

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD GOROSH,

Plaintiff-Appellant,

v

WOODHILL CONDOMINIUM ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED
October 16, 2012

No. 306822
Ingham Circuit Court
LC No. 10-1664-CH

Before: FITZGERALD, P.J., and METER and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals by right from the order of the trial court denying plaintiff summary disposition, granting summary disposition to defendant, and granting defendant immediate possession of the subject property. We reverse.

I. BASIC FACTS

This case arises out of a foreclosure by advertisement. Plaintiff was the owner of a condominium located in Okemos, Michigan for approximately 17 years; plaintiff owns additional properties in both Michigan and California. Plaintiff did not primarily reside in the condo, and had instructed defendant that any notices from defendant should be sent to his address in West Bloomfield, Michigan.

In 2004 and 2006, defendant had instituted foreclosure proceedings against plaintiff for failure to pay his condominium association dues. Each time, plaintiff redeemed prior to the expiration of the six-month redemption period. Plaintiff was in arrears to defendant again in January 2010. The amount originally owed was \$1,992.78. In February 2010, plaintiff submitted two checks to defendant totaling \$1,525.00. However, at that point defendant had already accelerated plaintiff's condominium dues obligations, and had charged plaintiff an additional \$3,465.00 dollars. Prior to plaintiff's partial payment, defendant recorded a lien against plaintiff's condominium interest in the total amount of \$5,544.28.¹ Wendy S. Hardt,

¹ It appears from the record that the lien amount includes not only unpaid dues and accelerated dues, but additionally includes "late fees and attorney fees."

attorney for defendant, stated in her affidavit that she sent notice of the lien to plaintiff on January 27, 2010, and sent follow-up correspondence on February 18, 2010, after the partial payment was received. Plaintiff claims to have never seen these notices, although he does not dispute that they were sent to the West Bloomfield address.

Defendant initiated a foreclosure by advertisement in March; Hardt stated that she sent a notice of foreclosure sale on March 16, 2010 to plaintiff's West Bloomfield address, although plaintiff only recalled seeing a notice posted on the door of the condominium. The foreclosure sale was conducted by the Ingham County Sheriff on April 22, 2010. The redemption period expired on October 22, 2010. Plaintiff did not redeem during this time period. Defendant was the highest bidder and acquired the condominium; the sheriff's deed indicates that defendant paid \$5,135.41, although the affidavit of the auctioneer attached by defendant does not list the amount of the highest bid or identity of the highest bidder.

Plaintiff received notice that an eviction proceeding had been initiated against him in the Ingham District Court in November 2010. Plaintiff offered to redeem the property for the amount due, but defendant rejected the offer. Plaintiff alleges that a default judgment was entered against him in the eviction proceeding. Plaintiff then filed suit in the circuit court asserting claims for quiet title, declaratory relief, and to set aside the foreclosure sale. The default judgment was later set aside by the district court after plaintiff filed a motion to do so based on lack of notice. The district court case was then consolidated with the present lawsuit in the circuit court.

On August 24, 2011, defendant moved for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff responded, alleging that defendant had failed to abide by the notice requirements of its bylaws, and that the sale was therefore invalid. A hearing was held on September 21, 2011, wherein the trial court determined that plaintiff had received proper notice under the foreclosure statute, and that defendant therefore was entitled to summary disposition.

II. STANDARD OF REVIEW

A trial court's decision to grant summary disposition is reviewed de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998).

III. DEFENDANT DID NOT COMPLY WITH ITS DUTIES UNDER ARTICLE II, SECTION 6 OF THE ASSOCIATION BYLAWS.

The master deed and incorporated bylaws, MCL 559.108, is in the nature of a contract between condominium owners and the condominium association. See *Rossow v Brentwood Farms Development, Inc*, 251 Mich App 652, 658; 651 NW2d 458 (2002). We determine the intent of the parties by reference to the specific language of the bylaws. See *In Re MCI Telecommunications Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). The language of the bylaws is to be given its ordinary and plain meaning, avoiding technical and constrained constructions. See *DeFrain v State Farm Mut Automobile Ins Co*, 491 Mich 359, 367; ____

NW2d ____ (2012). To the extent possible, this Court should presume that every word has meaning and avoid any construction that would render any part of a bylaw nugatory. See *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992). We additionally avoid interpretations that produce absurd or unreasonable conditions or results. *Hastings Mut Ins v Safety King Inc*, 286 Mich App 287, 297; 778 NW2d 275 (2009).

MCL 559.208 governs foreclosures under the Condominium Act, MCL 559.101 *et seq.*, and provides in relevant part:

2) A foreclosure shall be in the same manner as a foreclosure under the laws relating to foreclosure of real estate mortgages by advertisement or judicial action except that to the extent the condominium documents provide, the association of co-owners is entitled to reasonable interest, expenses, costs, and attorney fees for foreclosure by advertisement or judicial action. The redemption period for a foreclosure is 6 months from the date of sale unless the property is abandoned, in which event the redemption period is 1 month from the date of sale.

Neither party disputes that defendant complied with the applicable laws related to the foreclosure of real estate mortgages by advertisement. Instead, plaintiff argues that defendant has not abided by its own bylaws. The relevant bylaws section is Article II, Section 6, which consists of one paragraph, in small type, that extends over more than one full page.

Article II, Section 6 provides in part:

[t]he Association may enforce collection of delinquent assessments by a suit at law for a money judgment or by foreclosure of the statutory lien that secures payment of assessments” and further provides that the “provisions of Michigan law pertaining to foreclosure of mortgages by judicial action and by advertisement . . . are incorporated herein by reference for the purposes of establishing the alternative procedures to be followed in lien foreclosure actions and the rights and obligations of the parties to such actions.

This section further provides that:

[e]ach co-owner of a unit in the Project acknowledges that at the time of acquiring title to such unit, he was notified of the provisions of this section and that he voluntarily, intelligently and knowingly waived notice of any proceedings brought by the Association to foreclose by advertisement the lien for nonpayment of assessments and a hearing on the same prior to the sale of the subject unit.

Finally, relevant to the instant case, the section contains the following language:

Notwithstanding the foregoing, neither a judicial foreclosure action or a suit at law for a money judgment shall be commenced, nor shall any notice of foreclosure by advertisement be published, until the expiration of ten (10) days after mailing, by first class mail . . . of a written notice that one or more installments of the annual assessment levied against the pertinent unit is or are delinquent and that the Association may invoke any of its remedies hereunder if

the default is not cured within ten (10) days after the date of mailing. . . . If the delinquency is not cured within the ten (10) day period, the Association may take such remedial action as may be available to it hereunder or under Michigan law. In the event the Association elects to foreclose the lien by advertisement, the Association shall so notify the representative designated above and **shall inform such representative that he may request a judicial hearing by bringing suit against the Association.** (Emphasis added).

Plaintiff alleges that defendant breached its duty to inform him, in the event of foreclosure by advertisement, of his right to request a judicial hearing by bringing suit against the association. The trial court acknowledged plaintiff's position, noting that "Plaintiff is ... claiming that under the bylaws, he should have received some other different type of notice saying that he had the right to take some legal action." However, the trial court never directly addressed that issue, and instead found that plaintiff had received sufficient notice by virtue of defendant's compliance with the *statutory* notice provisions of Michigan law. MCL 600.3205a. We disagree, because defendant breached its express contractual duty to provide additional notice to plaintiff of his right to request a judicial hearing by bringing suit against the association.

As a threshold matter, we address defendant's contention that Article II, Section 6 "effectively waives the requirement of a notice to the right of a judicial hearing," due to the above-quoted "waiver" provision contained within it. We disagree. Even if Section 6 read as defendant suggests, it defies reason that a bylaws section can both (a) explicitly establish a contractual duty on the part of defendant; and (b) provide that plaintiff has waived all rights to challenge a breach of that duty. Such a construction of Section 6 would, in effect, render the express duty a nullity, and we avoid such a construction if possible. See *Altman*, 439 Mich at 635.

Further, the bylaws provision on which defendant relies reads:

. . . Each co-owner of a unit in the Project acknowledges that at the time of acquiring title to such unit, he was notified of the provision of this section and that he voluntarily, intelligently, and knowingly waived *notice of any proceedings brought by the Association to foreclose by advertisement.* [Emphasis added.]

Plaintiff does not dispute that he received notice of the *proceedings* relating to the foreclosure, but instead alleges that defendant breached its duty to inform him *of his right to request a judicial hearing by bringing suit against the association.* Nowhere does the "waiver" provision address that independent duty. Consequently, no reasonable construction of the waiver clause "effectively waives" the express requirement that defendant "shall inform [plaintiff] that he may request a judicial hearing by bringing suit against the Association."

Defendant's primary argument is simply that plaintiff was not prejudiced by any defect in the notice provided to him. In support of this proposition, defendant references the doctrine of "substantial compliance." However, we do not find this doctrine applicable. The term "substantial compliance" generally is used in the context of statutes that require a citizen to provide notice to a government agency. See *Plunkett v Dep't of Transp*, 286 Mich App 168,

176-77; 779 NW2d 263 (2009) (“When notice *is required of an average citizen for the benefit of a governmental entity*, it need only be understandable and sufficient to bring the important facts to the governmental entity’s attention. Thus, a liberal construction of the notice requirements is favored to avoid penalizing an inexperienced layman for some technical defect. . . . A notice should not be held ineffective when in *substantial compliance* with the law.” (Emphasis added and in original; internal citations and quotation marks omitted). This doctrine’s normal application is thus for the benefit of the layman versus the government, not for the benefit of one contracting party versus another.

In the context of foreclosure sales, defendant is correct that this Court has held that defective *statutory* notice renders a foreclosure sale voidable, not void. *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 502; 739 NW2d 656 (2007). A party challenging the validity of notice of a foreclosure sale must show that they were prejudiced by inadequate notice. *Id.* However, “foreclosure by advertisement is . . . based on contract” between, in this case, a co-owner and a condominium association. See *Cheff v Edwards*, 203 Mich App 557, 560; 513 NW2d 439 (1994). Nothing in the contractual language of the bylaws indicates that substantial compliance with the duties imposed therein is sufficient, or that an aggrieved co-owner must show they were prejudiced by the association’s breach of its duties. The bylaws indicate that defendant “shall” inform plaintiff that he is entitled “to request a judicial hearing by bringing suit against the association.” The word “shall” generally designates a mandatory provision. *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008). As discussed below, defendant cannot demonstrate that it complied with this explicit contractual duty. Additionally, defendant, in its dealings with plaintiff, insisted upon strict compliance with contractual provisions, accelerating plaintiff’s dues and proceeding with a foreclosure despite plaintiff’s partial payment, and refusing plaintiff’s overtures to fully redeem within shortly over a month past the redemption period. While a party has a right to insist upon strict compliance with contractual terms, see *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003), it should not then be surprised, or be found to object, when the other party to the contract seeks to hold it to strict compliance as well.

Finally, we do not agree with defendant that the sum total of the correspondences sent to plaintiff fulfilled its duties to plaintiff under the contract, because the Statement of Lien “put Gorosh on notice” that the foreclosure was being done pursuant to Article II, Section 6 of the bylaws. Mere reference to the section that provides for defendant’s duty to plaintiff does not suffice to satisfy that duty. Further, the Statement of Lien does not advise plaintiff to refer to this section to determine his rights under the bylaws, but only states that the lien is being claimed by defendant pursuant to that section. The Statement of Lien, in fact, does not reference a foreclosure proceeding at all.

Simply put, the bylaws do not require plaintiff to unearth knowledge of his right to “request a judicial hearing by bringing suit.” Nor do the bylaws authorize defendant to satisfy its express duty (to inform plaintiff of that right) simply by sending plaintiff the Notice of Foreclosure, which plaintiff could then read in combination with the Statement of Lien, which references the section of the bylaws pursuant to which defendant is pursuing foreclosure, buried within which is a description of *defendant’s* duties to inform plaintiff (which duties defendant never satisfied). We decline to engage in such a bizarre interpretation of the bylaws drafted by defendant. See *Hastings Mut Ins*, 286 Mich App at 297.

The bylaws instead unambiguously make clear that defendant was obligated to satisfy specific notice requirements before proceeding with a foreclosure by advertisement. It failed to do so. We therefore conclude that defendant's breach of its contractual duty rendered the sheriff's sale invalid under the individual circumstances of this case. See *Michigan Trust Co v Cody*, 264 Mich 258, 261-262; 249 NW 844 (1933). The evidence introduced at the motion hearing clearly demonstrates that plaintiff is entitled to have the sheriff's sale set aside as a matter of law. We reverse the trial court's grant of summary disposition to defendant, vacate the order of possession, and grant summary disposition to plaintiff on plaintiff's claims to quiet title and set aside the sheriff's sale.

Reversed. We do not retain jurisdiction. Having prevailed in full, plaintiff may tax costs pursuant to MCR 7.219(A).

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Mark T. Boonstra