Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00435-CV

Everett W. **GREGORY** Jr. and Marcia Gregory,
Appellants

v.

BANK OF AMERICA, N.A. and Jesse R. Mendoza,
Appellees

From the 37th Judicial District Court, Bexar County, Texas
Trial Court No. 2014 CI 05064
Honorable Cathy Stryker, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Karen Angelini, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: June 14, 2017

AFFIRMED IN PART, REVERSED AND REMANDED IN PART

Everett W. Gregory Jr. and Marcia Gregory appeal the trial court's summary judgment on their claims against appellees Bank of America N.A. and Jesse R. Mendoza. The Gregorys argue they raised a fact issue regarding each element of their cause of action for breach of contract against Bank of America and their related claims for a declaratory judgment, permanent injunction, and attorney's fees. The Gregorys do not challenge the dismissal of their cause of action under the Deceptive Trade Practices Act (DTPA) or their claims against Mendoza. We affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

In 1999, the Gregorys refinanced a house they owned in San Antonio. The Gregorys signed a deed of trust and a promissory note to NationsBank for the amount of $85,900. The note required the Gregorys to make payments on the first day of each month for fifteen years. The deed of trust provided how the payments received by NationsBank must be applied to interest, principal, and other amounts due. If the Gregorys defaulted by failing to timely pay in full each month, the note authorized NationsBank to notify the Gregorys of the default. If the Gregorys failed to pay the overdue amount by a certain date after their receipt of the notice, NationsBank could accelerate the note and demand payment of the entire balance. Bank of America is NationsBank's successor in interest and became the holder of the note in April 1999.

The Gregorys filed for bankruptcy in 2008, but continued to make payments to Bank of America through the bankruptcy trustee. After the Gregorys filed for bankruptcy, Bank of America stopped accepting the Gregorys' automated payments. Bank of America's records show Bank of America received funds from the Gregorys in various months, but Bank of America reversed the payments instead of applying the payments to the Gregorys' account. In fall 2012, the Gregorys started making payments to Bank of America over the phone, but Bank of America also reversed some of those payments and did not apply them to the Gregorys' account. The Gregorys continued making payments in 2013 and 2014 by cashier's checks drawn on the Gregorys' account at Chase Bank. Bank of America accepted the Gregorys' cashier's checks throughout 2013 and the first several months of 2014. Bank of America credited some of the Gregorys' payments in 2013, but reversed other payments.

In July 2013, Bank of America sent the Gregorys a notice stating the Gregorys were in default. The notice lists the payments allegedly missed from March 2011 to July 2013. The notice stated the Gregorys had the right to cure the default by paying Bank of America a total of

$38,555.20. The notice also stated that if the default was not cured "in the full amount" by August 20, 2013, "the mortgage payments **will be accelerated** with the full amount . . . becoming due and payable in full." The Gregorys attempted to tender payments, but Bank of America refused to accept the payments as curing the default because the amount paid was less than $38,555.20.

Bank of America requested that the bankruptcy court grant it relief from the automatic stay. After the request was granted, the Gregorys filed suit to enjoin Bank of America from foreclosing on the house. The trial court issued a preliminary injunction, finding there was a substantial probability that Bank of America would foreclose on the house "when there is no default sufficient to justify foreclosure." The Gregorys also sued Bank of America for breach of contract and violating the DTPA. The Gregorys sought damages, a declaratory judgment, a permanent injunction, and attorney's fees. The Gregorys named Jesse Mendoza, a Bank of America employee, as a defendant and alleged he defamed Marcia Gregory and was "verbally rough" with her, but Mendoza was never served.

Bank of America filed a traditional and no-evidence motion for summary judgment. Bank of America argued its evidence conclusively established it did not breach the deed of trust or the note. In support of its traditional ground, Bank of America relied on the loan documents, the default notice, Everett Gregory Jr.'s deposition, bankruptcy filings, and a "bankruptcy plan ledger." Although Bank of America also attached a business records affidavit to its motion, the affidavit does not explain the transaction codes contained in the bankruptcy plan ledger. Bank of America further argued the Gregorys had no evidence of any element of their cause of action for breach of contract. Bank of America's motion also challenged the Gregorys' cause of action under the DTPA, and requested summary judgment on the Gregorys' claims for a declaratory judgment, permanent injunction, and attorney's fees because the Gregorys did not have a valid, underlying cause of action to support the requested relief.

The Gregorys filed a response and produced an affidavit from Everett Gregory Jr., Bank of America's records showing the transaction history for the Gregorys' account, and copies of the fronts and backs of cashier's checks made payable to, and accepted and cashed by, Bank of America beginning in January 2013 through April 2014. The trial court granted Bank of America's motion and dismissed all of the Gregorys' claims. The Gregorys appeal.

STANDARD OF REVIEW

"We review a summary judgment de novo." *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556, 561 (Tex. App.—San Antonio 2000, pet. denied). To prevail on a traditional motion for summary judgment, the movant must show "there is no genuine issue as to any material fact and the [movant] is entitled to judgment as a matter of law." TEX. R. CIV. P. 166a(c); *accord Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). "When a party moves for a no-evidence summary judgment, the nonmovant must produce some evidence raising a genuine issue of material fact." *Romo v. Tex. Dep't of Transp.*, 48 S.W.3d 265, 269 (Tex. App.—San Antonio 2001, no pet.) (citing Tex. R. Civ. P. 166a(i)). The nonmovant does not have the burden to marshal its evidence, but it must produce some evidence that raises a fact issue on the challenged element. *See id.* We take as true all evidence favorable to the nonmovant, resolve all conflicts in the evidence in the non-movants' favor, and "indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Rhône-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999); *see City of San Antonio*, 47 S.W.3d at 561.

DTPA & CLAIMS AGAINST MENDOZA

The Gregorys do not argue the trial court erred by rendering summary judgment on their DTPA cause of action or on their claims against Mendoza. We must refrain from deciding cases on issues not raised by the parties. *See W. Steel Co. v. Altenburg*, 206 S.W.3d 121, 124 (Tex. 2006)

(per curiam). We therefore affirm the trial court's judgment as to the Gregorys' DTPA cause of action and their claims against Mendoza.

BREACH OF CONTRACT

Bank of America raised several grounds for summary judgment on the Gregorys' cause of action for breach of contract. Because the trial court did not specify the grounds for granting summary judgment, we must affirm if any grounds advanced in Bank of America's motion are meritorious. *See FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000). Bank of America argued in its summary judgment motion that its evidence conclusively established it did not breach the deed of trust or the note and the Gregorys have no evidence of any element of their cause of action for breach of contract. The elements of breach of contract are: "(1) a valid contract; (2) the plaintiff performed or tendered performance; (3) the defendant breached the contract; and (4) the plaintiff was damaged as a result of the breach." *Richter v. Wagner Oil Co.*, 90 S.W.3d 890, 898 (Tex. App.—San Antonio 2002, no pet.). The Gregorys argue they raised a fact issue as to each element of their breach of contract claim and established Bank of America is not entitled to judgment as a matter of law.

A. Valid Contract

The covenants in a deed of trust and a promissory note are contractual. *See Williams v. Durst's Adm'x*, 35 Tex. 421, 423 (1871); *Jim Maddox Props., LLC v. WEM Equity Capital Invs., Ltd.*, 446 S.W.3d 126, 132 (Tex. App.—Houston [1st Dist.] 2014, no pet.). The parties agreed to the covenants contained in the deed of trust and the promissory note in 2009, and the Gregorys allege they are suing Bank of America for breaching those agreements. Bank of America does not argue on appeal why the deed of trust or the note is not a valid contract. We hold Bank of America's no-evidence ground as to the "valid contract" element of the Gregorys' cause of action does not support the trial court's summary judgment.

B. Performance or Tendered Performance

A plaintiff alleging a breach of contract must show it performed or tendered performance under the contract. *Richter*, 90 S.W.3d at 898. "A tender is an unconditional offer by a debtor to pay another a sum not less in amount than that due on a specified debt." *Jensen v. Covington*, 234 S.W.3d 198, 206 (Tex. App.—Waco 2007, pet. denied). "Prevention of performance by one party excuses performance by the other party, both of conditions precedent to performance and of promise." *Dorsett v. Cross*, 106 S.W.3d 213, 217 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). "When the obligation of a party to a contract depends upon a certain condition's being performed, and the fulfillment of the condition is prevented by the act of the other party, the condition is considered fulfilled." *Id.*; *see Jensen*, 234 S.W.3d at 206 ("[A] formal tender is excused where the creditor has indicated he is unwilling to accept what is due in discharge of the debt.").

Bank of America did not challenge this element in its traditional motion for summary judgment or argue the evidence conclusively establishes the Gregorys failed to perform or tender performance. Instead, Bank of America asserted the Gregorys had no evidence showing they performed or tendered performance. Bank of America also argues the Gregorys did not perform because they missed several payments and failed to pay $38,555.20 to cure the default. The promissory note required the Gregorys to make monthly payments at a specified NationsBank location in San Antonio "or at a different place if required by the Note Holder." Bank of America became the note holder on April 1, 1999, when the Gregorys' first payment was due.

Everett Gregory Jr. swore in his affidavit there were arrearages on the note, but the arrearages were caused by Bank of America's breach of the deed of trust and the note. Everett further swore he made "automated payments" to Bank of America, but starting in early 2011, "Bank of America through their transactional errors or other mistake stopped taking my automated

payments." He also swore he always had sufficient funds for the automated payments and "was very adamant and diligent about [his] mortgage." Everett further swore Bank of America failed to apply payments he made.

It is reasonable to infer from Bank of America's acceptance of the Gregorys' automated payments that the parties arranged for the Gregorys to make automated payments to satisfy the Gregorys' payment obligations under the note. Taking the Gregorys' evidence as true, Bank of America failed to accept and apply the Gregorys' payments that were paid in accordance with the note. We hold the Gregorys produced some evidence showing they tendered performance by offering to pay Bank of America the full amounts due, but Bank of America refused to accept the Gregorys' payments and thereby prevented the Gregorys from performing. *See Jensen*, 234 S.W.3d at 206; *Dorsett*, 106 S.W.3d at 217.

Everett further swore in his affidavit that starting in late 2012, after Bank of America stopped accepting the automated payments, he made payments to Bank of America over the phone. The Gregorys produced copies of the fronts and backs of cashier's checks made payable to—and accepted and cashed by—Bank of America beginning in January 2013 through April 2014. This evidence shows the Gregorys performed or tendered performance under the deed of trust and the note during these months. Taking the Gregorys' evidence as true, and drawing all reasonable inferences in their favor, the Gregorys produced some evidence raising a genuine issue of material fact with regard to whether the Gregorys performed, tendered performance, or were excused from performing.

C. Breach

In its motion for summary judgment, Bank of America argued the terms of the note regarding the Gregorys' monthly payments impose no obligations on Bank of America. It also argued it was not required to accept the Gregorys' attempt to cure the default because the amount

the Gregorys tendered was less than the $38,555.20 amount stated in the default notice. On appeal, the Gregorys argue Bank of America breached the deed of trust and the note by failing to (1) accept and apply their payments; (2) comply with the requirements for accelerating the note; and (3) accept their attempt to cure the default. Bank of America argues the Gregorys did not raise the first two alleged breaches in their summary judgment response.

1. Sufficiency of the Gregorys' Summary Judgment Response

In the summary judgment context, we may consider only the issues expressly presented to the trial court in a written response as grounds for reversal. TEX. R. CIV. P. 166a(c); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 677-78 (Tex. 1979). The "Arguments and Authorities" section of the Gregorys' written response contains the following subsection:

C. The defendant breached the contract.

> 28. The affidavit of Everett W. Gregory Jr. and Marcia Gregory establishes that he was not given credit for many payments he made and that amounts that were not owed were charged in the Notice to Cure that billed Gregory. This was both a breach of their duties to properly apply payments and the[ir] duty to send a correct default amount in a notice to cure. See id at 3,4,5. Also see Ex A Enclosure A and PL Ex C which show vastly different amounts necessary to cure the debt or for that matter retire the debt through a loan. [Bank of America] also refused to give him annual accountings that were contractual duties. See id at 3,4,5.

Although using other words, the Gregorys expressly argued Bank of America breached its contractual obligations by failing to accept and apply their payments and follow the requirements for accelerating the note. We may therefore consider these issues as grounds for reversal. *See* TEX. R. CIV. P. 166a(c); *City of Houston*, 589 S.W.2d at 677-78.

2. Failure to Accept and Apply the Gregorys' Payments

The Gregorys argue Bank of America breached several provisions of the deed of trust and the note by failing to accept and apply their payments. Whether a defendant's conduct constitutes a breach of contract is a question of law for the court. *Schuhardt Consulting Profit Sharing Plan*

v. Double Knobs Mountain Ranch, Inc., 468 S.W.3d 557, 573-74 (Tex. App.—San Antonio 2014, pet. denied). We construe a contract to "give effect to the parties' intentions as expressed in the writing itself." *El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 805 (Tex. 2012). We consider the entire contract to harmonize and give effect to all the provisions so that none will be rendered meaningless. *Id.* Absent any indication that the parties intended contractual terms to have a technical or special meaning, we give the contract's terms their plain, ordinary, and generally accepted meanings. *See id.* at 808.

We begin by examining the contract's express language. *See id.* at 805-06. Paragraph 3 of the deed of trust provides:

> 3. **Application of Payments.** Unless applicable law provides otherwise, all payments received by Lender [for payment of principal, interest, taxes, insurance, late charges, and prepayments] shall be applied: first, to any prepayment charges due under the Note; second, to amounts payable [for taxes and insurance]; third, to interest due; fourth, to principal due; and last, to any late charges due under the Note.

Paragraph 3(A) of the note provides:

> **3. PAYMENTS**
>
> **(A) Time and Place of Payments**
>
> I will pay principal and interest by making payments every month.
>
> I will make my monthly payments on the 1st day of each month beginning on April 1, 1999. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. My monthly payments will be applied to interest before principal. If, on March 01, 2014, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "maturity date."
>
> I will make my monthly payments at [the NationsBank location] or at a different place if required by the Note Holder.

Bank of America argues these provisions impose obligations only on the Gregorys and suggest it was not required to accept the Gregorys' payments. We disagree. Although the plain language of the note's payment provisions expressly require the Gregorys to make payments, the Gregorys' tendered payments cannot be applied unless Bank of America accepts the payments.

Paragraph 3 of the deed of trust requires how "payments received by Lender" must be applied. Considering the entire deed of trust and the note, the parties intended that if the Gregorys made payments according to the terms of the deed of trust and the note, then Bank of America was required to accept those payments and apply them as per paragraph 3 of the deed of trust.

The Gregorys produced evidence showing Bank of America breached the deed of trust and the note by not accepting their payments and not applying those payments as per paragraph 3 of the deed of trust. *See Woods MFI, LLC v. PlainsCapital Bank*, No. 14-15-00655-CV, 2016 WL 6465872, at *8-10 (Tex. App.—Houston [14th Dist.] Nov. 1, 2016, pet. filed) (mem. op.) (holding lender's acceptance of auto-debit from borrower's account, followed by its unexplained failure to continue accepting auto-debits, raised a fact issue as to the lender's breach of contract).[1] Regarding Bank of America's traditional ground as to the breach element, we hold Bank of America did not conclusively establish it complied with the provisions of the deed of trust and the note. Regarding Bank of America's no-evidence ground, we hold the Gregorys produced some evidence raising a fact issue as to whether Bank of America breached provisions of the deed of trust and the note by not accepting and properly applying the Gregorys' payments.

3. Failure to Comply with Acceleration Requirements

"The accelerated maturity of a note, which is initially contemplated to extend over a period of months or years, is an extremely harsh remedy." *Allen Sales & Servicenter, Inc. v. Ryan*, 525 S.W.2d 863, 866 (Tex. 1975). Because acceleration is such a harsh remedy, we strictly construe acceleration provisions against acceleration. *Schuhardt Consulting*, 468 S.W.3d at 569; *Burns v.*

[1] The *Woods MFI* court held that depositing money into an account "*without [the lender] having any authorization to debit the account*" did not conclusively establish a tender for purposes of the plaintiffs' cross-motion for summary judgment. *See* 2016 WL 6465872, at *7. However, the court held the evidence raised an inference as to the existence of auto-debit arrangement, which supported the borrower-guarantor's breach of contract claim against the lender. *See id.* at *8-10.

Stanton, 286 S.W.3d 657, 661 (Tex. App.—Texarkana 2009, pet. denied). Furthermore, a notice's failure to strictly comply with the acceleration requirements in a deed of trust may support a cause of action for breach of contract. *See Sauceda v. GMAC Mortg. Corp.*, 268 S.W.3d 135, 140 (Tex. App.—Corpus Christi 2008, no pet.) (reversing summary judgment when lender's notice failed to comply with all requirements of an acceleration clause nearly identical to the one in this case). Paragraph 21 of the deed of trust contains requirements for accelerating the note:

> NON-UNIFORM COVENANTS: Borrower and lender further covenant and agree as follows:
>
> **21. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under paragraph 17 [relating to the transfer of the property] unless applicable law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice will result in acceleration of the sums secured by this Security Instrument and sale of the Property**. . . .

Paragraph 6 of the note provides:

> **6. BORROWER'S FAILURE TO PAY AS REQUIRED**
>
> **(A) Late Charge for Overdue Payments**
>
> If the Note Holder has not received the full amount of any monthly payment by the end of fifteen (15) calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 4.00% of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.
>
> **(B) Default**
>
> If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.
>
> **(C) Notice of Default**
>
> If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is delivered or mailed to me.

In the trial court, Bank of America argued it complied with the deed of trust's and the note's acceleration provisions because it sent the Gregorys a notice listing all of the months the Gregorys failed to make payments and specified the default was $38,555.20.

Paragraph 21 of the deed of trust requires that "prior to acceleration," Bank of America "shall give notice" to the Gregorys and the notice "shall specify: (a) the default; [and] (b) the action required to cure the default." The note provides a default occurs if the Gregorys "do not pay the full amount of each monthly payment on the date it is due." Under the plain meaning of this provision, a separate default occurs in each and every month the Gregorys do not pay the full amount of each monthly payment. Furthermore, the notice provisions use the terms "specify," "the," and "required" to refer to a particular default and a particular action that *must* be taken to cure the particular default. *See In re W.B.B.*, No. 05-16-00454-CV, 2017 WL 511208, at *5 (Tex. App.—Dallas Feb. 8, 2017, no. pet.) (mem. op.) (distinguishing "a," which refers to an unspecified subject, from "the," which is used to refer to particular subject). We construe paragraph 21 as requiring the notice to correctly identify (1) the particular month or months the Gregorys did not make a payment of the full amount due; and (2) the particular amount the Gregorys owe and must pay to cure the default. If the notice specifies an inaccurate default or that the Gregorys are required to pay more than the actual amount owed, then the notice has not specified "the default" or specified "the action required to cure the default." *See El Paso Field Servs.*, 389 S.W.3d at 805.

Bank of America's notice lists twenty nine months (from March 2011 to July 2013) for which the Gregorys supposedly did not make payments. Bank of America also relies on the bankruptcy plan ledger and the notice of default to establish the Gregorys failed to make payments for those months. The Gregorys produced evidence that Bank of America breached provisions of the deed of trust and the note by not accepting and applying the Gregorys' payments. The Gregorys also produced evidence showing they made payments over the phone in late 2012, and Bank of

America accepted those payments. They further produced copies of cashier's checks showing they made payments to Bank of America—and that Bank of America accepted those checks—from January 2013 through July 2013 and thereafter.

If the Gregorys' summary judgment evidence is true, then the bankruptcy plan ledger does not correctly identify the months for which the Gregorys did not pay and the notice of default fails to correctly identify the specific default and action required to cure the default. Additionally, when viewed in a light most favorable to the Gregorys, the ledger appears to confirm Bank of America did not accept and apply the Gregorys' payments as the deed of trust requires. The ledger contains several entries appearing to show the Gregorys made numerous payments that Bank of America received, but Bank of America reversed the payments instead of applying them to the Gregorys' account. The Gregorys' payments appear to be coded on the ledger as "Funds Received," but several of those payments were reversed. The bankruptcy plan ledger's code for these reversed payments is "MISC REVERSAL," "PAYMENT REVERSAL," or "FUND REVERSAL." The reversals total over $28,000 of the payments received. Bank of America's evidence does not explain the transaction codes and entries on the bankruptcy plan ledger or explain why Bank of America reversed over $28,000 of the Gregorys' payments. Finally, the bankruptcy plan ledger states, "This ledger is for bankruptcy purposes only," and notes Bank of America keeps a separate record "that tracks payments according to the terms of the loan documents."

Taking the Gregorys' evidence as true, and drawing all reasonable inferences in their favor, Bank of America's notice does not correctly identify (1) the particular months the Gregorys failed to make payments (or failed to tender performance), and (2) the particular amount the Gregorys owe under the note and must pay to cure the default. Consequently, the Gregorys raised a fact issue with regard to whether Bank of America breached the deed of trust because the notice of default did not satisfy the requirements for accelerating the note. *See Sauceda*, 268 S.W.3d at 140.

4. Conclusion as to the Breach Element

We conclude the Gregorys raised a fact issue regarding Bank of America's breach of the deed of trust and the note by failing to accept and properly apply the Gregorys' payments. We further conclude the Gregorys raised a fact issue regarding Bank of America's breach the deed of trust because the default notice failed to correctly identify the default and the action required to cure the default.[2] Thus, Bank of America's traditional and no-evidence grounds regarding the breach element do not support the trial court's summary judgment.

D. Damages

A plaintiff suing for breach of contract must show damages or a loss resulting from the defendant's breach. *Richter*, 90 S.W.3d at 898. A plaintiff may sue for breach of contract if the plaintiff suffers a loss of credit reputation, is denied a loan, or is charged a higher interest rate as a result of the defendant's breach. *See St. Paul Surplus Lines Ins. Co. v. Dal-Worth Tank Co.*, 974 S.W.2d 51, 53 (Tex. 1998) (per curiam) (citing LAWRENCE A. CUNNINGHAM, 5 CORBIN ON CONTRACTS § 1007 (Supp. 1998)). Everett's affidavit lists numerous ways the Gregorys have suffered loss and been injured as a result of Bank of America breaching the deed of trust and the note, including their loss of credit reputation, being denied a loan from Chase Bank, and being charged at higher interest rates than they would otherwise be charged. Bank of America does not argue on appeal why the Gregorys failed to raise a fact issue regarding this element. We hold Bank of America's no-evidence ground regarding the element of damages does not support the trial court's summary judgment.

[2] Because we hold there is a fact issue as to Bank of America's breach, we need not address whether Bank of America further breached the deed of trust or the note by refusing to accept the Gregorys' attempt to cure. *See* TEX. R. APP. P. 47.1. According to Bank of America's brief and the default notice, Bank of America refused to accept the Gregorys' attempt to cure the default because the amount the Gregorys tendered was less than $38,555.20. There is a fact issue as to whether this is the actual amount owed under the note, and it is reasonable to infer that Bank of America would not have accepted any amount less than $38,555.20, even if the amount tendered was the actual amount owed under the note.

E. Conclusion as to Breach of Contract

Bank of America did not conclusively establish it complied with provisions of the deed of trust and the note regarding the application of the Gregorys' payments and acceleration. Furthermore, the Gregorys produced evidence raising a genuine issue of material fact as to all elements of their cause of action for breach of contract. We therefore hold the trial court erred by rendering summary judgment on the Gregorys' cause of action for breach of contract.

THE GREGORYS' CLAIMS FOR A DECLARATORY JUDGMENT, PERMANENT INJUNCTION & ATTORNEY'S FEES

Bank of America moved for summary judgment on the Gregorys' claims for a declaratory judgment, permanent injunction, and attorney's fees. Bank of America argued these claims fail as a matter of law because they are all based on the Gregorys' causes of action for breach of contract and violations of the DTPA, which Bank of America argued failed as a matter of law. The Gregorys contend they are entitled to a remand as to these claims because they raised a fact issue regarding all elements of their cause of action for breach of contract. Because we hold the trial court erred by rendering summary judgment on the Gregorys' cause of action for breach of contract, the Gregorys' claims for a declaratory judgment, permanent injunction, and attorney's fees do not fail as a matter of law.

Regarding the Gregorys' declaratory judgment claim, Bank of America further argued in its summary judgment motion the Gregorys had no evidence of a justiciable controversy to be resolved by the declaration sought. A declaratory judgment is appropriate only if (1) a justiciable controversy exists as to the rights and status of the parties; and (2) the controversy will be resolved by the declaration sought. *See Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995). The Gregorys produced evidence showing Bank of America is asserting they owe $38,555.20. They also produced evidence showing they owe substantially less than $38,555.20. According to

their live pleading, the Gregorys seek "a declaratory judgment as to a tabulation of the amount owed." The Gregorys produced some evidence of a justiciable controversy to be resolved by the declaration sought. *See id.* Thus, Bank of America's no-evidence grounds do not support the trial court's summary judgment as to the Gregorys' request for a declaratory judgment. We therefore hold the trial court erred by rendering summary judgment on the Gregorys' claims for a declaratory judgment, permanent injunction, and attorney's fees.

CONCLUSION

We affirm the trial court's judgment as to the Gregorys' claims against Mendoza and their DTPA cause of action. We reverse the remainder of the trial court's judgment and remand for further proceedings.

Luz Elena D. Chapa, Justice