United States District Court
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

NSEW HOLDINGS LLC	§	
	§	
v.	§	Civil Action No. 4:15-CV-828
	§	(Judge Mazzant/Judge Nowak)
WELLS FARGO BANK, N.A.	§	

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Came on for consideration the report of the United States Magistrate Judge in this action, this matter having been heretofore referred to the Magistrate Judge pursuant to 28 U.S.C. § 636. On December 6, 2016, the report of the Magistrate Judge (Dkt. #50) was entered containing proposed findings of fact and recommendations that Defendant Wells Fargo Bank, N.A.'s ("Defendant") Motion for Final Summary Judgment Against Plaintiff's Claims and in Support of Its Own Claims ("Motion for Summary Judgment") (Dkt. #30) be granted. The Magistrate Judge recommended Plaintiff's claims be dismissed with prejudice, and Defendant be granted summary judgment on its counterclaim. Having received the report of the Magistrate Judge (Dkt. #50), having considered each of Plaintiff's timely filed objections (Dkt. #54), Defendant's Response (Dkt. #58), and having conducted a de novo review, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct, and the Court hereby adopts the Magistrate Judge's report (Dkt. #50) as the findings and conclusions of the Court. The Court also considers herein Defendant's Motion for Entry of Final Judgment (Dkt. #56) and Defendant's Supplement to Wells Fargo's Motion for Entry of Final Judgment to Amend Total Amount of Attorney Fees (Dkt. #60).

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BACKGROUND

This suit arises from the foreclosure of a homeowners' association lien against a property located at 437 Crest View Point Drive, Lewisville, Texas 75067 (the "Property"). The underlying facts recited in the Report and Recommendation are pertinent and thus are restated herein. Lloyd Payne (the "Borrower") purchased the Property on or about March 31, 2000; he financed the purchase with a $143,500 purchase-money, first-lien mortgage loan (the "First Loan") from Provident Home Loans, a Division of Provident Funding Associates, L.P., a California Limited Partnership, secured by a Deed of Trust dated March 31, 2000, and recorded on April 10, 2000. On June 14, 2000, Provident assigned and transferred the First Loan to Norwest Mortgage, Inc., which later became Wells Fargo Home Mortgage, Inc. ("Wells Fargo Mortgage").

On or about December 14, 2001, Borrower refinanced the Property, obtaining a $144,700 second first-lien mortgage loan from Wells Fargo Mortgage (the "Second Loan"), which paid off the Borrower's indebtedness under the First Loan. The Second Loan Deed of Trust included a Renewal and Extension Rider reflecting that the proceeds of the Second Loan were a renewal and extension of the amounts owing from the First Loan. The Renewal and Extension Rider expressly subrogated Wells Fargo Mortgage "to all the rights, powers, and equities of the original owners and holders of the prior promissory notes (whether such current holder shall assign and transfer its respective liens to the holder hereof or shall release its respective liens upon satisfaction of the indebtedness owing to such holder)." This deed of trust was recorded on December 26, 2001. Defendant Wells Fargo Bank later succeeded Wells Fargo Mortgage by merger.

Borrower subsequently entered into a Texas Home Equity Note (Fixed Rate – First Lien) with Defendant. This Note was secured by a Texas Home Equity Security Instrument (First Lien), recorded on February 18, 2010, that expressly stated Defendant "shall be subrogated to any and

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all rights, superior title, liens and equities owned or claimed by any owner or holder of any liens and debts outstanding immediately prior to the execution hereof, regardless of whether said liens or debts are acquired by [Defendant] by assignment or are released by the holder thereof upon payment." A portion of the proceeds from this Loan, specifically $83,552.89, was used to pay off the remaining balance of the Second Loan.

The Property is part of the Vista Ridge Estates Homeowners Association, and the Declaration of Covenants, Conditions and Restrictions for Vista Ridge Estates (the "HOA Declaration") authorizes Vista Ridge Estates Homeowners Association to charge assessments to their property owners. The HOA Declaration explicitly empowers Vista Ridge Estates Homeowners Association to secure the payment of assessments levied on the Property by lien; however, "such lien shall be specifically made secondary, subordinate and inferior to all liens, present and future, given, granted and created by or at the insistence of the [Borrower] . . . to secure the payment of monies advanced on account of the purchase price and/or the improvement of [the Property]." Vista Ridge Estates Homeowners Association executed a lien on the Property on April 25, 2013 to secure the payment of assessments levied on the Property, and subsequently foreclosed on such interest. On May 5, 2015, the Sheriff of Denton County, Texas conducted a foreclosure sale, at which Plaintiff NSEW Holdings LLC ("Plaintiff") purchased the Property for $40,100, and the Sheriff's Deed was recorded on May 7, 2015.

The Magistrate Judge entered a report and recommendation on December 6, 2016, recommending Defendant's Motion for Summary Judgment be granted (Dkt. #52). Specifically, the Magistrate Judge recommended that the Court find as follows: (1) Defendant is entitled to contractual subrogation; (2) Defendant is entitled to equitable subrogation; (3) the HOA Declaration establishes the homeowners' association's lien is expressly subordinate to Defendant's

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lien; (4) Defendant is entitled to a declaratory judgment; and (5) Defendant's lien is valid to the extent the lien is subrogated to the purchase money liens, attorney's fees, hazard insurance, and real property taxes. Subsequently, on December 20, 2016, Plaintiff filed its objections to the Magistrate Judge's report and recommendation (Dkt. #54). Also on December 20, 2016, Defendant filed its Motion for Entry of Final Judgment (Dkt. #56). On January 3, 2017, Defendant filed its Response to Plaintiff's objections to Magistrate Judge's Recommendation (Dkt. #58). On January 27, 2017, Defendant filed its Supplement to Wells Fargo's Motion for Entry of Final Judgment to Amend Total Amount of Attorney Fees (Dkt. #60). To date, Plaintiff has failed to file a response to either Defendant's Motion for Entry of Final Judgment and/or its Supplement.

ANALYSIS

Under the law, a party who files timely written objections to a magistrate judge's report and recommendation is entitled to a de novo determination of those findings or recommendations to which the party specifically objects. 28 U.S.C. § 636(b)(1)(c); Fed. R. Civ. P. 72(b)(2)-(3). Plaintiff objects to each of the Magistrate Judge's findings; specifically, Plaintiff argues that: (1) contractual subrogation does not apply; (2) equitable subrogation does not apply; (3) the HOA Declaration did not subordinate assessment liens to Defendant's lien; (4) Defendant is entitled to a declaratory judgment; and (5) Defendant is not entitled to recover attorney's fees or prior escrow advances. The Court now addresses each of Plaintiff's objections in turn.

Objection 1: Contractual Subrogation

Plaintiff first objects to the Magistrate Judge's finding that contractual subrogation applies. Plaintiff argues that the Magistrate Judge conflates contractual subrogation with equitable subrogation and improperly relied on cases analyzing equitable subrogation rather than contractual subrogation—specifically *Vogel v. Veneman*, 276 F.3d 729, 735 (5th Cir. 2002), and *TFHSP LLC*

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v. Wells Fargo Bank, N.A., No. 4:12CV554, 2013 WL 12114023, at *1 (E.D. Tex. May 21, 2013). Plaintiff is incorrect. The Fifth Circuit in *Vogel* specifically held that a chain of financings from one lienholder to another, in which each lender advanced money to extinguish prior amounts owing, and executed a deed of trust on the property at issue, established that the subsequent lienholder was both equitably *and* contractually subrogated to the previous lienholder's valid purchase money lien. 276 F.3d at 735 ("The chain of financings from Westside to FSA, in which each lender advanced money to extinguish prior amounts owing, and executed a deed of trust on the property, establish that FSA was both equitably and contractually subrogated to Westside's valid purchase money lien on the Vogels' homestead."). Plaintiff similarly argues that *TFHSP LLC* "relies on considerations arising out of *equitable* subrogation, not *contractual*." One court in the Eastern District of Texas found in *TFHSP LLC* that the homeowner's association assessment lien therein was contractually subrogated to the valid purchase money lien when "the chain of financings from Sebring to Bank of America in which money was advanced to extinguish prior amounts owing, coupled with the assignment from Bank of America to Wells Fargo." *TFHSP LLC*, 2013 WL 12114023, at *2. The case law relied upon by the Magistrate Judge, contrary to Plaintiff's assertion, discusses contractual subrogation.[1]

Moreover, here, as in *Vogel*, Defendant has proffered competent summary judgment evidence showing a chain of financing from Provident Home Loans to (Norwest Mortgage, Inc., which later became Wells Fargo Mortgage, and subsequently) Defendant in which money was

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[1] Plaintiff also argues that *Leonard v. Brazosport Bank of Tex.*, 628 S.W.2d 216, 219 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.) is distinguishable because the plaintiff was in privity with the party seeking contractual subrogation. This argument is unavailing because, as the Magistrate Judge properly concluded, "contractual subrogation arises out of privity between one lienholder paying off the prior lienholder, thus stepping into the shoes of the prior lienholder." *Vogel v. Glickman*, 117 F. Supp. 2d 572, 579 (W.D. Tex. 2000) (holding contractual subrogation is created by and between successive lenders; thus, "[c]ontractual privity between the borrower and the new lender is not required").

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