COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00124-CV

WALTON BABINEAUX AND LINDA C. BABINEAUX F/K/A LINDA C. SKODA — APPELLANTS

V.

CITIMORTGAGE, INC. — APPELLEE

FROM THE 97TH DISTRICT COURT OF MONTAGUE COUNTY
TRIAL COURT NO. 2014-0380M-CV

MEMORANDUM OPINION[1]

Appellants Walton Babineaux and Linda C. Babineaux, f/k/a Linda C. Skoda, appeal from the trial court's final summary judgment in favor of appellee Citimortgage, Inc. (Citi) on its claims seeking to enforce the terms of a secured

[1]*See* Tex. R. App. P. 47.4.

loan agreement and on the Babineauxes' counterclaims. The Babineauxes raise several arguments on appeal contending that Citi either did not have the authority to take the actions it took under their home-equity-loan contract or could not bring the claims it brought in this suit. We conclude that the trial court did not err by granting Citi judgment as a matter of law and affirm its judgment.

I. BACKGROUND

A. THE LOAN, NOTE, AND SECURITY INSTRUMENT

In 1988, Linda bought real property in Montague County as part of a probate sale. Although Linda and Walton were married in 1974, Linda bought the property under her maiden name—Linda C. Skoda. Indeed, it appears that Linda uses either name interchangeably or hyphenates the two. On December 19, 2006, Walton borrowed $75,001 from Citi and executed a home-equity note, promising to repay that amount plus interest. The note required Walton to repay the loan in monthly payments of $455.71 beginning February 1, 2007, and continuing on the first day of each month until paid in full or until January 1, 2037.

To secure the note, Walton and Linda[2] signed a home-equity security instrument granting Citi a lien against the Montague County property. Under paragraph four of the security instrument, the Babineauxes were required to pay all property taxes due on the property. To facilitate these tax payments, the security instrument provided that the Babineauxes would pay an additional

[2]Linda signed as "Linda C. Babineaux."

amount each month that Citi would hold in an escrow account and apply those funds to the taxes due. However, Citi retained the right to waive this requirement in writing "at any time" and then could revoke the waiver "at any time by a notice." In the event of an escrow waiver, the Babineauxes would be required to pay the taxes directly to the taxing authority and provide Citi receipts showing that the taxes had been paid. A failure by the Babineauxes to do so would allow Citi to "exercise its rights under Section 9 and pay such amount," obligating the Babineauxes to repay Citi. Section nine, in turn, provided that if the Babineauxes failed to perform their obligations under the security instrument, Citi was authorized to protect its interest in the property:

> (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees . . . . Although [Citi] may take action under this Section 9, [Citi] does not have to do so and is not under any duty or obligation to do so. It is agreed that [Citi] incurs no liability for not taking any or all actions authorized under this Section 9. . . .
>
> Any amounts disbursed by [Citi] under this Section 9 shall become additional debt of [the Babineauxes] secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from [Citi] to [the Babineauxes] requesting payment.

Additionally, if the Babineauxes breached the security instrument, Citi could accelerate "the sums secured by this Security Instrument," seek a judicial order foreclosing on the property, and sell the property in satisfaction of Walton's debt after providing the Babineauxes with the required notice. Citi was authorized

under the security instrument to accept partial payments without waiving its right to later reject them or its right to declare the note in default.

Contemporaneously with the note and security instrument, Citi waived the escrow requirement for real-estate taxes and assessments. The waiver again provided (1) that the Babineauxes were required to pay the property taxes directly to the taxing authority and to provide proof of payment to Citi and (2) that Citi had the authority to "revoke the waiver as to any or all Escrow Items in accordance with the terms of the Security Instrument."

B. JUDICIAL PROCEEDINGS REGARDING 2007 AND 2008 PROPERTY TAXES

On August 6, 2007, Linda filed suit against the taxing authority for Montague County, arguing that because she possessed "Allodial Title" to the property through "a copy of the original Federal land patent from the Bureau of Land Management," it was not subject to taxation, specifically for the 2007 tax year. The trial court rendered judgment in favor of the taxing authority on June 23, 2008, concluding that the property is "subject to being appraised and taxed for ad valorem purposes."

After Linda failed to pay the 2007 taxes, Montague County filed suit against Linda, seeking to collect the 2007 and 2008 delinquent property taxes. Linda filed a "countersuit" in the same case, naming Montague County and its tax assessor-collector, and asserted that the 2007 and 2008 property taxes could not be assessed against her property because it was "U.S. Patented Land."

Once Citi notified Walton that the 2007 and 2008 taxes had not been paid in violation of the security instrument and escrow waiver, the Babineauxes paid the property taxes for 2007 and 2008. Montague County dismissed its claims, but Linda did not dismiss her countersuit. The trial court dismissed Linda's countersuit on September 29, 2009. Linda appealed to this court, and we affirmed the trial court's judgment on August 5, 2010. *Skoda v. Montague Cty.*, No. 2-09-362-CV, 2010 WL 3075718, at *3 (Tex. App.—Fort Worth Aug. 5, 2010, pet. denied). The supreme court denied Linda's petition for review on November 19, 2010.

C. 2009 TAXES AND ESCROW ACCOUNT

Meanwhile, the Babineauxes did not pay the property taxes due for 2009. On June 4 and 14, 2010, Citi notified Walton that the 2009 property taxes had not been paid. As permitted under the security instrument, Citi reminded Walton that if the 2009 property taxes were not paid, it could "elect to advance payment of these delinquent taxes on [their] mortgage account . . . [and could] establish an escrow account for the payment of future taxes due on this property," which could increase the monthly payment due "to cover the payment advanced for delinquent taxes, as well as the new monthly tax escrow collection." Citi eventually paid the 2009 property taxes, totaling $1,294.91, on August 17, 2010. The Babineauxes do not dispute that Citi paid the 2009 taxes or that they never paid the 2009 taxes.

Citi then revoked its escrow waiver and established an escrow account for reimbursement of the paid 2009 taxes and to collect any taxes due in the future. Citi notified Walton in an escrow analysis and a mortgage statement that beginning October 1, 2010, his monthly payment would increase by $259.04 for a new total due of $714.75 based on Citi's $1,294.91 tax payment. Walton and Linda decided they would not pay the increased amount "because it was a land grant" and continued to pay only $455.71 each month. Citi applied the partial payments to principal and interest due on the note and applied none to the escrow account.

Linda paid the property taxes due for tax years 2010, 2011, 2012, 2013, and 2014, noting on all but one check that she was paying "under coercion." Citi erroneously paid the 2010 property taxes but deleted that amount from the escrow account, including late charges, after Montague County affirmed that Linda had paid the 2010 taxes. On January 27, 2011, Citi notified Walton of its error and of the credit to the escrow account, but it reaffirmed that it was entitled to reimbursement for the 2009 taxes. Citi stated that Walton's "new payment" was "$563.61, which includes an escrow payment of $107.90." The Babineauxes continued to pay only $455.71 each month. Beginning in March 2011, Citi accepted Walton's partial payments but held them until it received sufficient funds to satisfy the full $563.61 payment. In July 2012, Citi began returning Walton's partial payments because they were insufficient to bring the loan current. Between March 2011 and July 2012, Citi sent Walton almost monthly

notices that the note was in default and advised him of the amount to bring the account current and cure the default. The Babineauxes never attempted to cure the default. Linda admitted that Citi "offered [them] everything under the sun" in a continued attempt to help the Babineauxes cure the default but that she was not interested.

D. ACCELERATION AND JUDICIAL FORECLOSURE

On May 1, 2014, Citi notified Walton by certified mail that the note was in default and offered him a last opportunity to cure:

> To cure the default you must pay the past due amount of $8078.79, including $770.64 in late charges and $472.50 in delinquency related expenses. We must receive your payment by 06/05/2014 . . . . Any additional monthly payments and late charges that fall due by 06/05/2014 must also be paid to bring your account current. . . .
>
> . . . .
>
> Failure to cure the default by 06/08/2014 will result in the acceleration of the loan. This means the entire unpaid balance will become due. Also, your property will be sold in accordance with the terms of the deed of trust and applicable law. . . .

Again, the Babineauxes admittedly did not cure the default. On November 6, 2014, Citi notified Walton by certified mail that the maturity of the note had been accelerated.

On November 12, 2014, Citi filed suit against the Babineauxes, seeking to enforce its right to sell the property by foreclosure sale under the security instrument and raising claims for breach of contract, judicial foreclosure, and a declaratory judgment. The Babineauxes answered and pleaded affirmative

defenses, including limitations, waiver, and excuse based on Citi's prior material breach. *See generally* Tex. R. Civ. P. 94 (listing defensive matters considered affirmative defenses that must be pleaded); *Blackstone Med., Inc. v. Phx. Surgicals, L.L.C.*, 470 S.W.3d 636, 646 (Tex. App.—Dallas 2015, no pet.) (recognizing prior material breach is affirmative defense). They also pleaded several counterclaims against Citi for breach of contract, unjust enrichment, negligence, negligent misrepresentation, and violations of the Texas and federal Debt Collection Acts, of the Truth in Lending Act, and of the Real Estate Settlement Procedures Act. These counterclaims were based on their contentions that Citi did not have the authority under the security instrument to pay the 2009 taxes based on its escrow waiver or to refuse Walton's payments.

Citi filed a traditional motion for summary judgment on its claims, essentially arguing that the plain terms of the note and security instrument allowed Citi to take the actions it took in foreclosing on the note based on the Babineauxes' default of its payment terms. Citi also filed a no-evidence motion for summary judgment directed to the Babineauxes' counterclaims. The Babineauxes filed a combined response. On January 9, 2017, the trial court granted Citi's motions, concluding that Citi was entitled to a judgment for judicial foreclosure against the Montague County property based on the Babineauxes' material breaches of the note and security instrument. The trial court granted Citi a judgment lien against the property to recover the amount of the judgment—$81,411.94 plus interest—and authorizing a writ of possession and an order of

sale for the property. Finally, the trial court ordered that the Babineauxes take nothing by their counterclaims. The Babineauxes filed a motion for new trial, which the trial court denied.

E. THE BABINEAUXES' APPEAL

The Babineauxes appeal and in four issues, including eleven subissues, argue that the summary judgment was improper on Citi's claim for breach of contract and on Citi's claim requesting a judicial foreclosure. They also argue that their counterclaims for breach of contract and negligence were not subject to judgment as a matter of law.[3] All of these issues pivot on one central argument: Citi could not do what it did under the terms of the note and the security instrument. We will address the Babineauxes' arguments around this foundational assertion. *See generally* Tex. R. App. P. 47.1 (allowing courts of appeals to address only issues raised that are necessary to final disposition of the appeal).

II. PROPRIETY OF SUMMARY JUDGMENT

A. STANDARDS OF REVIEW

We review a summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). We consider all the evidence presented in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could and disregarding evidence contrary to the

[3]The Babineauxes do not challenge the summary judgment on the remainder of their counterclaims or on Citi's claim for a declaratory judgment.

nonmovant unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009); *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *20801, Inc. v. Parke*r, 249 S.W.3d 392, 399 (Tex. 2008); *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006). If, as here, the trial court's order granting summary judgment does not specify the ground or grounds relied on for its ruling, we will affirm the summary judgment if any of the theories presented in the trial court and preserved for appellate review are meritorious. *See Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003). Thus, we need not address each subissue posited by the Babineauxes attacking the trial court's ultimate summary judgment. *See* Tex. R. App. P. 47.1.

To be entitled to summary judgment on one of its claims for affirmative relief, Citi must conclusively prove all essential elements of the claim. *See* Tex. R. Civ. P. 166a(a), (c); *MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986). If Citi does so, it will not be prevented from obtaining summary judgment merely because the Babineauxes pleaded an affirmative defense. *See Kirby Expl. Co. v. Mitchell Energy Corp.*, 701 S.W.2d 922, 926 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Clark v. Dedina*, 658 S.W.2d 293, 296 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd). The Babineauxes' affirmative defense prevents the granting of summary judgment in favor of Citi only if they raise an issue of fact on each element of the defense through competent summary-

judgment evidence. *See Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984); *'Moore' Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 936–37 (Tex. 1972); *Songer v. Archer*, 23 S.W.3d 139, 142 (Tex. App.—Texarkana 2000, no pet.).

Similarly, if Citi conclusively negated at least one essential element on the Babineauxes' affirmative claims for breach of contract and negligence, it would be entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(b), (c); *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010). To the extent Citi additionally sought a no-evidence summary judgment on the Babineauxes' counterclaims for breach of contract and negligence,[4] the Babineauxes were required to raise a genuine issue of material fact by producing more than a scintilla of probative evidence on the elements of those counterclaims challenged by Citi as being supported by no evidence. *See* Tex. R. Civ. P. 166a(i) & cmt.; *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009); *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008).

B. CITI'S CLAIM FOR JUDICIAL FORECLOSURE

Citi was entitled to summary judgment on its claim for judicial foreclosure if it conclusively established that (1) a debt exists, (2) the debt is secured by a lien on homestead property as allowed by the Texas Constitution, (3) the

[4]Of course, Citi's no-evidence motion for summary judgment is inapplicable to its own claims for affirmative relief. *See* Tex. R. Civ. P. 166a(i) cmt. Indeed, Citi expressly limited its no-evidence motion to the Babineauxes' counterclaims.

Babineauxes are in default under the note and the security instrument, and (4) the Babineauxes received notice of default and acceleration. *See Huston v. U.S. Bank Nat'l Ass'n*, 988 F. Supp. 2d 732, 740–41 (S.D. Tex. 2013), *aff'd*, 583 F. App'x 306 (5th Cir. 2014). In their second issue, the Babineauxes argue that the trial court erred by granting Citi judgment as a matter of law on its claim for judicial foreclosure. The Babineauxes attack the summary judgment on this claim based on Citi's acceptance of their partial payments before "[s]uddenly" rejecting them in July 2012, which they assert operated to waive Citi's right to accelerate the maturity of the debt and foreclose. In other words, they assert that they raised genuine issues of material fact on their pleaded affirmative defense of waiver.

But the security instrument twice explicitly stated that the acceptance of partial payments did not waive any rights or remedies Citi had, including the right to accelerate the maturity of the debt and foreclose on the property. The Babineauxes do not argue that these provisions are unenforceable.[5] Indeed, contractual nonwaiver provisions routinely are considered valid and enforceable. *See, e.g.*, *Shields Ltd. P'ship*, 526 S.W.3d at 481; *Shellnut v. Wells Fargo*

[5]They assert for the first time in their reply brief that the nonwaiver provisions themselves were waived by Citi's conduct. Because they did not raise this argument in the trial court or in their opening brief to this court, the Babineauxes waived this argument. *See Pineridge Assocs., L.P. v. Ridgepine, LLC*, 337 S.W.3d 461, 472 n.10 (Tex. App.—Fort Worth 2011, no pet.). In any event, this contention has been expressly rejected. *See Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 481 (Tex. 2017).

Bank, N.A., No. 02-15-00204-CV, 2017 WL 1538166, at *8 (Tex. App.—Fort Worth Apr. 27, 2017, pet. filed) (mem. op.); *Creech v. Christian*, No. 05-08-00952-CV, 2009 WL 2902940, at *3 (Tex. App.—Dallas Sept. 11, 2009, pet. denied) (mem. op. on reh'g). Citi's acceptance of partial payments, which was allowed under the security instrument, cannot be considered intentional conduct inconsistent with the right to enforce its terms. *See Shields Ltd. P'ship*, 526 S.W.3d at 484–85; *Breof BNK Tex., L.P. v. D.H. Hill Advisors, Inc.*, 370 S.W.3d 58, 66–67 & n.3 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *Creech*, 2009 WL 2902940, at *3. Citi conclusively established each element of its affirmative claim for judicial foreclosure, and the Babineauxes failed to raise an issue of fact on their waiver defense. We overrule issue two.

C. CITI'S CLAIM FOR BREACH OF CONTRACT

In their first issue, the Babineauxes assert that the trial court erred by granting judgment as a matter of law in Citi's favor on its claim for breach of contract. They argue that they raised issues of fact on their affirmative defenses of limitations, waiver, and Citi's prior material breach. Because the Babineauxes did not raise fact issues on each element of these affirmative defenses through competent summary-judgment evidence, Citi was entitled to summary judgment on its breach-of-contract claim, and we overrule issue one for the following reasons.

1. Limitations

The Babineauxes assert that the applicable four-year limitations period is found in section 16.004 and that it began to run on February 1, 2010—the date they failed to pay the property taxes due for the 2009 tax year—or on October 1, 2010—when Walton began making partial payments—both of which occurred more than four years before Citi filed its suit on November 12, 2014. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.004(a)(3) (West 2002) (mandating four-year limitations period for actions on debt). Citi asserts that the applicable limitations period is found in section 16.035 and that it did not begin to run until November 6, 2014—the date Citi notified the Babineauxes that it was exercising its option to accelerate the maturity of the note. *See id.* § 16.035 (mandating four-year limitations period to bring suit for the recovery of real property under a real-property lien); *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001) ("If a note or deed of trust secured by real property contains an optional acceleration clause, default does not *ipso facto* start limitations [under section 16.035] running on the note. Rather, the action accrues only when the holder actually exercises its option to accelerate."). The accrual date of a limitations period is a question of law that is amenable to summary-judgment disposition. *See Moreno v. Sterling Drug*, 787 S.W.2d 348, 351 (Tex. 1990).

Section 16.035 states that a "suit for the recovery of real property under a real property lien or the foreclosure of a real property lien" is governed by a four-year limitations period. Tex. Civ. Prac. & Rem. Code Ann. § 16.035(a). Contrary

to the Babineauxes' argument, the text of section 16.035 does not limit its applicability to claims for judicial foreclosure. *See Metcalf v. Wilmington Savs. Fund Soc'y, FSB*, No. 03-16-00795-CV, 2017 WL 1228886, at *4 (Tex. App.—Austin Mar. 29, 2017, pet. denied) (mem. op.). It applies to a "suit" that seeks the recovery of real property or the foreclosure of a real property lien. Tex. Civ. Prac. & Rem. Code Ann. § 16.035(a). Citi's suit sought to enforce its right to judicial foreclosure under the security instrument, not to recover money due under the note. *See Aguero v. Ramirez*, 70 S.W.3d 372, 375 (Tex. App.—Corpus Christi 2002, pet. denied) (recognizing suit to enforce right to repayment of note is separate from suit to foreclose on real property securing note because note and security are separate obligations). In pleading its breach-of-contract claim, Citi alleged that it was suing "to specifically enforce its right to foreclose the security instrument and sell the property in satisfaction of all sums due and owing thereunder." Clearly, Citi's suit was a suit seeking the foreclosure of a real-property lien, governed by section 16.035. *See Metcalf*, 2017 WL 1228886, at *4. And as the Babineauxes concede in their reply, limitations had not expired on claims governed by section 16.035 based on Citi's November 2014 acceleration notice. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.035(e); *Holy Cross*, 44 S.W.3d at 566. The Babineauxes did not raise an issue of material fact regarding limitations.

2. Waiver

As they argued regarding judicial foreclosure, the Babineauxes contend that Citi waived its right to declare the note in default and accelerate its maturity because it accepted Walton's partial payments for twenty-one months before returning them. And as we held regarding judicial foreclosure, the nonwaiver provision in the security instrument allowed Citi to accept partial payments and later reject them without losing its right to enforce the note and security instrument. No issue of material fact precluded summary judgment on this affirmative defense.

3. Excuse Based on Citi's Prior Material Breach

The Babineauxes argue that their breaches of the note and security instrument were excused based on Citi's improper implementation of an escrow account and attempts to collect the amounts advanced without proper notice. The security instrument allowed Citi to pay the delinquent 2009 property taxes, consider those amounts part of the secured debt, and request repayment regardless of whether it also established an escrow account. Citi repeatedly notified Walton that the 2009 property taxes had not been paid and established an escrow account in October 2010 to collect reimbursement for both the 2009 and future delinquent taxes.[6] Citi notified Walton that his monthly payments were

[6]The Babineauxes rely heavily on a July 2012 letter Citi sent to Walton in which Citi stated that the escrow account included monies it advanced for the 2011 delinquent property taxes. But the summary-judgment record is clear that Citi established the account based on the 2009 property taxes and that it was

increasing, effective October 1, 2010, to include the monies advanced for the 2009 property taxes. In short, Citi was authorized under the security instrument to take the actions it took regarding the 2009 delinquent taxes. *See Triton 88, L.P. v. Star Elec., L.L.C.*, 411 S.W.3d 42, 59 (Tex. App.—Houston [1st Dist.] 2013, no pet.). The Babineauxes failed to submit competent summary-judgment evidence raising an issue of material fact on each element of this affirmative defense.

D. THE BABINEAUXES' COUNTERCLAIMS

1. Breach of Contract

In their third issue, the Babineauxes argue that the trial court erred by granting Citi judgment as a matter of law on their counterclaim that Citi breached the security instrument. But as Citi points out, it moved for a no-evidence summary judgment on the Babineauxes' breach-of-contract counterclaim on the basis that the Babineauxes offered no evidence of damages, an essential element of their counterclaim. *See* Tex. R. Civ. P. 166a(i). In response, the Babineauxes did not point to any evidence, much less more than a scintilla of evidence, in the summary-judgment record on this element challenged by Citi. They merely made a bare assertion in their summary-judgment response that

---

authorized under the security instrument to seek reimbursement for what it had paid. Whether Citi may have erroneously sought to also collect the 2011 taxes through the escrow account even though it never actually did so is not relevant. We conclude that this letter does not raise a fact issue regarding a prior material breach by Citi.

Citi's breach "has caused [them] damages." In their reply brief to this court, the Babineauxes argue for the first time that they are entitled to nominal damages. But they failed to make this argument to the trial court, and we cannot reverse a summary judgment on a ground not advanced in the trial court. *See, e.g.*, *Pinnacle Anesthesia Consultants, P.A. v. St. Paul Mercury Ins. Co.*, 359 S.W.3d 389, 398 (Tex. App.—Dallas 2012, pet. denied) (citing *City of Hous. v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979)). We overrule issue three.[7]

2. Negligence

The Babineauxes alleged that Citi negligently serviced the loan and "negligently communicated information about the status of [their] account." Their alleged damages arising from Citi's negligence were "severe mental anguish and emotional distress" as well as "any economic damages suffered." In Citi's no-evidence motion directed to the Babineauxes' negligence counterclaim, Citi argued that the Babineauxes failed to produce competent summary-judgment evidence of their damages. In their fourth issue, the Babineauxes contend that the grounds Citi raised in its traditional motion for summary judgment directed to their negligence counterclaim—the absence of a legal duty owed by Citi, the

[7]We need not address each subissue raised by the Babineauxes attempting to point out genuine issues of material fact on the remaining elements of their counterclaim for breach of contact. Citi pointed out to the trial court that there was no evidence of an element of the Babineauxes' counterclaim—damages—and because the Babineauxes did not raise a genuine issue of material fact on that element, the trial court was required to grant Citi's no-evidence motion. *See* Tex. R. Civ. P. 166a(i).

economic-loss rule, and limitations—did not justify the trial court's summary judgment. The Babineauxes pointed to no summary-judgment evidence of their negligence damages in response to Citi's motions. But to counter Citi's argument that the economic-loss rule barred their negligence counterclaim, the Babineauxes referred to Linda's deposition testimony that their counterclaims sought "to put our family life back, to . . . stop the stress, to stop the headaches, to stop [Walton's] very deep depression." Linda did not directly state that the stress, headaches, and Walton's depression were caused by Citi; she merely averred that she filed suit "to stop" these identified conditions. Linda's isolated assertion was unsupported by any facts and created no more than a mere surmise or suspicion of damages; therefore, this evidence was no more than a mere scintilla and failed to raise a genuine issue of material fact on an essential element of their negligence counterclaim. *See* Tex. R. Civ. P. 166a(i); *Moore v. K Mart Corp.*, 981 S.W.2d 266, 269 (Tex. App.—San Antonio 1998, pet. denied); *cf. Rallings v. Evans*, 930 S.W.2d 259, 262 (Tex. App.—Houston [14th Dist.] 1996, no writ) (recognizing deposition testimony may serve as summary-judgment evidence but is subject to the requirements of rule 166a for such evidence); *Wiley v. City of Lubbock*, 626 S.W.2d 916, 918 (Tex. App.—Amarillo 1981, no writ) (same). We overrule issue four.

III. CONCLUSION

Citi conclusively established each element of its clams for judicial foreclosure and breach of contract as it argued in its traditional motion for

summary judgment. The note, security instrument, and escrow waiver allowed Citi to take each action it took before declaring the Babineauxes' debt in default, accelerating the maturity of the note, and seeking to recover the money owed by foreclosing on the securing real property. The Babineauxes did not produce more than a scintilla of probative evidence supporting their damages arising from their counterclaims for breach of contract or negligence. These were specific grounds raised in Citi's no-evidence motion for summary judgment. Accordingly, the trial court did not err by granting summary judgment in Citi's favor on its claims and on the Babineauxes' counterclaims. We affirm the trial court's judgment. *See* Tex. R. App. P. 43.2(a).

/s/ Lee Gabriel

LEE GABRIEL
JUSTICE

PANEL: SUDDERTH, C.J.; GABRIEL and KERR, JJ.

DELIVERED: December 21, 2017