

STATE OF MICHIGAN
COURT OF APPEALS

DARRYL TIPTON AND MARY TIPTON,

Plaintiffs-Appellants,

V

FLAGSTAR BANK, FSB,

Defendant-Appellee.

UNPUBLISHED

October 9, 2012

No. 305911

Washtenaw Circuit Court

LC No. 11-401-CH

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiffs appeal by right from the order of the Washtenaw Circuit Court granting summary disposition in favor of defendant. We affirm because even assuming plaintiffs have stated a cause of action, they have failed to provide evidence sufficient to create a question of material fact.¹

Plaintiffs purchased the subject property in 2002. After several years, plaintiffs were no longer able to make the loan payments to mortgagee and lender Flagstar Bank. On June 3, 2010, the property was sold at sheriff's sale. Plaintiffs did not redeem the property during the redemption period nor during that period did they bring an action to extend the period. In March, 2011 a district court issued an order of eviction.

Plaintiffs filed the instant suit on April 12, 2011 and seek relief on multiple grounds which can be distilled into two claims. First, plaintiffs allege that defendant violated MCL 600.3205c by failing to serve them with a "14 day letter." We presume that plaintiffs are referring to the letter described in MCL 600.3205a after which a borrower, per MCL 600.3205b, has 14 days to contact a housing counselor and, if such contact is made, MCL 600.3205c imposes obligations upon the lender regarding loan modification. MCL 600.3205c(8) provides that if the mortgage holder does not fulfill these obligations, it may be required to proceed by judicial foreclosure rather than foreclosure by advertisement.

¹ This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

Plaintiffs' reliance on MCL 600.3205c, in and of itself, is unavailing. The statute provides a mechanism by which a borrower may demand that a foreclosure proceed under supervision of a court, but the statute does not in and of itself create an independent cause of action to nullify a foreclosure sale after the expiration of the redemption period and entry of a judgment of possession.

Plaintiffs' second claim is that defendant's conduct in the alleged violation of MCL 600.3205c along with other alleged improprieties in the foreclosure process rise to the level of "a clear showing of fraud or irregularity" such that plaintiffs are entitled to an equitable extension of the redemption period. *Schulthies v Barron*, 16 Mich App 246, 247-8; 167 NW2d 784 (1969). However, plaintiffs did not seek this relief from a court during the redemption period nor raise the issue when defendant brought an action for possession in the district court.

Finally, even if we found that plaintiff had stated a claim, we would affirm the trial court's dismissal under MCR 2.116(C)(10). While one of the plaintiffs asserts in an affidavit that they did not receive the "14 day letter," they offer no rebuttal to defendant's documentary evidence that the letter was in fact served by first class mail and certified mail as required by the statute.²

Similarly, plaintiffs allege that defendant proceeded with the foreclosure contrary to statements it had made to the plaintiffs that it was considering agreeing to a loan modification and that as a result plaintiffs were dissuaded from any action they might have taken to stop the foreclosure sale. However, plaintiffs fail to present any evidence that any such statements were made prior to the foreclosure sale. Plaintiffs submit a letter from defendant dated two weeks after the sale responding to a request for modification and a second letter sent in September, several months before the end of the redemption period, denying a request for modification. A letter stating that a loan modification was being considered could certainly mislead a borrower and might be the basis for a legal or equitable claim. However, without evidence that such assurances were made *prior* to the foreclosure sale, or at least that the inaccurate letter prevented plaintiffs from pursuing redemption, we fail to see how it can be a basis for relief in this case.

Lastly, plaintiffs allege that the person who signed the affidavits in support of the non-judicial foreclosure did not have personal knowledge of the facts set forth in those affidavits and that she signed the affidavit outside the presence of a notary public.

² Defendant has also submitted an April 8, 2010 affidavit of publication of an initial foreclosure notice, an affidavit of publication stating that a notice of mortgage sale and redemption period was published on 4 consecutive weeks in May 2010 and an "affidavit of compliance with MCL 600.3204 through 600.3205E."

However, plaintiffs provided no evidence in support of this allegation nor in support of the claim that anything contained within the affidavits was false.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause