**Opinion issued June 1, 2017**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-15-01098-CV**

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**SENGER CREEK DEVELOPMENT, LLC, JAMES GILBERT, CLAY MOORE AND TRENTON TORREGROSSA, Appellants**

**V.**

**RICHARD L. FUQUA, II, FUQUA FAMILY LIMITED PARTNERSHIP, AND LEVEL 2 SOLUTIONS, INC., Appellees**

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**On Appeal from the 127th District Court**
**Harris County, Texas**
**Trial Court Cause No. 2014-31147-B**

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## MEMORANDUM OPINION

Appellants, Senger Creek Development, LLC, James Gilbert, Clay Moore, and Trenton Torregrossa (collectively referred to as Senger Creek), appeal the trial

court's order which granted summary judgment in favor of appellees, Richard L. Fuqua, II, Fuqua Family Limited Partnership, and Level 2 Solutions, Inc. (collectively referred to as the Fuqua Defendants). In three issues on appeal, Senger Creek argues that the trial court erred in granting summary judgment on its claims for wrongful foreclosure, trespass to try title, breach of contract, knowing participation in a breach of fiduciary duty, and civil conspiracy.[1]

We affirm in part and reverse in part.

## Background

On April 19, 2007, Gilbert, Moore, Torregrossa, and Robert Ferguson, Sr. formed Senger Creek to purchase and develop 56 acres of land in North Houston.[2] To fund the purchase, Ferguson, on behalf of his limited partnership, Parkway Lakes Master, L.P., executed a Real Estate Lien Note ("the Note") that provided Senger Creek with a line of credit in the amount of $1,200,000 that matured after a year. The Note was secured by a Deed of Trust that provided that the beneficiary, Parkway Lakes, could appoint a substitute trustee, and if Senger Creek defaulted, Parkway

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[1] In a fourth issue on appeal, Senger Creek argues that the trial court refused to correct its severance order dated September 19, 2015. Senger Creek raised this issue with this Court previously. *See Senger Creek Dev., LLC v. IH45 Invs., LLC*, Nos. 01–15–01097–CV & 01–15–01098–CV, 2016 WL 1658918 (Tex. App.—Houston [1st Dist.] Apr. 26, 2016, pet. denied) (mem. op.). Because the Texas Supreme Court denied Senger Creek's petition for review, Senger Creek's third issue is moot.

[2] Feguson's membership interest was held in the name of Parkway Lakes Master, L.P., a Texas limited partnership.

Lakes could declare the unpaid principal balance and earned interest on the Note immediately due and request the trustee to foreclose the lien. The Deed of Trust further provided that the beneficiary could purchase the property at the foreclosure sale by offering the highest bid and then having the bid credited on the Note.

On April 19, 2008, Senger Creek and Ferguson entered into an extension agreement, extending the maturity date of the Note until April 19, 2009. The parties signed a second extension agreement on April 19, 2009, extending the maturity date of the Note until April 19, 2010 and increasing the line of credit to $2,000,000. Senger Creek asserted that in October 2009, a third-party appraiser valued the property at $6,000,000. After this appraisal, Senger Creek alleged that the relationship between Senger Creek and Ferguson deteriorated because Ferguson wanted a bigger share of the profits.

Unbeknown to Gilbert, Moore, and Torregrossa, on November 3, 2009, Parkway Lakes assigned the Note and Deed of Trust to Level 2, an entity formed by Fuqua,[3] in exchange for cancelling various debts Ferguson owed to Fuqua and related entities. Senger Creek alleged that between March and May 2010, Senger Creek "made numerous attempts to contact Ferguson and Fuqua to arrange and

[3] Fuqua also served as Level 2's president.

tender payments on the Note, to obtain draws on [Senger Creek's] line of credit, and to renew the Note and Deed of Trust."[4]

On May 5, 2010, Fuqua's law firm, Fuqua & Associates, sent a letter to Senger Creek, notifying it that Level 2 was the current owner of the Note, that his firm had been retained by Level 2, and that the Note had matured on April 19, 2010. The letter also stated that Senger Creek defaulted on the Note, immediate payment of the unpaid principal and all accrued and unpaid interest was due, and that if Senger Creek did not make immediate payment, Level 2 intended to foreclose the lien in accordance with an attached "Notice of Substitute Trustee's Sale." The notice provided that Fuqua was the substitute trustee, Level 2 was the holder of the Deed of Trust, and the sale would occur on June 1, 2010 in Harris County. The notice did not provide the substitute trustee's address.

On May 6, 2010, Fuqua filed an appointment of substitute trustee appointing himself substitute trustee under the Deed of Trust. On May 27, 2010, Senger Creek's attorney sent Fuqua a letter, acknowledging receipt of the Notice of Substitute Trustee's Sale and stating that pursuant to the Note's terms, Senger Creek had not received a 10-day notice and the opportunity to cure. The attorney further stated that

[4] According to his affidavit, Gilbert stated that before the Note matured, he heard rumors that Ferguson had assigned the Note to Level 2.

if "the property is sold at that foreclosure sale, my clients will pursue a claim for wrongful foreclosure against all responsible parties."

On June 1, 2010, the Fuqua Family Limited Partnership (FFLP) bought the property at the foreclosure sale with a $1,500,000 credit bid. Six months later, FFLP recorded the foreclosure deed reflecting its purchase of the property.

In July 2012, FFLP sold the property to IH45 Investments, LLC. Senger Creek alleged that IH45 was advised of the "defective and invalid" foreclosure sale and that IH45 attempted to get Senger Creek, Gilbert, Moore, and Torregrossa to sign releases.

On May 30, 2014, Senger Creek sued the Fuqua Defendants and other parties. In its petition, Senger Creek asserted claims against the Fuqua Defendants for wrongful foreclosure, trespass to try title, breach of contract, knowing participation in a breach of fiduciary duty, civil conspiracy, unjust enrichment, promissory estoppel, and usury. Senger Creek asserted that it suffered actual and exemplary damages and sought monetary relief. In its prayer, Senger Creek alternatively argued that the trial court should declare the foreclosure deed void and set it aside as well as setting aside all subsequently-recorded instruments and declaring Senger Creek the legal and equitable owner of the property. Senger Creek stated that the discovery rule applied because it did not discover the existence of its claims against the Fuqua Defendants until April 2014. Each of the Fuqua Defendants filed an

answer asserting a general denial and various affirmative defenses, including statute of limitations, waiver, and estoppel.

**Motions for summary judgment**

On November 19, 2014, the Fuqua Defendants moved for summary judgment on Senger Creek's claims for breach of contract, knowing participation in a breach of fiduciary duty, civil conspiracy, unjust enrichment, promissory estoppel, and usury. The Fuqua Defendants asserted that the Note matured on April 19, 2010, that Senger Creek's attorney objected to the foreclosure on May 27, 2010, and by waiting until May 30, 2014, more than four years after the Note matured and Senger Creek failed to pay the amounts remaining due, limitations had run on Senger Creek's claims. The Fuqua Defendants also asserted that the discovery rule did not apply because the Note's maturity date and the written notice received by Senger Creek were not inherently undiscoverable.

On January 16, 2015, Senger Creek responded to the motion for summary judgment, arguing that the Fuqua Defendants did not present competent evidence to conclusively show that a wrongful act caused injury to Senger Creek on April 18 or May 5, 2010. Senger Creek alleged that the breach of contract claim established that "Level 2 breached the Note and Deed of Trust causing injury to [Senger Creek] (at the earliest) on June 1, 2010, when Fuqua wrongfully foreclosed Level 2's lien o[n] the Property."

With regard to its claims for knowing participation in a breach of fiduciary duty and civil conspiracy, Senger Creek argued that the Fuqua Defendants' reliance on the Note and Notice of Substitute Trustee's Sale did not show when Senger Creek knew or, in the exercise of ordinary diligence, should have known of the wrongful act and resulting injury. Senger Creek argued that discovery had just begun and no depositions had been taken, and "[t]hus, it is yet to be determined what confidential information was leaked to [the] Fuqua Defendants by Ferguson—who owed fiduciary duties to [Senger Creek] in his capacity as owner of [Parkway Lakes Master], a member of [Senger Creek]." Senger Creek continued, "Because a fact issue exists as to when [Senger Creek's] claims accrued and whether they knew or should have known about the wrongful acts of [the] Fuqua Defendants and Ferguson Defendants which caused injury to [Senger Creek] . . . the discovery rule applies and therefore [the Fuqua] Defendants statute of limitations affirmative defense fails."

On February 6, 2015, the Fuqua Defendants sought summary judgment on Senger Creek's wrongful foreclosure and trespass to try title claims. The Fuqua Defendants asserted that Senger Creek's claims fail as a matter of law because Senger Creek had actual notice of the foreclosure sale, Senger Creek cannot connect any claimed defects in the foreclosure sale to any injury it has suffered, and it cannot show a grossly inadequate price at the foreclosure sale. They also argued that the foreclosure sale was not void and, even if Senger Creek could establish a defect in

the foreclosure, a failure to comply with the notice requirement would render the foreclosure sale voidable. They also argued that if the foreclosure had been voidable, Senger Creek's delay in challenging the foreclosure sale served to waive its claims because the property had been sold to a good faith purchaser.

Senger Creek responded to the Fuqua Defendants' summary judgment on wrongful foreclosure and trespass to try title, arguing that the foreclosure sale was void because the notice of sale did not disclose the substitute trustee's street address as required in section 51.0075(e) of the Texas Property Code, Level 2 failed to provide a 10-day notice of opportunity to cure before posting the property for foreclosure, and the substitute trustee was not authorized to sell the property to an entity in which he owns or controls an interest. Senger Creek also argued that the property sold for an amount that was grossly inadequate, which is a question of fact for the jury to decide, and that because Level 2 and its predecessor in interest, Parkway Lakes, committed a prior material breach of the note by failing to fund draw requests, Senger Creek was excused from its obligations.

The Fuqua Defendants replied, arguing that their failure to include a substitute trustee's address rendered the foreclosure sale voidable rather than void. And that even though the notice did not include the substitute trustee's address, Senger Creek could still not recover on its wrongful foreclosure claim because it failed to show that the defect caused the property to be sold for a grossly inadequate price. The

Fuqua Defendants further replied that Senger Creek received actual notice of the substitute trustee's address as evidenced by Senger Creek's attorney sending a letter to Fuqua, acknowledging receipt of the Notice of Substitute Trustee's Sale.

Senger Creek filed a cross-motion for partial summary judgment on the wrongful foreclosure and trespass to try title claims, arguing that the foreclosure sale was void *ab initio* because the notice of sale did not disclose the substitute trustee's street address, Level 2 failed to provide a 10-day opportunity to cure notice before posting the property for foreclosure and the substitute trustee was not authorized to sell the property to an entity in which it owns or controls an interest.

The Fuqua Defendants responded to the cross-motion and filed objections to Senger Creek's summary judgment evidence. The Fuqua Defendants asserted that the sale was not void *ab initio* because the notice failed to include the substitute trustee's address and that FFLP, which owns 100% of the interest of Level 2, designated Level 2 to hold the Note as Parkway's assignee. The Fuqua Defendants also asserted that Senger Creek's argument regarding the lack of 10-day notice relies on a provision of the Note that does not apply; rather, because the Note reached maturity, the amount due was immediately owed.

**The trial court's orders**

On March 6, 2015, the trial court issued an amended order finding that the Note matured on April 19, 2010[5] and granting the Fuqua Defendants' summary judgment on limitations on Senger Creek's claims for breach of contract, breach of fiduciary duty, civil conspiracy unjust enrichment, promissory estoppel, and usury.[6] Also on March 6, 2015, the trial court granted the Fuqua Defendants' partial summary judgment on Senger Creek's wrongful foreclosure and trespass to try title claims.

On March 27, 2015, Senger Creek filed a motion for reconsideration of the trial court's order granting the Fuqua Defendants' motion for summary judgment on its claims for wrongful foreclosure and trespass to try title. The trial court denied the motion for reconsideration on April 14, 2015. On September 19, 2015, the trial court severed the claims against the Fuqua Defendants into a separate cause number thus making its judgments final. On October 19, 2015, Senger Creek filed a motion for new trial, motion for reconsideration, motion for ruling on objections and motion to modify, correct or reform summary judgment regarding the wrongful foreclosure

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[5] Neither party challenges the trial court's ruling that the Note matured on April 19, 2010.

[6] The trial court had initially granted the Fuqua Defendants' motion for summary judgment on limitations on January 22, 2015.

and trespass to try title claims. The trial court denied Senger Creek's motion for new trial and for reconsideration on December 8, 2015. Senger Creek appeals the trial court's orders granting summary judgment in favor of the Fuqua Defendants.

## Foreclosure Sale

In its first issue on appeal, Senger Creek argues that the trial court erred in granting the Fuqua Defendants' summary judgment and in denying its cross-motion for summary judgment on its claims for wrongful foreclosure.[7]

### Standard of Review

We review the trial court's grant of a summary judgment de novo. *Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007); *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). To prevail on a traditional summary judgment motion, the movant bears the burden of proving that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009).

When both parties move for summary judgment on the same issues and the trial court grants one motion and denies the other, we review both parties' summary

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[7] Although Senger Creek's brief mentions its trespass to try title claim, Senger Creek's arguments only address its wrongful foreclosure claim. Thus, Senger Creek has waived review of the portion of the trial court's order that granted summary judgment on its trespass to try title claim. *See* TEX. R. APP. P. 38.1(i).

judgment evidence and determine all questions presented. *Dorsett*, 164 S.W.3d at 661; *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000). Each party bears the burden of establishing that it is entitled to judgment as a matter of law. *City of Santa Fe v. Boudreaux*, 256 S.W.3d 819, 822 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *see also* TEX. R. CIV. P. 166a(c) ("The judgment sought shall be rendered forthwith if . . . there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response.").

When a defendant moves for summary judgment, it must either (1) disprove at least one element of the plaintiff's cause of action or (2) plead and conclusively establish each essential element of an affirmative defense to rebut plaintiff's cause. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995) (per curiam). To decide whether issues of material fact preclude summary judgment, evidence favorable to the non-moving party must be taken as true, every reasonable inference must be indulged in its favor, and any doubts resolved in its favor. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). The movant must conclusively establish its right to judgment as a matter of law. *Charida v. Allstate Indem. Co*., 259 S.W.3d 870, 872 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (citing *MMP Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986)). A matter is conclusively established if reasonable

people could not differ as to the conclusion to be drawn from the evidence. *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005).

If we determine that the trial court erred, we render the judgment that the trial court should have rendered. *Dorsett*, 164 S.W.3d at 661; *FM Props.*, 22 S.W.3d at 872. If the trial court's order does not specify the grounds for its summary judgment ruling, we affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious. *See Knott*, 128 S.W.3d at 216.

**Was the Foreclosure Sale Void?**

On appeal, Senger Creek argues that the foreclosure sale was void for four reasons: (1) Level 2 failed to provide the substitute trustee's street address in the Notice of Substitute's Trustee's Sale as required by the Texas Property Code; (2) Level 2 failed to provide a 10-day notice of default and opportunity to cure before posting the property for foreclosure; (3) Senger Creek was not in default due to Level 2's prior material breach; and (4) no public sale for cash occurred because FFLP purchased the property using a credit bid for a debt it did not own. We address these in turn.

### 1. Notice of address

Section 51.0075(e) of the Texas Property Code provides that "[t]he name and a street address for a trustee or substitute trustees shall be disclosed on the notice required by Section 51.002(b)." TEX. PROP. CODE ANN. § 51.0075(e) (West 2014).

Section 51.002(b) provides,

> Except as provided by Subsection (b-1),[8] notice of the sale, which must include a statement of the earliest time at which the sale will begin, must be given at least 21 days before the date of the sale by:
>
> (1) posting at the courthouse door of each county in which the property is located a written notice designating the county in which the property will be sold;
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> (2) filing in the office of the county clerk of each county in which the property is located a copy of the notice posted under Subdivision (1); and
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> (3) serving written notice of the sale by certified mail on each debtor who, according to the records of the mortgage servicer of the debt, is obligated to pay the debt.

TEX. PROP. CODE. ANN. § 51.002(b)(1–3) (West 2014).

The purpose of notice under Section 51.002 is to provide a minimum level of protection to the debtor, and actual receipt of the notice is not necessary. *See Onwuteaka v. Cohen*, 846 S.W.2d 889, 892 (Tex. App.—Houston [1st Dist.] 1993,

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[8] Section b-1 addresses a situation when the county clerk's office is closed due to inclement weather. *See* TEX. PROP. CODE ANN. § 51.002(b-1) (West 2014). The parties never argued that this section applies.

writ denied); *Hous. Omni USA Co., v. Southtrust Bank Corp*., No. 01–07–00433–CV, 2009 WL 1161860, at *6 (Tex. App.—Houston [1st Dist.] Apr. 30, 2009, no pet.) (mem. op.).

On appeal, the Fuqua Defendants do not dispute that the Notice of Substitute Trustee's Sale did not include Fuqua's address. Rather, they argue that such defect did not render the foreclosure sale void, but merely voidable.

If "void," then the foreclosure deed is a nullity, of no effect, and not susceptible of ratification. *Cummings v. Powell*, 8 Tex. 80, 85 (1852). A "voidable" act operates to accomplish the thing sought to be accomplished until the fatal vice in the transaction has been judicially ascertained and declared. *Slaughter v. Qualls*, 162 S.W.2d 671, 674 (1942). A voidable act may be subsequently ratified or confirmed. *Cummings*, 8 Tex. at 85.

Although it is undisputed that Fuqua, as substitute trustee, did not provide his address on the Notice of Substitute Trustee's Sale, we have previously held that deficiencies in the notice render the foreclosure sale voidable rather than void. *See WMC Mortg. Corp v. Moss*, No. 01–10–00948–CV, 2011 WL 2089777, at *7 (Tex. App.—Houston [1st Dist.] May 19, 2011, no pet.) (mem. op.) (determining that "such a deficiency in the notice would render the tax foreclosure sale voidable rather than void"); *see also Kourosh Hemyari v. Stephens*, 355 S.W.3d 623, 628 (Tex. 2011) (stating that the Court has previously acknowledged that "minor defects in an

otherwise valid foreclosure sale do not void it"); *Elbar Invs., Inc. v. Wilkinson*, No. 14–99–00297–CV, 2003 WL 22176624, at *2–3 & n.1 (Tex. App.—Houston [14th Dist.] Sept. 23, 2003, pet. denied) (mem. op.) (holding that junior lienholder lacked standing to challenge foreclosure sale on basis of irregularities in notice because such deficiencies rendered sale voidable rather than void); *Fireman's Fund Ins. Co. of Tex. v. Jackson Hill Marina, Inc.*, 704 S.W.2d 131, 135 (Tex. App.—Tyler 1986, writ ref'd n.r.e.) (holding that foreclosure sale of building was rendered voidable rather than void by inadequate notice under provisions of security agreement and applicable law). In light of these authorities and precedent from this Court, we construe that a defect in failing to provide the street address as required in section 51.0075 renders the foreclosure sale voidable, rather than void.

Senger Creek has cited other authorities, holding that failing to include a substitute trustee's address renders the foreclosure sale invalid. *See G4 Trust v. Consol. Gasoline, Inc.*, No. 02–10–00404–CV, 2011 WL 3835656, at *3 (Tex. App.—Fort Worth 2011, pet. denied) (mem. op.). Contrary to Senger Creek's contention, *G4* did not address whether the foreclosure sale in that case was void or voidable, and it is distinguishable on that basis. Accordingly, we hold that the foreclosure sale was not void, but voidable, due to the Notice of Substitute Trustee's Sale that failed to provide the substitute trustee's street address.

### 2. Ten-Day Notice Required?

Senger Creek next argues that the foreclosure sale was void because Level 2 failed to provide a 10-day notice and an opportunity to cure before posting the foreclosure. It is undisputed that on April 19, 2010, the Note's maturity date, Senger Creek had not paid the principal balance and interest due. The Deed of Trust provides in paragraph 5, under the heading "Beneficiary's Rights,"

> 5. If [Senger Creek] defaults on the Note or fails to perform any of [Senger Creek's] obligations or if default occurs on a prior lien note or other instrument, and the default continues after [Level 2] gives [Senger Creek] notice of the default and the time within which it must be cured, as may be required by law or by written agreement, then [Level 2] may:
>
> a. declare the unpaid principal balance and earned interest on the Note immediately due;
>
> b. request [Fuqua] to foreclose this lien, in which case [Level 2] or [Level 2's] agent shall give notice of the foreclosure sale as provided by the Texas Property Code as then amended; and
>
> c. purchase the Property at any foreclosure sale by offering the highest bid and then have the bid credited on the note.

A trustee has no power to sell the debtor's property, except such as may be found in the deed of trust; and the powers therein conferred must be strictly followed. *Slaughter*, 162 S.W.2d at 675. The Deed of Trust does not require a 10-day notice

before posting the property for foreclosure. Likewise, the Note also does not require Level 2 to give a 10-day notice before posting the property for foreclosure. The Note does state "If [Senger Creek] defaults in the payment of this Note or in the performance of any obligation in any instrument securing or collateral to it, the holder of this Note shall give notice to [Senger Creek] and if such event of default is not cured within 10 days for a monetary default . . . then Payee may declare the unpaid principal balance and earned interest on this Note immediately due." This language, to the extent it applies,[9] does not require the holder (Level 2) to provide a 10-day notice before posting the property for foreclosure.

We disagree with Senger Creek that Level 2 had to provide a 10-day notice before posting the property for foreclosure. Because the Note matured on April 19, 2010 and Senger Creek did not pay the Note in full, Senger Creek was in default. Pursuant to the Deed of Trust, Fuqua gave notice of the default to Senger Creek on behalf of Level 2 on May 5, 2010 and demanded payment immediately, and informed it that if payment was not made immediately, Level 2 intended to foreclose on the lien at a sale scheduled for June 1, 2010, thus giving Senger Creek more than

[9] The Fuqua Defendants argued, in their reply to Senger Creek's response to the Fuqua Defendants' motion for summary judgment, that this language applied not to a default on maturity, but rather a default that occurs before the Note reaches maturity.

21 days' notice.[10] We therefore overrule Senger Creek's argument that the foreclosure sale was void on this basis.

### 3. Senger Creek not in default?

Senger Creek next argues that the uncontroverted evidence "established a prior material breach on the part of Level 2 and precludes a finding that Senger Creek was in default." Specifically, Senger Creek asserts that prior to the Note's maturity, it made draw requests to Level 2 and that Level 2 failed to fulfill the requests which essentially excused Senger Creek from performing under the Note.

We agree that a foreclosure sale is void if the borrower is not in default. *See Bradford v. Thompson*, 470 S.W.2d 633, 635 (Tex. 1971); *Slaughter*, 162 S.W.2d at 675. However, Senger Creek's argument asks this Court to hold that Level 2 committed a prior material breach that excused Senger Creek's subsequent breach to pay off the Note which, in turn, voided the foreclosure sale. In its March 6, 2015 order, however, the trial court rendered judgment against Senger Creek on its breach of contract claim. Because, as we later discuss, we affirm the trial court's ruling granting summary judgment against Senger Creek's breach of contract claim, we overrule Senger Creek's argument.

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[10] *See* TEX. PROP. CODE ANN. § 51.002(b) (West 2014) (requiring notice of sale to be given 21 days before date of sale).

### 4. Did the purchase of the property by FFLP render the sale void?

Senger Creek next argues that because "the Note and Deed of Trust do not authorize the trustee to engage in self-dealing or otherwise bid on behalf of a non-mortgagee entity in which the trustee owns an interest," Fuqua violated the terms of the Deed of Trust when he bid on behalf of FFLP, and therefore the sale is void.

In support of its argument, Senger Creek relies on *Casa Monte Co. v. Ward*, 342 S.W.2d 812, 813 (Tex. Civ. App.—Austin 1961, no writ). There, the holder of the note, Casa Monte, sued appellees for a deficiency judgment, the alleged difference between the amounts for which certain real estate sold at a trustee's foreclosure sale. *Id.* at 813. The trial court granted summary judgment in favor of appellees. *Id*. The court of appeals noted that, as a prerequisite to the recovery of a deficiency judgment, the deficiency must be established by a valid foreclosure sale. *Id*. In affirming, the court of appeals stated, "[t]he foreclosure sale in suit was invalid" because the substitute trustee under the deed of trust sold the property to a corporation in which he was the president. *Id*. The court of appeals noted that the deed of trust did not authorize the trustee to sell to himself. *Id*. The court then stated that "sales made by a trustee under a deed of trust to himself are voidable at the election of maker of the note." *Id*.

Here, Ferguson assigned the Note and Deed of Trust to Level 2 before the Note reached maturity. Level 2 appointed Fuqua as the substitute trustee to foreclose

on the property. Fuqua, on behalf of FFLP—which owned 100% of Level 2—purchased the property. The Deed of Trust provides that the beneficiary (Level 2) "may purchase the Property at any foreclosure sale by offering the highest bid and then have the bid credited on the note." Contrary to Senger Creek's assertion, the Deed of Trust did not preclude a non-mortgagee entity from bidding on the property, which distinguishes it from the deed of trust in *Casa Monte*. We therefore hold that the sale was not void on this basis.

In Texas, a voidable foreclosure sale, unlike a void sale, is treated as valid until it is set aside, and acts to pass the debtor's title to the purchaser. *Slaughter*, 162 S.W.2d at 674 (stating "[t]hat which is void is without vitality or legal effect. That which is voidable operates to accomplish the thing sought to be accomplished, until the fatal vice in the transaction has been judicially ascertained and declared.") (quoting *Smith v. Thornhill*, 25 S.W.2d 597, 598 (Tex. Comm'n App. 1930, judgm't adopted), *judgment vacated on other grounds on reh'g*, 34 S.W.2d 803 (Tex. Comm'n App. 1931, holding approved); *see Diversified, Inc. v. Walker*, 702 S.W.2d 717, 721 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.). Having overruled all of Senger Creek's arguments on why the foreclosure sale was void, we next determine whether the trial court properly granted summary judgment on Senger Creek's wrongful foreclosure claim.

## Wrongful Foreclosure

In its second issue, Senger Creek argues that the trial court erred in granting summary judgment on its wrongful foreclosure claim because the Fuqua Defendants "failed to conclusively negate any essential elements of wrongful foreclosure."

Proof of a wrongful foreclosure claim demands demonstration of a defect in the foreclosure sale proceedings and a causal connection between the defect and a grossly inadequate selling price. *See Sauceda v. GMAC Mortg. Corp*., 268 S.W.3d 135, 139 (Tex. App.—Corpus Christi 2008, no pet.) (citing *Charter Nat'l Bank–Hous. v. Stevens*, 781 S.W.2d 368, 371 (Tex. App.—Houston [14th Dist.] 1989, writ denied)). A defect in foreclosure proceedings may occur when there is no default or when the sale is otherwise void. *See Slaughter*, 162 S.W.2d at 675 (deciding that foreclosure sale was void because, inter alia, note was not in default at time of sale); *Lavigne v. Holder*, 186 S.W.3d 625, 627–28 (Tex. App.—Fort Worth 2006, no pet.) (reversing summary judgment in favor of creditor because, in absence of default, creditor could not accelerate debt or foreclose against property). A defect may also occur when the statutory foreclosure procedures are not followed. *See Hous. First Am. Sav. v. Musick*, 650 S.W.2d 764, 768 (Tex. 1983). Failure to properly foreclose on property gives rise to a cause of action for either the return of the property or damages. *C & K Invs. v. Fiesta Group, Inc*., 248 S.W.3d 234, 254 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *see also Pinnacle Premier Props., Inc. v. Breton*,

447 S.W.3d 558, 565 (Tex. App.—Houston [14th Dist.] 2014, no pet.). The measure of damages for wrongful foreclosure is lost equity, that is, the difference between the value of the property in question at the date of foreclosure and the remaining balance due on the indebtedness. *Farrell v. Hunt*, 714 S.W.2d 298, 299 (Tex. 1986); *C & K Invs.*, 248 S.W.3d at 254.

In its traditional summary judgment motion, the Fuqua Defendants challenged Senger Creek's wrongful foreclosure claim on three grounds: (1) no defect in the foreclosure proceedings as a matter of law; (2) the evidence conclusively establishes that the property did not sell for a grossly inadequate amount; and (3) "Senger Creek cannot show that any injury resulted from any of the notice defects they claim void the foreclosure sale because the summary judgment evidence conclusively establishes that they had actual notice of the foreclosure sale described by the May 5, 2010 letter and notice."

**Defect in Foreclosure**

While the Fuqua Defendants argued below that no defect in the foreclosure process existed, they do not dispute on appeal that the substitute trustee failed to provide his address in accordance with section 51.0075. *See* TEX. PROP. CODE ANN. § 51.0075. The summary judgment evidence shows that the substitute trustee failed to include his address. We therefore conclude that the Fuqua defendants did not

conclusively establish as a matter of law that the foreclosure sale did not have any defect.

**Grossly Inadequate Price**

The Fuqua Defendants next argue that FFLP paid $1.5 million for the property via a credit bid and that such amount was not grossly inadequate because, at the time of the sale, the property's tax appraisal valued it at less than what was bid on the property. *See Natural Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 159 (Tex. 2012) (providing that evidence of price paid, nearby sales, tax valuations, appraisals, or online resources may support market value). Even if the Fuqua Defendants conclusively established that the price paid was not grossly inadequate, Senger Creek presented summary judgment evidence that an October 25, 2009 appraisal of the property showed that its fair market value was $6,000,000. We conclude that Senger Creek's evidence raises a genuine issue of fact on whether the property sold for a grossly inadequate amount.

**Causal Connection Between Defect and Price**

Finally, the Fuqua Defendants claim that the evidence conclusively established that Senger Creek could not show a causal connection between the defect and the grossly inadequate sales price. The Fuqua Defendants argued in their motion for summary judgment that "Senger Creek cannot show that any injury resulted from any of the notice defects they claim void the foreclosure sale because the summary

judgment evidence conclusively establishes that they had actual notice of the foreclosure sale described by the May 5, 2010 letter and notice."

We note that the Fuqua Defendants relied on Senger Creek's attorney's May 27, 2010 letter as evidence that Senger Creek had notice of the sale to support its argument that the evidence conclusively established that no causal connection existed between the defect and inadequate price. While we agree that the May 27 letter shows that Senger Creek had actual notice of the sale, we disagree that this evidence conclusively establishes that no causal connection existed between the alleged grossly inadequate sales price and the defective notice. We reach this decision because the summary judgment evidence shows that the property sold for $4,500,000 less than the valuation provided by a third-party appraisal completed a year earlier. And, "[t]he statutory notice provisions of section 51.002 seek to not only protect the debtor by affording him a lengthy notice period in which he may cure, but also adequately inform the third party public in order to maximize the likelihood of a profitable public sale at market value in which the debtor may recover his equity in his property." *Jasper Fed. Sav. & Loan Ass'n v. Reddell*, 730 S.W.2d 672, 674–75 (Tex. 1987). By failing to provide proper notice, reasonable jurors may conclude that the third party public was not adequately informed. *See Estate of Broughton v. Fin. Freedom Senior Funding Corp.*, No. 13–14–00091–CV, 2016 WL 2955058, at *3, 5 (Tex. App.—Corpus Christi May 19, 2016, pet. granted, judgm't

vacated w.r.m.) (mem. op.) (concluding that appellants raised fact issue on causation when significant disparity between sale price and appraisal and noting it is question of fact to be determined from evidence whether or not irregularity had any influence upon consideration for which property sold); *see also King v. Hill*, No. 07–10–0198–CV, 2012 WL 967351, at *3 (Tex. App.—Amarillo Mar. 22, 2012, no pet.) (mem. op.) (finding summary judgment evidence sufficient to enable reasonable and fair-minded jurors to differ in their conclusions as to whether failure to conduct foreclosure sale at designated location chilled the bidding process by excluding other potential bidders, thereby causing or contributing to grossly inadequate price); *see also Charter Nat'l Bank-Hous.*, 781 S.W.2d at 374 (quoting *Allen v. Pierson*, 60 Tex. 604, 607 (Tex. 1884) ("[I]t is a question of fact to be determined from the evidence whether or not the irregularity had any influence upon the consideration for which the property sold. It is not a matter of law to be assumed by the court."). We therefore conclude that the Fuqua Defendants did not demonstrate as a matter of law that no causal connection existed between the defect and the sales price.

Because the Fuqua Defendants did not disprove any element of Senger Creek's wrongful foreclosure claim, the trial court erred in granting summary judgment on this claim.

We sustain Senger Creek's second issue.

## Statute of Limitations

In its third issue, Senger Creek argues that the trial court erred in granting traditional summary judgment based on limitations on its claims for breach of contract, knowing participation in a breach of fiduciary duty, and civil conspiracy.

The general rule is that a cause of action accrues when a wrongful act causes some legal injury, even when the fact of injury is not discovered until later, and even if all of the resulting damages have not yet occurred. *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996). However, there are exceptions to the general rule that operate to defer accrual and toll statutes of limitations. *See Mellon Serv. Co. v. Touche Ross & Co*., 17 S.W.3d 432, 435–36 (Tex. App.—Houston [1st Dist.] 2000, no pet.). Limitations may be tolled: (1) where a defendant has fraudulently concealed a plaintiff's injury and (2) where the nature of the injury is inherently undiscoverable, but may be objectively verified. *Id*. at 436.

The discovery rule defers the accrual of a cause of action until the plaintiff knows, or by exercising reasonable diligence, should know of the facts giving rise to the claim. *Barker v. Eckman*, 213 S.W.3d 306, 311–12 (Tex. 2006). For the discovery rule to apply, the injury must be inherently undiscoverable and objectively verifiable. *Id*. at 312; *Via Net v. TIG Ins. Co*., 211 S.W.3d 310, 313 (Tex. 2006). *Comput. Assocs. Int'l, Inc. v. Altai, Inc*., 918 S.W.2d 453, 456 (Tex. 1996). In other words, such claims accrue when the claimant knows or in the exercise of ordinary

diligence should know of the wrongful act and resulting injury. *Murphy v. Campbell*, 964 S.W.2d 265, 271 (Tex. 1997). The date that a claimant knew or should have known of an injury is generally a fact question. *Childs v. Haussecker*, 974 S.W.2d 31, 44 (Tex. 1998). However, if reasonable minds could not differ about the conclusion to be drawn from the facts in the record, the start of the limitations period may be determined as a matter of law. *Id*.

A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense. *KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp*., 988 S.W.2d 746, 748 (Tex. 1999). Thus, the Fuqua Defendants must (1) conclusively prove when the cause of action accrued and (2) negate the discovery rule, if it applies, by proving as a matter of law that there is no genuine issue of material fact about when Senger Creek discovered, or in the exercise of reasonable diligence should have discovered, the nature of their injury. *See id*.

**Breach of contract**

Both parties agree that the statute of limitations for a breach of contract claim is four years. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.004 (West 2002). They disagree as to when Senger Creek's breach of contract claim accrued and whether the discovery rule applies. In their motion for summary judgment, the Fuqua Defendants asserted that Senger Creek's breach of contract claim was based on

Ferguson's failure to fulfill his contractual duty to allow Senger Creek to draw from its line of credit pursuant to the Note and Deed of Trust. Because the Note matured on April 19, 2010, the Fuqua Defendants asserted that Senger Creek's breach of contract claim accrued no later than four years from April 19, 2010. The Fuqua Defendants also argued that the discovery rule did not apply because "the Note's maturity and the written notice received by the Senger Creek plaintiffs—were not only *not* 'inherently undiscoverable' but readily observable."

It is well-settled that a breach of contract claim accrues when the contract is breached. *Stine v. Stewart*, 80 S.W.3d 586, 592 (Tex. 2002). In its amended petition, Senger Creek alleged that Parkway Lakes and Level 2 breached its agreement to advance draws to Senger Creek. The Fuqua Defendants presented evidence of the Note, Deed of Trust, the first and second modifications of the Note, Fuqua's affidavit, and Fuqua's letter to Senger Creek to support their argument that limitations had run on Senger Creek's breach of contract claim. Because Senger Creek's breach of contract claim was based on Ferguson's failure to comply with the terms of the Note, this claim accrued no later than at the Note's maturity—April 19, 2010. We conclude that the Fuqua Defendants' evidence conclusively establishes that limitations barred Senger Creek's breach of contract claim because it waited until over four years after this date to sue.

Moreover, Senger Creek's own summary judgment evidence shows that Senger Creek knew that Parkway Lakes and Level 2 repeatedly ignored its requests to draw from its line of credit. Senger Creek's attorney's letter to Fuqua acknowledged receipt of Fuqua's letter notifying Senger Creek that the Note had reached maturity and had not been paid. Thus, the alleged breach of failing to comply with the Note was not inherently undiscoverable and the discovery rule does not apply.

In its summary judgment response and on appeal, Senger Creek argues that the earliest breach occurred on June 1, 2010, the date of the foreclosure sale. This argument ignores Senger Creek's own summary judgment evidence mentioned above. We therefore conclude that Senger Creek has not raised a genuine issue of fact as to when its breach of contract claim accrued or whether the discovery rule applied to defer the accrual of the statute of limitations on its breach of contract claim.

**Knowing Participation in a Breach of Fiduciary Duty**

Both parties agree that the statute of limitations for a knowing participation in a breach of fiduciary duty claim is four years. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.004 (West 2002). The Fuqua Defendants asserted that Senger Creek based its knowing participation in a breach of fiduciary duty claim on Ferguson's alleged breach of fiduciary duty owed to the other members of Senger Creek and the

assignment of the Note to Level 2. The Fuqua Defendants thus argue that because Fuqua sent notice of the assignment, Senger Creek knew of its claim no later than May 5, 2010.

When analyzing the applicability of the discovery rule in cases in which the alleged injuries arise from a breach of fiduciary duty, the claims are generally considered inherently undiscoverable. *S.V.*, 933 S.W.2d at 8; *Comput. Assocs.*, 918 S.W.2d at 456. Nonetheless, once the fiduciary's misconduct becomes apparent, the claimant cannot ignore it, regardless of the fiduciary nature of the relationship. *S.V.*, 933 S.W.2d at 8.

Here, Senger Creek's amended petition stated that its knowing participation in a breach of fiduciary duty claim was based on the Fuqua Defendants' knowledge of Ferguson's fiduciary relationship with Senger Creek and its acceptance of the "benefits of the breaches of the fiduciary duties owed to [Senger Creek]." The evidence shows that Fuqua sent Senger Creek a letter and notice of sale on May 5, 2010, informing Senger Creek that Ferguson had assigned the Note to Level 2. Senger Creek confirmed that it received the letter when its own attorney sent Fuqua a response on May 27, 2010, acknowledging it had received the notice of sale. Because its knowing participation in a breach of fiduciary duty claim arises from Ferguson's breach of fiduciary duty which would have accrued no later than May 5,

2010 when Level 2 gave Senger Creek notice of the assignment, the Fuqua Defendants conclusively established that Senger Creek's claim is barred.[11]

Senger Creek argued that "a fact issue exists as to when [its] claims accrued and whether [it] knew or should have known about the wrongful acts of [the] Fuqua Defendants and Ferguson Defendants which caused injury to [Senger Creek and] conspired to defraud Plaintiffs and engaged and participated in breach of fiduciary duties, the discovery rule applies and therefore Defendants statute of limitations affirmative defense fails." Senger Creek fails to establish a genuine issue of material fact regarding when this claim accrued.

Accordingly, we conclude that the trial court properly granted summary judgment on Senger Creek's knowing participation in a breach of fiduciary duty claim.

**Civil Conspiracy**

Conspiracy claims are subject to a two year statute of limitations.[12] *See Stevenson v. Koutzarov*, 795 S.W.2d 313, 318 (Tex. App.—Houston [1st Dist.] 1990,

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[11] Additional summary judgment evidence shows that Gilbert heard "rumors" that Ferguson had assigned the Note to Level 2 even before Fuqua informed Senger Creek of this fact in writing.

[12] "The essential elements [of civil conspiracy] are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result." *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983)

writ denied) (statute of limitations for civil conspiracy is two years). Senger Creek's amended petition states,

> Ferguson Defendants and Fuqua Defendants entered into a conspiracy with each other to defraud [Senger Creek] by wrongfully foreclosing on the Property and misappropriating SCD's proprietary trade secrets and development plans for their own personal gain.
>
> In furtherance of the conspiracy, Fuqua Defendants and Ferguson Defendants surreptitiously caused the Note and Deed of Trust to be assigned to Level 2 and then willfully and intentionally ignored and refused to honor SCD's draw requests; and then conducted a non-judicial foreclosure sale in violation of the terms of the Note and Deed of Trust, thereby violating Texas Law.

By its own allegations, Senger Creek's conspiracy claim was based on Ferguson and Level 2's failure to honor its draw requests and Ferguson's assignment of the Note to Level 2. Although the actual assignment occurred earlier, Senger Creek received notice that Ferguson assigned the Note to Level 2 on May 5, 2010. Accordingly, we hold that Senger Creek's civil conspiracy claim is barred because it was not brought within two years of learning about the assignment. *See S.V.*, 933 S.W.2d at 4 (explaining generally "a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred"); *see also Seureau v. ExxonMobil Corp.*, 274 S.W.3d 206, 226 (Tex. App.—Houston [14th Dist.] 2008,

no pet.) ("Stated differently, a cause of action generally accrues when facts come into existence which authorize a claimant to seek a judicial remedy.").

Moreover, Senger Creek's conspiracy claim was premised on Ferguson assigning the Note to Level 2 and intentionally ignoring and refusing to honor Senger Creek's draw requests. Because these actions were not inherently undiscoverable, the discovery rule does not apply.

We overrule Senger Creek's third issue.[13]

**Standing**

In their brief, the Fuqua Defendants assert that Gilbert, Moore, and Torregrossa lack standing to bring wrongful foreclosure and trespass to try title claims. The Fuqua Defendants rely on three answers to requests for admissions to show that these three plaintiffs have no standing.

> 1. Gilbert, Moore, and Trenton Torregrossa are not parties to the deed of trust associated with the Note and Property.
>
> 2. Gilbert, Moore, and Torregrossa are not parties to the Note.
>
> 3. Gilbert, Moore, and Torregrossa did not have any direct ownership interest in the Property on May 31, 2010.

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[13] Although the trial court's order granting summary judgment on limitations grounds also disposed of Senger Creek's unjust enrichment, promissory estoppel, and usury claims, Senger Creek does not challenge this portion of the trial court's order on appeal. Accordingly, such grounds are waived. *See* TEX. R. APP. P. 38.1(i).

Senger Creek did not respond to the Fuqua Defendants' standing argument.

Standing, a component of subject-matter jurisdiction, is a constitutional prerequisite to maintaining suit under Texas law. *Tex. Ass'n of Bus. v. Tex. Air Control Bd*., 852 S.W.2d 440, 444–45 (Tex. 1993); *Concerned Cmty. Involved Dev., Inc. v. City of Hous.*, 209 S.W.3d 666, 670 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). Standing requires that there exist a real controversy between the parties that will actually be determined by the judicial declaration sought. *Sammons & Berry, P.C. v. Nat'l Indem. Co*., No. 14–13–00070–CV, 2014 WL 3400713, at *3 (Tex. App.—Houston [14th Dist.] July 10, 2014, no pet.) (mem. op.) (citing *Nootsie, Ltd. v. Williamson Cty. Appraisal Dist*., 925 S.W.2d 659, 662 (Tex. 1996)). Only the party whose primary legal right has been breached may seek redress for the injury. *Nauslar v. Coors Brewing Co*., 170 S.W.3d 242, 249 (Tex. App.—Dallas 2005, no pet.). Without a breach of a legal right belonging to a specific party, that party has no standing to litigate. *Cadle Co. v. Lobingier*, 50 S.W.3d 662, 669–70 (Tex. App.—Fort Worth 2001, pet. denied). Standing cannot be waived and can be raised for the first time on appeal. *Tex. Ass'n of Bus*., 852 S.W.2d at 444–45. When reviewing standing on appeal, we construe the petition in favor of the plaintiff and, if necessary, review the entire record to determine whether any evidence supports standing. *Id*. at 446. Whether a party has standing to bring a claim is a question of

law reviewed de novo. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998).

Senger Creek is a limited liability company and, as such, is a legal entity separate from Gilbert, Moore, and Torregrosa. *See Geis v. Colina Del Rio, L.P.*, 362 S.W.3d 100, 109 (Tex. App.—San Antonio 2011, pet. denied) (recognizing limited liability company as legally distinct from member). Gilbert, Moore, and Torregrosa, as members of Senger Creek, do not have an interest in any property of the company. *See* TEX. BUS. ORGS. CODE ANN. § 101.106(b) (West 2012). "A member of a limited liability company lacks standing to assert claims individually where the cause of action belongs to the company." *Barrera v. Cherer*, No. 04–13–00612–CV, 2014 WL 1713522, at *2 (Tex. App.—San Antonio Apr. 30, 2014, no pet.) (mem. op.) (citing *Wingate v. Hajdik*, 795 S.W.2d 717, 719 (Tex. 1990)). But, a limited liability company member may have an individual action against a defendant for a claim that the defendant has breached a contractual duty owed directly to the shareholder, individually. *Wingate*, 795 S.W.2d at 719 (quoting *Mass. v. Davis*, 168 S.W.2d 216, 221 (1942)). The nature of the alleged wrong indicates whether the individual or solely the company has standing. *Redmon v. Griffith*, 202 S.W.3d 225, 234 (Tex. App.—Tyler 2006, pet. denied) (citing *Faour v. Faour*, 789 S.W.2d 620, 622 (Tex. App.—Texarkana 1990, writ denied)).

Senger Creek's amended petition states that Gilbert, Moore, and Torregrossa each own a 16 2/3% membership interest in Senger Creek. Under its wrongful foreclosure claim, Senger Creek asserted that the foreclosure sale deed is void and it asked the trial court to set aside the foreclosure sale, or alternatively, to recover damages equal to the difference between the market value of the property on the date of foreclosure and the remaining balance due on the indebtedness, if any. It is clear that Senger Creek, as a limited liability company, asserts a wrongful foreclosure claim against the Fuqua Defendants. However, it is not entirely clear whether the individual plaintiffs are also asserting a wrongful foreclosure claim. To the extent that the individual plaintiffs assert a claim for wrongful foreclosure, we agree with the Fuqua Defendants that Gilbert, Moore, and Torregrossa lack standing to assert claims individually when the wrongful foreclosure claim belongs to the company. *See Nauslar*, 170 S.W.3d at 250–51; *see also Wingate*, 795 S.W.2d at 719–20 (holding individual stakeholder of legal entity does not have the right to personally recover for harms done to legal entity); *APM Enters., L.L.C. v. Nat'l Loan Acquistions Co*., No. 06–14–00027–CV, 2014 WL 5317753, at *7 (Tex. App.—Texarkana Oct. 17, 2014, no pet.) (mem. op.) (holding limited liability member has no standing to bring company's causes of action); *Barrera*, 2014 WL 1713522, at *2 (holding limited liability member lacked standing to bring forcible detainer action against tenant on property owned by limited liability company). We therefore

conclude that Gilbert, Moore, and Torregrossa lack standing to bring a wrongful foreclosure claim against the Fuqua Defendants and we dismiss them from this portion of the suit. *See* TEX. R. APP. P. 43.2(f).

## Conclusion

We affirm in part and reverse in part the trial court's orders that granted summary judgment in favor of the Fuqua Defendants. We remand the case for further proceedings consistent with this opinion.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Jennings and Bland.