

STATE OF MICHIGAN
COURT OF APPEALS

KURT A. HOMKES, KAREN S. HOMKES,
husband and wife, and JEFFREY L. HOMKES, a
single man,

UNPUBLISHED
April 1, 1997

Plaintiffs-Appellants,

v

SHORELINE BANK, formerly CITIZENS TRUST
AND SAVINGS BANK, a Michigan banking
corporation,

No. 183070
Allegan County
LC No. 94017684 CK

Defendant-Appellee.

Before: Marilyn Kelly, P.J., and Neff and J. Stempien,* JJ.

PER CURIAM.

In this foreclosure action, plaintiffs appeal as of right from a grant of summary disposition for defendant pursuant to MCR 2.116(C)(4), (C)(7), (C)(8) and (C)(10).

They argue that the judge erred in granting summary disposition without allowing them to amend their complaint. They allege also that summary disposition was premature, because discovery had just begun. We affirm.

I

Plaintiffs took out a loan from and gave a first mortgage to AgriBank FCB in 1988. The mortgage was on farmland they owned and was subject to the provisions of the federal Farm Credit Act of 1971, 12 USC 2001 *et. seq.* In 1990, plaintiffs took out a second loan, this one from defendant and gave a second mortgage. The second mortgage was secured by the same farmland as the first. Plaintiffs took out another loan from defendant on other farmland they owned but defaulted on both loans obtained from defendant.

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

Plaintiffs Kurt and Karen Homkes filed for chapter 12 bankruptcy in 1993. Defendant objected to the reorganization plan. However, defendant and all the plaintiffs settled the dispute by agreeing to a consent judgment that allowed defendant to foreclose on the second mortgage.

In 1994, the court entered the consent judgment, and defendant brought foreclosure proceedings on the second mortgage. At the same time, AgriBank began foreclosure proceedings on the first mortgage. Because the Federal Land Bank foreclosure was scheduled to be held before defendant's foreclosure of its second mortgage, defendant was forced to purchase the first mortgage to protect its position.

The foreclosure sale under the second mortgage was held on May 19, 1994. AgriBank assigned its interest in the first mortgage to defendant on May 23, 1994. After expiration of the redemption period, defendant scheduled an auction sale for November 29, 1994 to sell the property which it now owned. Plaintiffs filed a *lis pendens* and a complaint against defendant seeking a preliminary injunction enjoining defendant from holding the auction. Plaintiffs asserted that defendant was required to offer them a right of first refusal to purchase the property before scheduling an auction sale under the Farm Credit Act. 12 USC 2219a.

Defendant filed a motion for summary disposition claiming that, because the sale had already been held, the request for injunctive relief was moot. Defendant also asserted that the Farm Credit Act was inapplicable because (1) defendant foreclosed on the mortgage given to it, rather than the first mortgage which was subject to the Farm Credit Act; (2) plaintiffs lost any basis to assert rights in the property, because they failed to redeem; and (3) plaintiffs' claims were barred by *res judicata*.

One day before the scheduled argument on the motion, plaintiffs brought a motion to file an amended complaint. They sought to add a claim that defendant assumed duties imposed by the Farm Credit Act by virtue of the assignment of the first mortgage. Plaintiffs sought damages for breach of those duties in addition to injunctive relief.

The trial judge ruled that the proposed amended complaint would be insufficient to impose a duty on defendant to offer a right of first refusal to plaintiffs. He granted summary disposition for defendant.

II

Plaintiffs assert on appeal that it was improper for the judge to grant summary disposition without allowing them to amend their complaint. We disagree.

Leave to amend a complaint is freely given when justice requires, in the absence of undue delay, bad faith or dilatory motive. MCR 2.118(A)(2); *McNees v Cedar Springs Stamping Co*, 184 Mich App 101, 103; 457 NW2d 68 (1990); *Taylor v Detroit*, 182 Mich App 583, 586; 452 NW2d 826 (1989). A trial court may deny leave to amend when it would be futile. An amendment is futile where a claim, ignoring its substantive merits, is legally insufficient on its face. *McNees, supra*.

Here, in their proposed amended complaint, plaintiffs alleged that they were third-party beneficiaries of the assignment contract between AgriBank and defendant. According to the terms of the contract, defendant agreed to provide plaintiffs with borrower's rights under the Farm Credit Act. Therefore, they asserted that they could bring a breach of contract action against defendant, as third-party beneficiaries,. MCL 600.1405; MSA 27A.1405.

Assuming that plaintiffs are third-party beneficiaries under the assignment contract, their proposed amended complaint does not set forth a basis of recovery. Defendant foreclosed on the second mortgage, not on the first. Any borrowers rights are connected to the first mortgage, which was never foreclosed. Even plaintiffs' proposed amended complaint acknowledges that defendant foreclosed on the second mortgage, not the first. Therefore, the proposed amended complaint failed to state a claim and was futile. *McNees, supra*.

Even if borrower's rights had been provided by the second mortgage, the judge properly granted summary disposition, because there is no private cause of action under the Farm Credit Act. *Zajac v Federal Land Bank of St Paul*, 909 F2d 1181 (CA 8, 1990); *Griffin v Federal Land Bank of Wichita*, 902 F2d 22 (CA 10, 1990); *Harper v Federal Land Bank of Spokane*, 878 F2d 1172 (CA 9, 1989); *Bowling v Block*, 785 F2d 556 (CA 6, 1986).

III

Finally, plaintiffs argue that summary disposition should not have been granted before the completion of discovery. We disagree.

Generally, a motion for summary disposition may be made at any time. *Jordan v Jarvis*, 200 Mich App 445, 452; 505 NW2d 279 (1993). A grant of summary disposition may be premature if discovery on a disputed issue is incomplete. *Dep't of Social Services v Aetna Casualty & Surety Co*, 177 Mich App 440, 446; 443 NW2d 420 (1989). It is timely where further discovery does not stand a fair chance of uncovering factual support for the nonmoving party's position. *Neumann v State Farm Mutual Automobile Ins Co*, 180 Mich App 479, 485; 447 NW2d 786 (1989). Here, plaintiffs did not specify how additional discovery would have helped uncover support for their position. Therefore, the trial court properly granted summary disposition for defendant.

Affirmed.

/s/ Marilyn Kelly

/s/ Janet T. Neff

/s/ Jeanne Stempien