Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00048-CV

Eduardo **JACAMAN**,
Appellant

v.

NATIONSTAR MORTGAGE, LLC,
Appellee

From the 49th Judicial District Court, Webb County, Texas
Trial Court No. 2014CVF000650-D1
Honorable Jose A. Lopez, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Marialyn Barnard, Justice
Rebeca C. Martinez, Justice
Irene Rios, Justice

Delivered and Filed: February 14, 2018

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

Eduardo Jacaman appeals the trial court's orders granting Nationstar Mortgage, LLC's ("Nationstar") no-evidence and traditional motions for summary judgment. In eight issues,[1]

[1] The numbering of the issues listed in the "Issues Presented for Review" section of Jacaman's brief differs from the numbering in the body of the brief. We refer to the issues as numbered in the "Issues Presented for Review" section.

In the "Issues Presented for Review" section of his brief, Jacaman lists eight issues. The eighth issue complains the trial court "repeatedly abused its discretion when it denied [Jacaman's] motion for new trial." However, Jacaman did not include a discussion of this issue in his brief. By failing to properly brief the issue presented, Jacaman presents nothing for our review on appeal because we cannot speculate as to the arguments that he could have brought or attempt to formulate an argument on his behalf. *See Stephens & Johnson Operting Co. v. Schroeder*, No. 04-14-00167-CV, 2015 WL 4760029, at *6 (Tex. App.—San Antonio Aug. 12, 2015, pet. denied); *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 839 (Tex. App.—Dallas 2014, no pet.) ("Issues raised on appeal, but not briefed, are waived."); TEX. R. APP. P. 38.1(i). Accordingly, Jacaman has waived appellate review of this issue.

Jacaman contends the trial court lacked jurisdiction to grant summary judgment and that he raised a genuine issue of material fact regarding his claims. We affirm the trial court's judgment as it relates to Jacaman's claims for wrongful foreclosure, promissory estoppel, negligence, and unjust enrichment and reverse and remand Jacaman's breach of contract claim for further proceedings.

BACKGROUND

On July 26, 2004, Jacaman obtained a loan of $485,300 from International Bank of Commerce ("IBC") that was secured by a lien on a parcel of real property. The terms of the loan were set forth in a note and deed of trust. After several transfers, the note was acquired by U.S. Bank, National Association, as Trustee for certificateholders of Bear Stearns Asset Backed Securities LLC, Asset-Backed Certificates, Series 2004-AC6 ("U.S. Bank"), and the deed of trust was assigned to Nationstar. In July 2013, Nationstar sent Jacaman notice that it was the newly-appointed servicer of the loan. Thereafter, Jacaman defaulted on the loan. On January 17, 2014, Nationstar's attorneys sent Jacaman notice that Nationstar intended to foreclose on the property due to Jacaman's default on the loan. On February 9, 2014, Nationstar sent Jacaman notice of its intention to foreclose on the property via a substitute trustee sale. On March 4, 2014, Nationstar sold the property at a non-judicial foreclosure.

On April 7, 2014, Jacaman sued Nationstar for wrongful foreclosure, alleging Nationstar failed to provide proper notice of his default, acceleration of the debt, and the foreclosure sale. On November 11, 2015, Jacaman filed an amended petition, adding several causes of action, including breach of contract, promissory estoppel, and negligence, all based on Nationstar's alleged failure to provide proper notice of default, acceleration, and foreclosure. Jacaman also added a claim of unjust enrichment, alleging the property's purchase price at foreclosure was inadequate. Nationstar filed a hybrid amended no-evidence motion for summary judgment and traditional motion for

summary judgment. On November 1, 2016, the trial court signed orders separately granting Nationstar's requests for traditional and no-evidence summary judgment. Jacaman appeals.

TRIAL COURT'S JURISDICTION

In his first issue, Jacaman contends the trial court lacked jurisdiction to grant Nationstar's motions for summary judgment because Nationstar did not have standing to bring its claims. However, the record shows Nationstar did not bring any claims against Jacaman. Rather, Nationstar filed summary judgment motions in response to the claims Jacaman brought against Nationstar. A plaintiff cannot file claims against a defendant and then complain on appeal that the defendant lacked standing to file a motion for summary judgment. *See* TEX. R. CIV. P. 166a(b) ("A party against whom a claim … is asserted … may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."). Rather, standing is a prerequisite for a *plaintiff* to bring a claim against another. *See Heckman v. Williamson Cty.*, 369 S.W.3d 137, 150 (Tex. 2012).

To the extent Jacaman attempts to argue Nationstar did not have the right to foreclose on the property, Jacaman waived this argument by not including it in his response to Nationstar's motions for summary judgment. *Unifund CCR Partners v. Weaver*, 262 S.W.3d 796, 797 (Tex. 2008) ("[A] party who fails to expressly present to the trial court any written response in opposition to a motion for summary judgment waives the right to raise any arguments or issues post-judgment."). We overrule Jacaman's first issue.

In his fourth issue, Jacaman complains the trial court violated his due process rights by refusing to allow him to present evidence of the court's lack of jurisdiction. During the motion for new trial hearing, Jacaman attempted to call Nationstar's attorney to testify. Jacaman indicated he wanted to question Nationstar's attorney regarding Nationstar's legal right to foreclose in an

attempt to prove the trial court lacked jurisdiction to rule on Nationstar's motion for summary judgment. The trial court denied Jacaman's request.

We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *State v. Bristol Hotel Asset Co.*, 65 S.W.3d 638, 647 (Tex. 2001). "A trial court abuses its discretion when it acts without regard to any guiding rules or principles." *Id.* When deciding whether it has jurisdiction, a "court should … confine itself to the evidence relevant to the jurisdictional issue." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). Nationstar had the right under the Texas Rules of Civil Procedure to move for summary judgment. *See* TEX. R. CIV. P. 166a(b), (i). Whether Nationstar had the legal right to foreclose is irrelevant to whether the trial court had jurisdiction to grant Nationstar's summary judgment motions. The trial court did not abuse its discretion by denying Jacaman's request to call opposing counsel to testify because the trial court clearly had jurisdiction to rule on a summary judgment motion and whether or not Nationstar's attorney testified as to foreclosure was irrelevant. We overrule Jacaman's fourth issue.

NO-EVIDENCE SUMMARY JUDGMENT

In his second, fifth, and seventh issues, Jacaman argues the trial court erred by granting Nationstar's no-evidence motion for summary judgment.

Standard of Review

We review a summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). To prevail on a motion for summary judgment, the movant has the burden of showing that there is no genuine issue of material fact and that judgment should be granted as a matter of law. *Shah v. Moss*, 67 S.W.3d 836, 842 (Tex. 2001).

When reviewing a no-evidence summary judgment, we examine the entire record in the light most favorable to the nonmovant, indulging in every reasonable inference and resolving any

doubts against the movant. *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006). If the nonmovant brings forward more than a scintilla of probative evidence that raises a genuine issue of material fact, then a no-evidence summary judgment is not proper. *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009); *see* TEX. R. CIV. P. 166a(i). "A genuine issue of material fact exists if more than a scintilla of evidence establishing the existence of the challenged element is produced." *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). "[M]ore than a scintilla of evidence exists if the evidence 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.'" *Id*. at 601 (quoting *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)).

If a party moves for both traditional and no-evidence summary judgment, we first review the trial court's judgment under the standards for a no-evidence summary judgment. *Id.* at 600. If the nonmovant failed to produce more than a scintilla of evidence under that burden, then there is no need to analyze whether the movant's summary judgment evidence proof satisfied the traditional summary judgment standard. *Id.*

Burden of Proof for No-Evidence Summary Judgment

In his fifth issue, Jacaman contends the trial court erred by granting a no-evidence summary judgment regarding issues on which Nationstar had the burden of proof. As the respondent to a no-evidence summary judgment motion, Jacaman had the burden of proof. *See* TEX. R. CIV. P. 166a(i). A proper no-evidence motion for summary judgment must state that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial and specify the elements as to which there is no evidence. *Id.* The burden then shifts to the nonmovant to produce evidence raising a genuine issue of material fact. *Id.*; *Gonzales v. Shing Wai Brass & Metal Wares Factory, Ltd.*, 190 S.W.3d 742, 745 (Tex. App.—San Antonio 2005, no pet.). Nationstar's no-evidence motion for summary judgment listed the

elements of Jacaman's causes of action and specified the elements as to which there was no evidence. Thus, Nationstar filed a proper no-evidence summary judgment motion. The burden then shifted to Jacaman to produce evidence raising a genuine issue of material fact. Accordingly, Nationstar followed the rules of civil procedure and did not have the burden of proof as complained of by Jacaman. We overrule Jacaman's fifth issue.

Jacaman's Summary Judgment Evidence

In his second and seventh issues, Jacaman argues the trial court erred by granting Nationstar's no-evidence motion for summary judgment because he raised genuine issues of material fact regarding his claims. In Nationstar's no-evidence motion for summary judgment, Nationstar asserted Jacaman could produce no evidence as to at least one element for each of Jacaman's claims: breach of contract, promissory estoppel, wrongful foreclosure, negligence, and unjust enrichment.

As summary judgment evidence, Jacaman presented two affidavits, each sworn by him. In the first affidavit, Jacaman attested he contracted with IBC for a loan, that he was later notified that Nationstar would be collecting his mortgage payments, and that on January 17, 2014, Nationstar notified him that the amount owed on the loan had increased. Jacaman further attested his business interests suffered a downturn in recent years, that he made good-faith efforts to renegotiate the loan, and that Nationstar ultimately foreclosed on the property. Jacaman further attested that when his sister called Nationstar about the loan on March 10, 2014, Nationstar told her it was too late to pay off the loan.

In the second affidavit, Jacaman attested the loan's creditors often accepted his late payments, which led him to believe Nationstar would not foreclose on the property without prior notification that it would no longer accept late payments, and that neither Nationstar nor its

predecessors ever notified him that they would no longer accept late payments. Jacaman further attested the following:

> [Nationstar] did not give me proper notice of my default, the action required to cure the default, a date, by which the default had to be cured, and that failure to cure the default on or before the date specified in the notice would result in acceleration of the sums secured by the security agreement and sale of the property.

In addition to the two affidavits, Jacaman presented as summary judgment evidence: the Notice of Servicing Transfer, dated July 12, 2013; two letters from Nationstar's attorneys, each dated January 17, 2014, informing Jacaman that Nationstar had referred the loan for foreclosure because of Jacaman's default; an online magazine article describing Nationstar's alleged bad reputation; and the deed of trust signed by Jacaman as part of his loan agreement. Covenant 22 of the deed of trust ("Covenant 22") required that, in the event Jacaman breached the loan agreement, Nationstar would provide Jacaman notice of his default prior to acceleration of the outstanding debt. Covenant 22 also required that, in the event Nationstar invoked its right to foreclose on the property, it would provide Jacaman notice of the foreclosure proceedings as required by law. Thus, Covenant 22 established two separate notice requirements in the event Jacaman defaulted on the loan and Nationstar elected to foreclose on the property: notice of default and notice of foreclosure.

Jacaman's Claims

Breach of Contract

"The four elements of a breach of contract claim are: (1) the existence of a valid contract; (2) performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff resulting from that breach." *Velvet Snout, LLC v. Sharp*, 441 S.W.3d 448, 451 (Tex. App.—El Paso 2014, no pet.). The deed of trust was a contract between Jacaman and Nationstar. Jacaman attested in his second affidavit the loan creditors, by accepting his late payments, led him

to believe he could make late payments on the loan, and that neither Nationstar nor its predecessors ever notified him they would no longer accept late payments on the loan.[2]

Covenant 22's requirement that Nationstar provide Jacaman notice of default read in part as follows:

> Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument … 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.

In his second affidavit, Jacaman attested he did not receive proper notice of the information pertaining to his default as required by Covenant 22, specifically, that he was in default, the action required to cure the default, the date by which the default must be cured, and that failure to cure the default on or before the given date would result in the sale of the property. Thus, Jacaman presented summary judgment evidence that Nationstar breached the deed of trust by failing to provide the notice of default required by Covenant 22. It is undisputed that Nationstar foreclosed on and sold Jacaman's property. Moreover, the January 17, 2014 letters in which Nationstar informed Jacaman it had referred the loan for foreclosure because of Jacaman's default did not include any of the information Covenant 22 required to be contained in the notice of default. Although Nationstar's summary judgment evidence included an affidavit attesting Nationstar sent proper notice prior to acceleration and that "all notices" were served on Jacaman at his address,

[2] The fact that Jacaman was in default on the loan does not preclude him from asserting a breach of contract claim against Nationstar for failing to provide notice as required by Covenant 22. A mortgage lender may have postdefault contract obligations that create a cause of action despite the borrower's default. *See Gatling v. CitiMortgage, Inc*., No. CIV.A. H-11-2879, 2013 WL 1625126, at *6 (S.D. Tex. Apr. 15, 2013); *Franklin v. BAC Home Loans Serv., L.P.*, No. 3:10–cv1174–M, 2011 WL 248445, at *3 (N.D. Tex. Jan. 26, 2011) ("It is illogical for the Court to conclude that Plaintiff cannot enforce BAC's obligations, assumed to be contractual which arise after Plaintiff's default merely because Plaintiff is in default."); *Sauceda v. GMAC Mortg. Corp.*, 268 S.W.3d 135, 140 (Tex. App.—Corpus Christi 2008, no pet.).

the record contains no indication what the notices contained or whether Jacaman received the notice of default as required under Covenant 22.

Therefore, we conclude the attestations contained in Jacaman's second affidavit presented more than a scintilla of evidence raising a genuine issue of material fact regarding his breach of contract claim against Nationstar. *See Sauceda v. GMAC Mortg. Corp.*, 268 S.W.3d 135, 140 (Tex. App.—Corpus Christi 2008, no pet.) (holding mortgagor had a valid breach of contract claim against mortgage servicer for failing to provide notices required by deed of trust before mortgage servicer foreclosed on property).

Promissory Estoppel

As an alternative theory of liability, Jacaman alleged Nationstar was liable under promissory estoppel. In its no-evidence summary judgment motion, Nationstar alleged Jacaman could not produce evidence relating to any of the elements of promissory estoppel and that promissory estoppel was unavailable as a cause of action in this case.

"The elements of promissory estoppel include: (1) a promise; (2) foreseeability of reliance by the promisor; and (3) substantial reliance by the promisee to his detriment." *Richter v. Wagner Oil Co.*, 90 S.W.3d 890, 899 (Tex. App.—San Antonio 2002, no pet.). However, promissory estoppel is not applicable where the alleged promise was covered by a valid contract between the parties. *Id.* Because Jacaman's promissory estoppel claim is based on Nationstar's violation of Covenant 22 of the deed of trust, promissory estoppel is not applicable in this case.

Wrongful Foreclosure

"The elements of a wrongful foreclosure claim are: (1) a defect in the foreclosure sale proceedings; (2) a grossly inadequate selling price; and (3) a causal connection between the defect and the grossly inadequate selling price." *Sauceda*, 268 S.W.3d at 139. In its no-evidence summary judgment motion, Nationstar alleged Jacaman could not produce evidence relating to any of the

foregoing elements. Jacaman presented no evidence Nationstar sold the property for a grossly inadequate price, or that any defect in the foreclosure proceedings caused a grossly inadequate selling price. Accordingly, we conclude Jacaman failed to present evidence raising a genuine issue of material fact regarding his claim of wrongful foreclosure.

Negligence

To establish a negligence cause of action, a party must show (1) the existence of a legal duty, (2) breach of that duty, and (3) damages proximately resulting from the breach. *UMLIC VP LLC v. T & M Sales & Envtl. Sys., Inc.*, 176 S.W.3d 595, 611 (Tex. App.—Corpus Christi 2005, pet. denied). Jacaman alleged Nationstar owed him both a contractual and statutory duty to provide notice of foreclosure and that Nationstar breached this duty by failing to provide notice of foreclosure. Jacaman also appears to allege Nationstar acted negligently by failing to provide notice of default and acceleration as required by the deed of trust. Nationstar asserted in its no-evidence motion for summary judgment that Jacaman could not produce any evidence that it breached either its contractual or statutory duties or that Jacaman suffered any damages as a result of Nationstar's alleged breach.

The Texas Property Code requires written notice of a foreclosure sale to be served by certified mail on each debtor obligated on the debt at least 21 days prior to the sale. *See* TEX. PROP. CODE ANN. § 51.002 (West 2014). Covenant 22's notice of foreclosure requirement likewise instructed that Nationstar provide Jacaman notice of the time, place, and terms of the sale in the manner prescribed by law. However, Jacaman did not present any summary judgment evidence that he did not receive notice regarding the foreclosure proceedings. Although Jacaman alleged in his amended petition that Nationstar failed to provide notice of the foreclosure sale, pleadings are not competent summary judgment evidence. *See Nebgen v. Minnesota Min. & Mfg. Co.*, 898 S.W.2d 363, 366 (Tex. App.—San Antonio 1995, writ denied). Moreover, although Jacaman

attested in his second affidavit he did not receive the required notice of default, neither of Jacaman's affidavits contain attestations that he did not receive the required notice of foreclosure.

To the extent Jacaman's negligence claim relates to Nationstar's alleged failure to provide notice of default and acceleration as required by the deed of trust, that claim is precluded by the economic loss rule. Under the economic loss rule, as applicable to this case, a party may not recover in tort for purely economic losses suffered to the subject matter of a contract. *James J. Flanagan Shipping Corp. v. Del Monte Fresh Produce N.A., Inc.*, 403 S.W.3d 360, 365 (Tex. App.—Houston [1st Dist.] 2013, no pet.). In determining whether the economic loss rule applies, we must consider "both the source of the defendant's duty to act (whether it arose solely out of the contract or from some common-law duty) and the nature of the remedy sought by the plaintiff." *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 45 (Tex. 1998) (quoting *Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12, 12 (Tex. 1996)). We look at the substance of the cause of action and not simply the manner in which it was pleaded to determine the type of action that is brought. *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 617–18 (Tex. 1986). "The nature of the injury most often determines which duty or duties are breached. When the injury is only the economic loss to the subject of a contract itself, the action sounds in contract alone." *Id.* at 618. In some circumstances, a party's actions may breach duties simultaneously in contract and in tort. *See id.* To maintain a separate tort action, the plaintiff must show that he has "suffered an injury that is distinct, separate, and independent from the economic losses recoverable under a breach of contract claim." *Sterling Chems., Inc. v. Texaco Inc.*, 259 S.W.3d 793, 797 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

In this case, Jacaman's alleged injury is that Nationstar's failure to provide proper notice of his default and the debt's acceleration as required by the deed of trust resulted in foreclosure on his property. As damages, Jacaman claims he is entitled to the difference between the price at

which the property was sold at foreclosure and the outstanding balance of the loan. Thus, Jacaman's alleged injury is an economic loss relating to the subject matter of the contract. We also note Jacaman pleaded negligence as an "alternative" cause of action. We have already determined Jacaman has a valid breach of contract claim based on Nationstar's failure to provide proper notice of his default as required by Covenant 22. Accordingly, we conclude Jacaman's negligence claim as it relates to Nationstar's failure to provide proper notice of default and acceleration is merely a recast of his claim for economic loss for breach of contract, and is therefore precluded by the economic loss rule. *See Bingham v. Nationstar Mortg. LLC*, No. 4:14-CV-2413, 2015 WL 12532480, at *5 (S.D. Tex. Oct. 9, 2015) (holding economic loss rule barred plaintiff's negligence claim where claim was based on Nationstar's failure to comply with notice provisions in the deed of trust); *UMLIC VP LLC*, 176 S.W.3d at 615 (holding economic loss rule precluded a negligence claim against mortgage servicer where source of alleged duty was the deed of trust).

Unjust Enrichment

In his amended petition, Jacaman alleged that, in the alternative, he is entitled to recover under the theory of unjust enrichment. Jacaman further alleged that to the extent Nationstar was unjustly enriched due to the inadequacy of the purchase price, he is entitled to recovery. Nationstar asserted in its no-evidence summary judgment motion that Jacaman could produce no evidence Nationstar received a benefit as a result of unjust enrichment.

Unjust enrichment occurs when a person has wrongfully secured a benefit or has passively received one which it would be unconscionable to retain. *Eun Bok Lee v. Ho Chang Lee*, 411 S.W.3d 95, 111 (Tex. App.—Houston [1st Dist.] 2013, no pet.). A person is unjustly enriched when he obtains a benefit from another by fraud, duress, or the taking of an undue advantage. *Id.* Jacaman did not present any summary judgment evidence that Nationstar sold the property for an inadequate price, nor does he explain how selling the property at an inadequate price would

unjustly enrich Nationstar. Moreover, to the extent Jacaman's unjust enrichment claim is based on Nationstar's failure to comply with the deed of trust, the equitable doctrine of unjust enrichment is not an available remedy. *See id.* ("[U]njust enrichment is unavailable when a valid, express contract governing the subject matter of the dispute exists."). Accordingly, we conclude Jacaman failed to present evidence raising a genuine issue of material fact regarding his claim for unjust enrichment.

For the foregoing reasons, we sustain Jacaman's second and seventh issues as they relate to his breach of contract claim, and overrule those issues as they relate to his claims for promissory estoppel, wrongful foreclosure, negligence, and unjust enrichment.

TRADITIONAL SUMMARY JUDGMENT

In his third and sixth issues, Jacaman contends the trial court erred by granting Nationstar's traditional motion for summary judgment. Because we have already found Jacaman failed to produce more than a scintilla of evidence raising a genuine issue of material fact regarding his claims for wrongful foreclosure, promissory estoppel, negligence, and unjust enrichment, we need not consider Jacaman's argument the trial court erred by granting Nationstar's traditional summary judgment motion regarding those claims. *See Ford Motor Co.*, 135 S.W.3d at 600; *Haven Chapel United Methodist Church v. Leebron*, 496 S.W.3d 893, 903 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

However, because Jacaman raised a genuine issue of material fact sufficient to defeat Nationstar's no-evidence motion for summary judgment regarding his breach of contract claim, we must address Nationstar's traditional motion for summary judgment regarding that claim.

Standard of Review

We review the trial court's summary judgment de novo. *Merriman*, 407 S.W.3d at 248. In a traditional motion for summary judgment, summary judgment is proper when there are no

disputed issues of material fact and the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a. When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Katy Venture, Ltd. v. Cremona Bistro Corp.*, 469 S.W.3d 160, 163 (Tex. 2015).

A movant who conclusively negates at least one of the essential elements of a cause of action is entitled to summary judgment. *Frost Nat. Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010). Once the movant establishes its right to summary judgment as a matter of law, the burden shifts to the nonmovant to present evidence raising a fact issue to defeat the motion for summary judgment. *Briggs v. Toyota Mfg. of Texas*, 337 S.W.3d 275, 282 (Tex. App.—San Antonio 2010, no pet.).

Discussion

In his third issue, Jacaman contends Nationstar's summary judgment evidence did not prove Nationstar was entitled to summary judgment as a matter of law. In its traditional motion for summary judgment, Nationstar argued it fully complied with the deed of trust. As summary judgment evidence, Nationstar presented the business records affidavit of A.J. Loll, the Vice President of Nationstar, in which Loll attested Nationstar maintained in its records (1) the deed of trust; (2) the promissory note signed by Jacaman; (3) the Notice of Servicing Transfer, dated July 12, 2013; (4) two letters from Nationstar's attorneys, dated January 17, 2014, informing that Nationstar had referred the loan for foreclosure because of Jacaman's default; (5) a Declaration of Mailing, in which an agent of Nationstar's attorneys declares that, pursuant to 15 U.S.C. § 1692g(a),[3] he personally mailed a Notice of Debt to Jacaman's address on January 17, 2014; and

[3] 15 U.S.C. § 1692g(a) relates to notice requirements debt collectors must comply with under the Federal Debt Collection Practices Act. The notice requirements under 15 U.S.C. § 1692g(a) are distinct from the notice requirements under the deed of trust in this case.

(6) a letter, dated February 9, 2014, in which Nationstar stated its intent to foreclosure on the property on March 4, 2014. Nationstar also presented the substitute trustee's deed from the foreclosure sale and the affidavit of Karl Terwilliger, an employee of the law firm representing Nationstar, in which Terwilliger attested that "to the best of [his] knowledge and belief, proper notice was sent prior to acceleration of indebtedness. All obligations duties [sic] of the holder of the debt were performed in the manner required by law and all notices were served on the Debtor at the Debtor's last known address as shown by the records of the holder of the debt."

None of Nationstar's summary judgment evidence conclusively negates any element of Jacaman's claim Nationstar breached the deed of trust by failing to provide notice of Jacaman's default as required by Covenant 22. Although the January 17, 2014 letters state Nationstar had begun foreclosure proceedings because of Jacaman's default, the letters do not contain the information required by Covenant 22, i.e., the action required to cure the default, the date by which the default must be cured, and that failure to cure the default on or before the given date would result in the sale of the property. Additionally, although Terwilliger's affidavit stated Nationstar performed all of its obligations and all notices were served on Jacaman at his address, we cannot conclude this statement conclusively proved Nationstar provided the notice required by Covenant 22. Taking as true all evidence favorable to Jacaman and resolving any doubts in his favor, we conclude Nationstar failed to conclusively negate an element of Jacaman's breach of contract claim. *See Katy Venture, Ltd.*, 469 S.W.3d at 163; *Fernandez*, 315 S.W.3d at 508; *Sauceda*, 268 S.W.3d at 140.

As a subset of his third issue, Jacaman also argues the trial court's signing of two separate orders, one granting Nationstar's no-evidence motion for summary judgment and one granting Nationstar's traditional motion for summary judgment, violated the one-judgment rule. *See* TEX. R. CIV. P. 301 (stating that "[o]nly one final judgment shall be rendered in any cause except where

it is otherwise specially provided by law"). We construe the two orders signed by the trial court on the same day as a single, final judgment of the case. *See Henderson v. Shanks*, 449 S.W.3d 834, 838 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (construing two separate orders signed by the trial court on the same day as a single, final judgment of the case).

Accordingly, we sustain Jacaman's third issue as it relates to his breach of contract claim. Because we conclude Nationstar failed to prove it was entitled to summary judgment as a matter of law on Jacaman's breach of contract claim, we need not address Jacaman's seventh issue, wherein he contends the trial court erred by overruling his objections to Nationstar's summary judgment evidence. *See* TEX. R. APP. P. 47.1.

CONCLUSION

Based on the foregoing analysis, we reverse and remand Jacaman's breach of contract claim to the trial court for further proceedings. We affirm the trial court's summary judgment as to Jacaman's remaining claims.

Irene Rios, Justice