# STATE OF MICHIGAN

# COURT OF APPEALS

---

WILLIAM L. FISHER and BARBARA J. FISHER,

Plaintiffs-Appellants,

v

RAYMOND RASCH and PHYLLIS RASCH,

Defendants-Appellees.

---

UNPUBLISHED
January 10, 1997

No. 179580
LC No. 93-466260

Before: Michael J. Kelly, P.J., and Markman and J.E. Martlew,* JJ.

PER CURIAM

Plaintiffs William L. Fisher and Barbara J. Fisher appeal of right the August 11, 1994, order of the Oakland Circuit Court granting summary disposition to defendants Raymond Rasch and Phyllis Rasch, pursuant to MCR 2.116(C)(7), which found plaintiffs' action involving a mortgage and settlement agreement barred by virtue of a prior settlement. We affirm..

Defendants, Raymond and Phyllis Rasch, are assignees of a mortgage on land in the City of Rochester Hills. Plaintiffs William L. and Barbara J. Fisher are quit claim grantees of this mortgaged land. In 1989 defendants, claiming default by plaintiffs, started foreclosure by advertisement pursuant to a power of sale in the mortgage. A settlement was reached on that dispute on April 28, 1989. The parties entered into an agreement which confirmed the validity of the note and mortgage, reformed the interest rate, reduced the principal balance and reduced the amount of the monthly payments. The agreement further precluded plaintiffs from asserting any invalidity of the original promissory note and mortgage of May 13, 1985. The foreclosure proceedings were dismissed.

Subsequently, plaintiffs defaulted and sued defendants claiming the mortgage notes of May 13, 1985 and of April 28, 1989 were usurious. Defendants' motion for summary disposition pursuant to MCR 2.116(C)(7),(8) and (10), based upon the release agreement of April 28, 1989, was granted. Defendants also started a foreclosure action. Plaintiffs' responsive motion for partial summary

* Circuit judge, sitting on the Court of Appeals by assignment.

disposition was denied, as was their motion for rehearing or reconsideration as well as their motion to enjoin the foreclosure sale. This appeal followed.

Plaintiffs' allegations of error are in repudiation of the settlement agreement of April 28, 1989. This agreement is valid as a matter of law, as plaintiffs did not tender back to defendants the consideration received as a result of that agreement. Plaintiff, therefore, may not assert claims barred by the agreement. *Stefanac v Cranbrook Ed. Comm.* 435 Mich. 155; 458 NW2d 56 (1990).

Plaintiffs' amended complaint challenged the settlement agreement of 1989. Plaintiffs urge the trial court erred in failing to address usury of the note and mortgage prior to reformation by the agreement of April 28, 1989. Usury is a defense to a claim against a debtor and can not be the basis for an independent action. *Rutter v Troy Mortgage Servicing Co.* 145 Mich App 116, 124; 377 NW2d 846 (1985*)*. The trial court's refusal to address the allegation of usury of the modified note was proper.

Plaintiffs further claim error in the interpretation of the settlement agreement by the trial court. If a contract's language is clear, it's construction is a question of law for the court. *Hafner v DAIIE,* 176 Mich App 151, 156, 438 NW2d 891 (1989*)*. The court must determine the intent of the parties' agreement and enforce it. *Whitaker v Citizens Ins. Co.*, 190 Mich App 436, 439; 476 NW2d 161 (1991*)*. Contractual language is given its ordinary and plain meaning, technical and constrained constructions are avoided. *Bianchi v Auto Club of Michigan,* 437 Mich 65, 71, n;1 467 NW2d 17 (1991*)*. The ordinary and plain meaning of the settlement agreement is that plaintiffs waived their defense of usury as to the 1985 note and mortgage by virtue of the agreement of April 28, 1989. These instruments were purged of usury, the agreement referred to both the note and mortgage and that the note was secured by the mortgage. The agreement of April 28, 1989 reads in part:

> *6.That Fisher and Nichols hereby waive, discharge and release Rasch from any and all arguments that the original promissory note and mortgage dated May 13, 1985 was usurious or invalid in any way and Fisher and Nichols, and their successor, assigns, and heirs are precluded from asserting any invalidity of the original promissory note and mortgage dated May 13, 1985.*

The trial court did not err. *G & A Inc. v Nahpa,* 204 Mich App 329, 330-331; 514 NW2d 255 (1994*)*. The plaintiffs have validly waived their right to raise the defense of usury. Plaintiffs' contention, that only the mortgage was waived and not their right to raise the defense of usury is contrary to the plain language of paragraph six, as is the argument that the agreement of 1989 was unsecured.

Plaintiffs next claim error in the trial court's order with reference to acceleration of the principal balance due in 1994 and not the foreclosure proceedings of 1989, which was dismissed as a consideration of the settlement agreement. Plaintiffs' claim is moot because the 1989 foreclosure was dismissed. If the claim of lack of notice had been timely asserted, their rights would have been determined by compliance with MCL 600.3208; MSA 27.A3208 and MCL 600.3212; MSA 27A.3212. *Cheff v Edwards* 203 Mich App 557, 513 NW2d 439 (1994). Plaintiffs do not have a

residual claim based on the dismissal of the 1989 foreclosure proceedings as plaintiffs did not effectively repudiate the agreement of settlement. *Stefanac, supra* 165, 170.

The trial court, in the order denying plaintiffs' motions for rehearing and to enjoin foreclosure, held that the balance due on the mortgage was not waived as Michigan is not a compulsory counterclaim state. *Sahn v Brisson* 43Mich App 666, 671; 204 NW2d 692 (1972). The issue, not being raised or litigated, is not barred by collateral estoppel from foreclosure by defendants based upon plaintiffs default. *Latimer v William Mueller & Son, Inc.* 149 Mich App 620, 640; 386 NW2d 618 (186). *Bullock v Huster,* 209 Mich App 551, 556; 532 NW2d 202 (1995).

Plaintiffs next claim error in the trial court's assessment of sanctions pursuant to MCR 2.114 (D)(2). The trial court correctly concluded that plaintiffs' complaint was not warranted by existing law. This Court affirms the trial court's assessment of sanctions. Plaintiffs' reliance on MCL 600.2932; MSA 27A.2932, which provides for actions to quiet title is misplaced. Plaintiffs' ad damnum clause did not request this relief and this statute does not provide authority for plaintiffs cause of action. At the time plaintiffs filed their suit no foreclosure was pending and there being no actual controversy existing, the complaint was not warranted. *Hofmann v Auto Club Ins. Assoc.* 211 Mich App 55, 97; 535 NW2d 529 (1995).

Plaintiffs also claim that the foreclosure of April 1989, was void. That claim was not raised before the trial court. Issues raised for the first time on appeal are not subject to appellate review. *Deal v Deal,* 197 Mich App 739,741; 496 NW2d 403 (1993).

Plaintiffs argue that the defense of usury is inalienable and cannot be waived. The trial court correctly ruled that the defense of usury is personal and may be waived. *Gardner v Matteson,* 38 Mich. 200 (1878); *Gladwin State Bank v. Dow*, 212 Mich.521,536; 180 NW 601 (1920). The settlement of 1989 altered the terms of the note and purged the taint of usury.

Plaintiffs next claim error in the trial court's denial of their motion for partial summary disposition based on their claim that both notes were satisfied and the mortgage was discharged as a result of payments made at the usurious rate of interest MCL 438.32, MSA 19.15(2). The trial court correctly denied plaintiffs motion. As assignees of the original mortgage, bringing an independent action, plaintiffs were not entitled to any remedy flowing from the alleged usurious transaction. The statute requires that all prior interest paid under a usurious contract be applied to extinguish any principal balance due. However a buyer or borrower can only avail themselves of this statute when the seller brings an action to enforce a usurious contract. A buyer or borrower cannot bring an independent action to recover interest paid on a usurious contract. *Olsen v Porter,* 213 Mich. App. 25, 29-30; 539 NW2d 523, (1995).

Plaintiffs claims of error as to the satisfaction of the notes and the discharge of the mortgage are not preserved for review and are abandon. *Froling v Carpenter* 203 Mich. App.368; 512 NW2d. 6 (1993). Likewise, plaintiffs raise an issue as to notice of the default in the mortgage of May 13, 1985. Again, plaintiffs have not provided any citation to the record indicating the issue was raised and decided

below. Plaintiffs further raise an issue relating to the existence of a power of sale in the mortgage of May 13, 1985. Again this issue is raised for the first time in this appeal and is not preserved. This Court lacks jurisdiction to decide this issue MCR 7.203 (A).

Plaintiffs claim of error as to the trial courts failure to rule on the allegation of extortion in the execution of the settlement agreement of April 28, 1989 is also without merit. The settlement agreement is binding absent rescission for cause and tender of the consideration is a condition precedent to the right to repudiate a contract of settlement. *Stefanac Supra* .163. Plaintiffs did not tender back the consideration before or at the time of starting suit, as required. Further the trial court was correct in not ruling on the issue of extortion as plaintiffs did not allege a prima facie case in the complaint. MCL 750.213; MSA 28.410 gives rise to civil liability, *Edwards v Grisham*, 339 Mich. 531,535; 64 NW2d. 715 (1954), when the elements of the offense are plead and proved. *People v Krist*, 97 Mich. App.669,675; 296 NW2d 139 (1980).

This Courts review of the record indicates that plaintiffs' brief on appeal violates MCR 7.216 (C) (1) (b) in that it is grossly lacking in the requirements of propriety, violated court rules and grossly disregarded the requirement of a fair presentation of the issues. Plaintiffs are assessed one thousand dollars damages as sanctions for this vexatious appeal payable to appellees within 28 days from the date of the release of this opinion. This award is not in lieu of costs and attorney fees which may be taxed by appellees.

Affirmed.

/s/ Michael J. Kelly

Judge Markman and Judge Martlew concur in results only.