversibly erred with respect to either ruling.

BACKGROUND

Amelia Colvin purchased a home in November 2006. To finance that purchase, she executed two promissory notes. The lender for both notes was Ark-La-Tex Financial Services, LLC d/b/a Benchmark Mortgage.

Less than two weeks after Colvin executed these promissory notes, Ark-La-Tex sold its interest in the notes to a third party. From that third party, the first note was eventually assigned in February 2008 to Deutsche Bank Trust Company. The second note was also assigned in February 2008, but the assignee was a different entity not involved in this appeal.

In 2007—i.e., after the sale of the notes from Ark-La-Tex, but before the assignment to Deutsche Bank—the new servicer of the loans notified Colvin that she was in default and that her loans were being accelerated. The servicer also sent Colvin a notice of foreclosure and force-placed insurance on the property.

Colvin responded that she was not actually in default, and in separate litigation, she obtained a temporary restraining order preventing the foreclosure sale. In March 2008, the servicer foreclosed anyways, but a court later nullified that foreclosure. Since that nullification, no foreclosure ever occurred. Instead, in 2015, Colvin conveyed the property to a third party in a short sale.

In March 2012—i.e., before the short sale—Colvin filed her original petition in this case. The only named defendant in that petition was Ark-La-Tex, and Colvin alleged among other things that the “claims” against her property were fraudulent and that both of her notes had been paid. In her request for relief, Colvin sought a declaratory judgment that she owned a fee simple interest in the property, that all liens on the property were released, and that Ark-La-Tex was permanently enjoined from seeking any future liens or judgments on the property.

In June 2012, Deutsche Bank filed a petition in intervention, claiming a justiciable interest in Colvin's lawsuit as the holder of the first note.

Colvin amended her petition to assert claims against both Ark-La-Tex and Deutsche Bank. In her live pleading, Colvin made widespread allegations, including that certain notices were not given, that the force-placed insurance was improper, and that certain allonges were fraudulent. Based on these allegations and many others, Colvin asserted claims for breach of contract, statutory fraud, common law fraud, violations of the Deceptive Trade Practices Act, violations of the Texas Debt Collection Act, and declaratory judgment.

Ark-La-Tex moved for summary judgment on traditional grounds, largely on the basis that it had divested itself of any interest in Colvin's property before any of her allegations arose. Deutsche Bank specially excepted and moved to dismiss on several grounds.

The trial court granted Ark-La-Tex's motion for summary judgment as well as Deutsche Bank's special exceptions and motion to dismiss. Following a nonsuit of certain counterclaims, the trial court rendered a final take-nothing judgment against Colvin, from which she now appeals.

ARK-LA-TEX'S MOTION FOR SUMMARY JUDGMENT

Ark-La-Tex asserted in its motion for summary judgment that it had conveyed all of its interests in Colvin's property in December 2006, which was just a few weeks after Colvin had originally acquired the property. To support that assertion, Ark-La-Tex cited to affidavit testimony and other documentary evidence.

Ark-La-Tex then asserted (with emphasis in the original): "Once the notes were transferred, Ark-La-Tex had **no** communications with Plaintiff and **no** involvement with anything related to Plaintiff's property, including the collection of

payments, force-placed insurance, and the foreclosure proceedings.” And based on this non-involvement, Ark-La-Tex argued that all of Colvin’s claims against it were meritless.

As the summary-judgment movant, Ark-La-Tex had the burden of showing that there was no genuine issue of material fact and that it was entitled to judgment as a matter of law on the grounds asserted in its motion. *See* Tex. R. App. P. 166a(c). Colvin does not argue in her main brief that Ark-La-Tex failed to satisfy this burden. For instance, she does not argue in her main brief that the evidence attached to Ark-La-Tex’s motion failed to prove that Ark-La-Tex had conveyed all of its interests in her property, or that Ark-La-Tex had no further involvement in the property after the purported conveyance. Without any such argument, we do not consider whether Ark-La-Tex’s motion was legally sufficient. *See Bridgestone Lakes Cmty. Improvement Ass’n, Inc. v. Bridgestone Lakes Dev. Co.*, 489 S.W.3d 118, 124 n.1 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (“Because the HOA did not bring a merits challenge to the Defendants’ summary judgment, we do not consider whether the Defendants met their burden of establishing their entitlement to judgment as a matter of law on the grounds asserted in their motion, or whether the HOA raised a genuine issue of material fact that precluded a summary judgment.”).

Colvin argues instead that if Ark-La-Tex fully conveyed its interests in her property, as Ark-La-Tex had asserted in its motion for summary judgment, then Ark-La-Tex was required to release its liens on the property. This argument, which Colvin made in her summary-judgment response, is not supported by any citation to authority, and it is contrary to the actual terms of her two security instruments.

The first note is secured by a deed of trust, which contains the following release provision: “Upon payment of all sums secured by this Security Instrument, Lender shall provide a release of this Security Instrument to Borrower or Borrower’s

designated agent in accordance with Applicable Law.” The term “Lender” is defined to include “any holder of the Note who is entitled to received payments under the Note,” and by the plain language of the deed of trust, the Lender’s obligation to provide a release is triggered only “upon payment of all sums secured by this Security Instrument.” The latter phrase does not have the same meaning as a sale or conveyance of the underlying note, which is the focus of Colvin’s appellate argument. The deed of trust addresses such sales in a separate paragraph, which provides as follows: “The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the ‘Loan Servicer’) that collects Periodic Payments due under the Note and this Security Instrument” This provision clearly contemplates that the purchaser of the note will “collect” Colvin’s mortgage payments—not discharge them, as Colvin seems to have suggested.

The second note is secured by a “Purchase Money Security Document,” and its provisions are materially indistinguishable from the deed of trust. The release provision in this other security instrument states as follows: “Upon payment of all that I owe under this Loan Agreement, you will cancel and return the Note to me and give me, in recordable form, a release of lien securing the Loan Agreement” The term “you” is defined to mean “the Lender and any holder entitled to receive payments under the Note.” The security instrument also contains a separate paragraph for the sale of the note: “A full or partial interest in the Loan Agreement can be sold one or more times without prior notice to me. The sale may result in a change of the company servicing or handling the Loan Agreement. The company servicing or handling the Loan Agreement will collect any monthly payment and

will comply with other servicing conditions required by the Loan Agreement or Applicable Law.”

Colvin has not made any showing that she, or any other person or entity, has fully discharged the payments that she was personally obligated to make under the two notes. In fact, as she stated in her own brief, Colvin sold the property in a short sale, which demonstrates that a debt remained outstanding. *See Branch Banking & Trust Co. v. Seideman*, No. 05-17-00381-CV, 2018 WL 3062450, at *3 n.1 (Tex. App.—Dallas June 21, 2018, pet. denied) (mem. op.) (“A short sale is a sale of property for a price that is less than the amount of debt on the property, resulting in a shortfall of sales proceeds to pay off the existing loans.”). Consequently, Colvin has not demonstrated that a release was required from Ark-La-Tex, or from any of its successors or assigns. *See Allen v. Wa. Mut. Bank*, No. A-15-CV-0411-LY-ML, 2015 WL 4395141, at *5 (W.D. Tex. July 16, 2015) (holding that evidence that the lender had transferred the note to another entity did not establish that the borrower was entitled to a release).

Colvin raises two additional arguments in a reply brief. First, Colvin argues that Ark-La-Tex was not entitled to summary judgment because Ark-La-Tex did not address whether a payment was properly applied to Colvin’s account or whether certain insurance information was properly provided. And second, Colvin argues that Ark-La-Tex did not conclusively establish when the notes were sold. We need not consider these arguments because they were not raised in Colvin’s main brief, and because “arguments raised for the first time in a reply brief are waived.” *See Metro. Transit Auth. of Harris Cnty. v. Douglas*, 544 S.W.3d 486, 498 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).

Colvin has not presented any other arguments for why the trial court’s summary judgment should be reversed. We accordingly overrule her first issue.

DEUTSCHE BANK'S SPECIAL EXCEPTIONS AND MOTION TO DISMISS

Deutsche Bank filed its petition in intervention in June 2012. At that time, Colvin's live pleading was her second amended petition, which she had filed with the assistance of counsel. The only named defendant in that petition was Ark-La-Tex.

Colvin did not assert any affirmative claims against Deutsche Bank until her fifth amended petition, which she filed pro se in May 2016, after her counsel had been permitted to withdraw. In that petition, Colvin sought monetary damages against Ark-La-Tex, Deutsche Bank, and various other entities, which she collectively identified as the "Defendants." Deutsche Bank moved to dismiss the claims against it, in part on the basis of limitations, and in other part because the petition was "a rambling, nonsensical litany of conclusory allegations." The trial court never ruled on this motion, but according to Deutsche Bank, Colvin requested to amend and clarify her allegations through repleading.

In November 2016, and with the assistance of new counsel, Colvin filed her sixth amended petition, which was her live pleading at the time of the trial court's final judgment.

Deutsche Bank then filed a combined "Original Answer, Special Exceptions, and Motion to Strike and Dismiss." Deutsche Bank asserted three main grounds in support of its special exceptions. In the first ground, Deutsche Bank pointed out that Colvin had reiterated and repackaged claims from an earlier lawsuit between Colvin and the original servicer of her loans. Deutsche Bank specially excepted because Colvin had conflated the actions of Deutsche Bank with the actions of other defendants and non-parties, and she referred to them all interchangeably, sometimes with "and/or" language. Because of these alleged pleading defects, Deutsche Bank

argued that Colvin had failed to state a claim. And because Colvin had already been given an opportunity to correct these pleading defects, Deutsche Bank argued that dismissal was the appropriate remedy. In its second ground, Deutsche Bank argued that Colvin lacked standing, insofar as she had challenged Deutsche Bank's alleged noncompliance with a pooling and servicing agreement, to which she was not a party. Finally, in its third ground, Deutsche Bank specially excepted that, because all of Colvin's allegations focused on the events surrounding the foreclosure of her home in 2008, her claims must have accrued at least four years before her fifth amended petition, which would also mean that they were barred by the applicable two-year and four-year statutes of limitations.

The trial court granted Deutsche Bank's motion without stating its reasons. Colvin now challenges that ruling in her second issue on appeal.

In her main brief, Colvin organizes her analysis of this issue in three parts, but those parts do not track the grounds that were presented in Deutsche Bank's special exceptions. In the first part, Colvin argues that Deutsche Bank had a burden to prove its ownership of the note, which was never a dispositive point raised in the special exceptions. In the second part, Colvin argues that she had standing to pursue her claims against Deutsche Bank, even if she did not have standing to challenge any sort of noncompliance with a pooling and servicing agreement. And in the third part, Colvin argues that special exceptions are not the appropriate vehicle for establishing an affirmative defense like the statute of limitations. Missing from these parts is any challenge to Deutsche Bank's first ground that the petition should be dismissed for the independent reason that her sixth amended petition suffered from pleading deficiencies.

Colvin addresses the alleged pleading deficiencies in her reply brief, but as we have already stated, arguments raised for the first time in a reply brief are waived.

Colvin was required to challenge in her main brief every independent basis for the trial court's grant of Deutsche Bank's special exceptions. Because Colvin did not assign error to every independent basis made in support of the trial court's ruling, this court must accept the validity of the unchallenged independent ground and uphold the trial court's ruling. *See Britton v. Tex. Dep't of Criminal Justice*, 95 S.W.3d 676, 681 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (“The reasoning is that, if an independent ground fully supports the complained-of ruling or judgment, but the appellant assigns no error to that independent ground, then (1) we must accept the validity of that unchallenged independent ground . . . and thus (2) any error in the grounds challenged on appeal is harmless because the unchallenged independent ground fully supports the complained-of ruling or judgment.”). Accordingly, without considering whether Deutsche Bank's special exceptions were proper, we overrule Colvin's second issue.

COLVIN'S MOTION FOR SUMMARY JUDGMENT

In her appellate brief, Colvin asserts that she challenged one of Ark-La-Tex's affirmative defenses in a no-evidence motion for summary judgment, which the trial court denied. Colvin now challenges that ruling in her third issue on appeal, but she has not provided appropriate record citations to either the motion or the ruling. Instead, her record citations refer us to a traditional motion for summary judgment that she filed in 2015, and a ruling from 2012 on a completely different motion for summary judgment. This issue is inadequately briefed. *See Tex. R. App. P. 38.1(i)*.

Even if this issue had been adequately briefed, and assuming further that it were meritorious, Colvin cannot show any reversible error in the denial of her no-evidence motion for summary judgment because, as we stated in the discussion of her first issue, she presented no grounds for setting aside Ark-La-Tex's traditional summary judgment.

We overrule Colvin's third issue.

CONCLUSION

The trial court's judgment is affirmed.

/s/ Tracy Christopher
Chief Justice

Panel consists of Chief Justice Christopher and Justices Bourliot and Spain. (Spain, J., concurring).