

CAUSE NO. C-6048-13-E

RICARDO DIAZ MIRANDA
PLAINTIFF

VS.

PLAINSCAPITAL BANK F/K/A
FIRST NATIONAL BANK
AND SAUL ORTEGA
DEFENDANT

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IN THE DISTRICT COURT

275TH JUDICIAL DISTRICT

HIDALGO COUNTY, TEXAS

PLAINTIFF'S FOURTH AMENDED PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, RICARDO DIAZ MIRANDA in the above-entitled and numbered cause, and complains of the conduct of PlainsCapital Bank and Saul Ortega, Defendants herein, and files this his *Fourth Amended Original Petition*, and for causes of action would show the following:

A. DISCOVERY PLAN

1. Plaintiff intends that discovery be conducted under Discovery Level 3.

B. PARTIES

2. Plaintiff Ricardo Diaz Miranda (hereinafter referred to as "Plaintiff Miranda") is an individual who resides in Hidalgo County, Texas.
3. Defendant PlainsCapital Bank, formerly known as First National Bank, is authorized to do business in the State of Texas, and has already made an appearance in this lawsuit.
4. Defendant Ortega is an individual who resides in Hidalgo County and has already made an appearance in this lawsuit.

C. JURISDICTION AND VENUE

5. This Court has jurisdiction over the parties and subject matter in this case. Pursuant to TRCP 47(c)(5) Plaintiff seeks damages in excess of \$1,000,000.
6. Venue in Hidalgo County is proper in this cause under Section 15.0002(a)(1), Section 15.011, Section 15011, Section 15.0011 and Section 15.088.

D. FACTS

7. On or about February 11, 2014, Plaintiff Miranda, received three letters regarding a Notice of Acceleration of Indebtedness and Notice of Substitute Trustee's Sale and three Notices of Substitute Trustee's Sale for the following properties:

- a. Lot One (1), KEYSTONE BUSINESS CENTER SUBDIVISION, an addition to the City of Pharr, Hidalgo County, Texas, according to the map or plat thereof recorded in Volume 51, Page 145, Map Records, Hidalgo county, Texas, reference to which is here made for all purposes.
- b. Lot One (1) LA ESTANCIA APARTMENTS SUBDIVISION, an addition to the City of McAllen, Hidalgo County, Texas, according to the map or plat thereof recorded in Volume 46, Page 126, Map Records, Hidalgo county, Texas, reference to which is here made for all purposes.
- c. All of Lots 2 and 5, EMPIRE NO.1 SUBDIVISION, an addition to the City of Mission, Hidalgo, County, Texas, according to the map recorded in Volume 44, Page 198, Map Records in the Office of the County Clerk of Hidalgo County, Texas, reference to which is here made for all purposes.

8. These three properties were set for Foreclosure on March 4, 2014 at 10:00 A.M. True and correct copies of the letters and enclosed notices are attached as **Exhibit "A"** for the first property, **Exhibit "B"** for the second property, and **Exhibit "C"** for the third property.

9. Plaintiff Miranda sought a loan from First National Bank, now held by PlainsCapital Bank, to finance the construction of Castello Cold Storage located at 10321, Pharr Texas, which is the property listed and identified above in paragraph 7a.

10. On or about July 2011, in order to receive the loan to build Castello Cold Storage, Saul Ortega, a First National Bank loan officer and former president of First National Bank pressured Plaintiff Miranda to purchase the following three properties as a condition before he approved the loan to Plaintiff Miranda:

a. La Estancia Apartments located at 2401 S. McColl Road, McAllen, Texas 78503, listed and identified above in paragraph 7b.

b. 334 N Moorefield Rd, Mission, Texas 78574 listed and identified above in paragraph 7c.

c. A house located at 1113 Harbord Lane, La Joya, Texas 78560.

11. The property listed in paragraph 10c above was owned by Saul Ortega, First National Bank's Loan Officer and former president. The property was owned under the guise of Pelon, L.L.C.

12. When Plaintiff Miranda was late in payment for two months for Estancia Apartments and Moorefield, Plaintiff Miranda attempted to speak to a bank representative and to pay a part of the whole amount he owed. Plaintiff Miranda spoke to a man by the name of Mr. Lyons who refused to accept partial payment for what Plaintiff Miranda owed. First National Bank would only accept full payment for the aforementioned properties.

13. Plaintiff Miranda returned to the bank and attempted to contact representatives from First National Bank to speak to them in attempts of resolving the issue at hand, but these attempts were unsuccessful since First National Bank did not want to cooperate.

14. The two properties listed in paragraphs 7a and 7b above were previously set for foreclosure on October 1, 2013.

15. On September 30, 2013, Plaintiff Miranda filed an *Original Petition and Application for Temporary Restraining Order* against First National Bank. *Plaintiff's Temporary Restraining Order and Order Setting Hearing for Temporary Injunction* was signed and set for hearing on October 14, 2013 at 9:00 a.m. At that time, the parties agreed to negotiate and or mediate the case.

16. Apparently, in the interim, Defendant PlainsCapital Bank bought Plaintiff Miranda's note and is now attempting to foreclose on Plaintiff Miranda.

E. CAUSE OF ACTION AS TO DEFENDANT PLAINSCAPITAL BANK

I. WRONGFUL FORECLOSURE

17. Any technical "default" in the terms of any notes was caused in whole or in partly by the actions of Defendant PlainsCapital Bank in inducing such default. Defendant PlainsCapital Bank wrongly

accelerated the maturity of the note, wrongly refused payment, and refused to provide information regarding the note. The affidavit of Plaintiff Miranda is attached as **Exhibit "D"**.

II. RESCISSION

Plaintiff herein re-alleges each and every fact and allegation set forth above in paragraphs 1-17 as fully set forth herein, and in addition and/or in the alternative would plead as follows:

18. A court may end a contract as an equitable remedy when the contract formation was marred by fraud. The remedy cancels the contract, returning the parties to the position they held before the agreement. In the instant case, PlainsCapital, on or about September 11, 2013, bought a significant number of notes from the FDIC originally belonging to First National Bank, including the Plaintiff's note. PlainsCapital, knew or should have known, that Plaintiff's loan was marred by fraud. As mentioned above, and throughout this lawsuit, three of the four loans that were made to the Plaintiff were forced upon him as a condition of the only loan that he was seeking, the "cold storage loan". Therefore, Plaintiff seeks a termination and cancellation and discharge of all future obligations of all the notes held by PlainsCapital, save and except, the "cold storage loan".

19. Plaintiff also seeks a return of all consideration already paid as if no contract ever existed. Plaintiff has sustained and will continue to sustain serious and irreparable pecuniary harm if the relief is not granted.

F. CAUSES OF ACTION AS TO DEFENDANT SAUL ORTEGA

I. FRAUD AND SELF DEALING

Plaintiff herein re-alleges each and every fact and allegation set forth above in paragraphs 1-19 as fully set forth herein, and in addition and/or in the alternative would plead as follows:

20. Ortega not only represented to the Plaintiff that the purchase of the three properties set out in paragraph 10 (a-c) were necessary to approval of his loan for Castelo Cold Storage, but further represented that the properties in questions were either valuable in the case of property identified in 10 (c) above, or in the alternative could be easily made into income producing property, in the case of the properties listed in paragraph 10 (a-b). Ortega knew that First National Bank did not require the purchase of the additional three properties as a condition on a loan to improve a piece of property Plaintiff already

owned. Ortega also misrepresented the viability of the two apartment properties and then concealed the fact that the house identified in paragraph 10 (c) was in fact his personal property that he was seeking to sell but could not find a buyer. Ortega knew his statements as to Plaintiff having to buy the additional three properties and the value of those properties were false. He further knowingly concealed the fact that the residential property was his and that the Ortega was using his position as loan officer to self-deal and unload a property that had questionable value and that he could not otherwise sell. Ortega made all of these representations with the intent that Plaintiff rely upon them and concealed his ownership interest in the residential property to cover up his own self-dealing

21. The two commercial properties were in fact non-performing assets owned by First National Bank that Ortega leveraged the Plaintiff into buying. The Plaintiff relied upon Ortega's misrepresentations both as to the precondition of his loan for the cold storage project, and the value of the properties he was all but compelled to purchase. As a result of his reliance Plaintiff purchased properties that were over-valued and were incapable of generating any income. Plaintiff was unable to generate income from the properties and the residential property cannot be resold for anywhere near what Plaintiff paid. As a result Plaintiff has been damaged in an amount in excess of the jurisdictional minimum of this Court that he will prove up at trial and for which he prays relief be granted.

II. NEGLIGENCE

Plaintiff herein re-alleges each and every fact and allegation set forth above in paragraphs 1-21 as fully set forth herein, and in addition and/or in the alternative would plead as follows:

22. Defendant Ortega was acting as the Plaintiff's loan officer and Plaintiff being a customer of the bank, Ortega had a duty to act in a reasonably prudent manner as to the loan being offered to the Plaintiff. By failing to disclose the true value of the properties in paragraph 10 (a-b) and failing to reveal that Ortega actually owned the residential property and was seeking to push it off on the Plaintiff, Ortega breach his duty to the Plaintiff. As a direct and proximate cause of Ortega's breach Plaintiff has been damaged in an amount in excess of the jurisdictional minimum of this Court that he will prove up at trial and for which he prays relief be granted.

III. BREACH OF FIDUCIARY DUTY

23. Plaintiff herein re-alleges each and every fact and allegation set forth above in paragraphs 1-19 as fully set forth herein, and in addition and/or in the alternative would plead as follows:

24. Ortega occupied a position of superior knowledge with regard to the loan transaction involving the Plaintiff. Ortega's position as a loan officer of First National Bank allowed him to know that the bank did not really require the purchase of the other three properties as a precondition of the loan for Castelo Cold Storage. However, because of his position in the bank, and in relation to the Plaintiff, Ortega owed Plaintiff a duty of trust not to act in a manner inconsistent with the Plaintiff's financial needs and abilities. That duty of trust required Ortega to act with the utmost good faith in his dealings with Plaintiff and created a fiduciary relationship between himself and the Plaintiff.

25. By forcing the Plaintiff to assume properties he did not need as a precondition of the loan for Castelo Cold Storage, misrepresenting the value of those properties and the true owner of them, Ortega breached his fiduciary duty of utmost good faith. As a direct and proximate result of Ortega's breach Plaintiff has been damaged in an amount in excess of the jurisdictional minimum of this Court that he will prove up at trial and for which he prays relief be granted.

G. TEMPORARY INJUNCTION

26. Plaintiff previously asked the Court for a Temporary Restraining Order and Temporary Injunction. On April 1, 2014, the Court granted the injunction enjoining Defendant from:

- a) Foreclosing on the property identified as: Lot One (1), KEYSTONE BUSINESS CENTER SUBDIVISION, an addition to the city of Pharr, Hidalgo county, Texas, according to the map or plat thereof recorded in Volume 51, page 145, Map Records, Hidalgo County, Texas reference to which is here made for all purposes; together with buildings and improvements thereon and hereafter placed thereon; appurtenances, servitudes, rights, ways, privileges, prescriptions and advantages thereunto belonging on in anyway pertaining.
- b) Foreclosing on the property identified as: Lot One (1), LA ESTANCIA APARTMENTS SUBDIVISION, an addition to the city of McAllen, Hidalgo county, Texas, according to the map or plat thereof recorded in Volume 46, page 126, Map Records, Hidalgo County, Texas reference to which is here made for all purposes; together with buildings and improvements

thereon and hereafter placed thereon; appurtenances, servitudes, rights, ways, privileges, prescriptions and advantages thereunto belonging on in anyway pertaining.

- c) Foreclosing on the property identified as: All of Lots 2 and 5, EMPIRE NO.1 SUBDIVISION, an addition to the City of Mission, Hidalgo, County, Texas, according to the map recorded in Volume 44, Page 198, Map Records in the Office of the County Clerk of Hidalgo County, Texas, reference to which is here made for all purposes; together with buildings and improvements thereon and hereafter placed thereon; appurtenances, servitudes, rights, ways, privileges, prescriptions and advantages thereunto belonging on in anyway pertaining.
- d) Attempting to evict or remove Plaintiff or any tenants from the properties that are the subject of this lawsuit.

This injunction remains in place.

H. DAMAGES

27. Due to the acts and omissions of Defendants PlainsCapital Bank and Saul Ortega described herein, including all wrongful and unlawful conduct of Defendants PlainsCapital Bank and Saul Ortega, Plaintiff Miranda has suffered serious and substantial damages, including, but not limited to the following:

- a. loss of use and enjoyment of property;
- b. attorney's fees;
- c. pre-judgment and post-judgment interest;
- d. exemplary damages;
- e. all monies paid from July 2011 to the present for all loans, save and except, the "cold storage loan"; and
- f. all actual damages to be incurred by Plaintiff Miranda in the future and such other and further relief to which Plaintiff Miranda may be justly entitled.

I. PRAYER

28. **WHEREFORE**, Plaintiff Miranda prays that citation be issued to Defendant PlainsCapital Bank and Defendant Saul Garza, and that Defendants be cited to appear herein, and that on final trial, Plaintiff have the following:

- a. Judgment against each Defendant for actual damages in excess of the minimum jurisdictional limits of this Court;
- b. Permanent injunction against Defendant PlainsCapital Bank;
- c. Loss of use and enjoyment of property;
- d. Attorney's fees;
- e. Pre-judgment and post-judgment interest;
- f. Exemplary damages;
- g. All monies paid from July 2011 to the present for all loans, save and except, the "cold storage loan"; and
- h. All actual damages to be incurred by Plaintiff Miranda in the future and such other and further relief to which Plaintiff Miranda may be justly entitled.

Respectfully submitted,

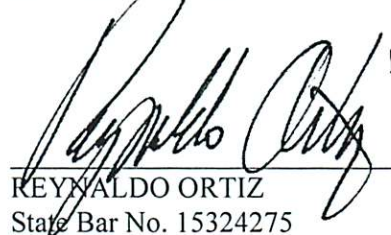
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REYNALDO ORTIZ
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ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument has been mailed via electronic mail, facsimile, or regular mail to all counsel of record on December 12, 2014, as follows:

VIA FACSIMILE ONLY (956) 686-6109

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