

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JOSEPH KHEDER and ANN KHEDER,  
  
Plaintiffs-Appellants,

UNPUBLISHED  
March 28, 2013

v

SETERUS, INC, f/k/a IBM LENDER BUSINESS  
PROCESS SERVICE INC, ELITE  
MAINTENANCE, INC, SAFEGUARD  
PROPERTIES, LLC, KELLER WILLIAMS  
NORTHVILLE MARKET CENTER, INC, and  
CHASE HOME FINANCE, LLC,

No. 308227  
Oakland Circuit Court  
LC No. 2011-116566-NZ

Defendants-Appellees.

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Before: MURPHY, C.J., and O'CONNELL and BECKERING, JJ.

PER CURIAM.

In this case challenging an entrance onto property to secure a lender's interest in the property after the mortgagors' default, plaintiffs Joseph and Ann Kheder appeal as of right the trial court's January 6, 2012, order granting summary disposition in favor of defendants Seterus, Inc. ("Seterus")<sup>1</sup> and Keller Williams Northville Market Center, Inc. ("Keller Williams"). In an earlier order entered on November 15, 2011, the trial court granted summary disposition in favor of defendants Safeguard Properties, LLC ("Safeguard"), Elite Maintenance, Inc. ("Elite"), and Chase Home Finance, LLC ("Chase"). We affirm.

**I. FACTUAL BACKGROUND**

Plaintiffs lived together at 110 Singh Boulevard in the Charleston Park subdivision. Joseph, a residential home builder and owner of several residential building companies, developed Charleston Park. Ann worked as the office manager for plaintiffs' business office at a

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<sup>1</sup> Seterus was formally known as IBM Lender Business Process Service, Inc. ("IBM"). However, IBM changed its name to Seterus on June 1, 2011. In this opinion, we refer to both Seterus and IBM to reflect how they were referred to in the trial court.

model home located at 114 Singh Boulevard, which is next door to plaintiffs' residence. The real property at 114 Singh Boulevard is the property that is the subject of this case.

On December 28, 2006, plaintiffs executed a mortgage with Sallie Mae Home Loans, Inc. ("Sallie Mae") acting as the lender and Mortgage Electronic Registration Systems, Inc. (MERS) acting as the mortgagee and nominee. The mortgage was a security instrument for a \$380,000 loan by Sallie Mae to plaintiffs for the subject property. The mortgage contains a power-of-sale provision and the following provisions pertinent to this case:

**9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument.** If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Agreement (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable and appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. . . . Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off.

\* \* \*

**12. Borrower Not Released; Forbearance By Lender Not a Waiver.** Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. . . . Any forbearance by Lender in exercising any right or remedy, including, without limitation, Lender's acceptance of payments from third parties, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

In April 2009, plaintiffs defaulted on their mortgage by being delinquent on payments. In August 2009, plaintiffs entered into their first of two forbearance agreements. The agreement included a proposed payment schedule, which required payments of \$500 on September 1, 2009; October 1, 2009; and November 1, 2009, and for a payment of \$29,599.52 on November 16, 2009. According to plaintiffs, they made four payments totaling \$4,000.

On December 27, 2009, MERS assigned its interest in the mortgage to Chase. In March 2010, plaintiffs and Chase entered into the second forbearance agreement with the following payment schedule: \$2,500 on February 28, 2010; \$2,116.43 on March 28, 2010; \$2,116.43 on April 28, 2010; \$2,116.43 on May 28, 2010; and \$53,713.51 on June 28, 2010. The agreement

stated that the provisions of plaintiffs' mortgage remained in full force and effect, except as otherwise provided in the forbearance agreement, and that, if plaintiffs did not meet the terms of the agreement,

Chase . . . may, without further notice to you, terminate the Forbearance Plan and continue collection and/or foreclosure proceedings according to the terms of your Note and Mortgage. After the final payment of the Forbearance Plan, regular payments will become due in addition to any delinquent payments, fees and/or charges. If your account is not current once the Forbearance period has ended, collection and/or foreclosure activity will resume.

Plaintiffs made payments of \$2,136.43 on both April 1, 2010, and May 4, 2010. Plaintiffs never made a payment to Chase in an amount exceeding \$53,000. According to plaintiffs, Chase instructed them not to make the approximate \$53,000 payment but then never gave plaintiffs further instructions. Plaintiffs began "waiting for something to happen."

On August 1, 2010, Chase assigned its interest in the mortgage to Federal National Mortgage Association (FNMA). On August 8, 2010, IBM sent plaintiffs a letter informing them that the servicing of their mortgage was being transferred to IBM effective August 1, 2010, and that IBM, not Chase, would be accepting payments from plaintiffs.

IBM hired Safeguard to conduct property-inspection and preservation services for the subject property. Safeguard maintained a network of independent contractors to perform the actual on-site services and subcontracted the work for the subject property to Elite. Elite visually inspected the subject property on October 20, 2010. It found that the exterior was secure and in good condition with no visible damage. No personal property was visible. On about November 19, 2010, Safeguard gave Elite a work order to winterize and secure the subject property. David Fiyalko, the owner of Elite, went to the subject property, took pictures, and spoke to Ann at plaintiffs' residence to ask if anyone was living at the subject property. Ann responded that no one was living there but that plaintiffs owned and maintained it as a model home for their business and that they were going through a loan modification concerning the property. Fiyalko left without entering the model home and reported to Safeguard that the model home appeared to be vacant and maintained.

On about December 29, 2010, Safeguard sent Fiyalko another work order to winterize and protect the subject property. Over the next several days, Fiyalko returned to the subject property, took pictures, and went to plaintiffs' residence again and but received no answer after knocking on the door, although someone appeared to be home on several occasions. According to Ann, she did not answer the door because someone rang the doorbell and pounded on the door. Ann explained, "I don't answer the door when people pound on my door. . . . That's a threat to me. Ringing the doorbell is sufficient. I don't need somebody pounding on it." Fiyalko "called a number on the developer's . . . sign and left a message," but he did not receive a response. So, Fiyalko, having determined that the model home was vacant, entered the home on January 3, 2011, through an unlocked back door and winterized the home per the instructions in the work order. He removed and changed the locks to the front entry, placed a lock box on the front door, removed the water meter, changed the utilities out of plaintiffs' names, placed a sign-in sheet inside the home on the front door, and placed a black and white attention sign containing

an electrical checklist outside the home on a door. In addition, he placed a green Safeguard notice tag on a door outside of plaintiffs' residence. The notice stated that the subject property was found to be vacant and could become unsecure or have an emergency situation; it also stated that future contact regarding the home was to be made with Safeguard and that the home was locked to prevent "additional damage." Notwithstanding Elite's actions, plaintiffs were still able to enter the model home.

On January 18, 2011, FNMA purchased the subject property for \$472,119.65 at a sheriff's sale. Two days later, Keller Williams realtor Michael Shebak went to the subject property and posted a FNMA notice on a door. The notice stated the following, in pertinent part: "The party named below [Keller Williams] has been requested to determine the occupancy status and condition of the property. All occupants should immediately contact the party named below to discuss the status of your occupancy and to report any conditions affecting the property."

On January 27, 2011, plaintiffs sued IBM, Elite, Safeguard, and Keller Williams, alleging claims of trespass, conversion, negligence, and defamation. On July 22, 2011, plaintiffs amended their complaint to add claims for fraud and estoppel against Chase. Chase, Safeguard, and Elite, moved the trial court for summary disposition. After a hearing, the court entered an order on November 15, 2011, granting summary disposition in favor of Chase under both MCR 2.116(C)(7) and (C)(8) and in favor of Safeguard and Elite under both MCR 2.116 (C)(8) and (C)(10). Seterus and Keller Williams then moved the trial court for summary disposition. After a second hearing, the court entered an order on January 6, 2012, granting summary disposition in favor of Seterus and Keller Williams under both MCR 2.116 (C)(8) and (C)(10).

## II. ANALYSIS

### A. TRESPASS AND CONVERSION

Plaintiffs first argue that the trial court erroneously granted summary disposition on their trespass and conversion claims in favor of Elite, Keller Williams, and Seterus. We disagree.

We review de novo a trial court's summary-disposition ruling. See *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Although the trial court stated that it granted summary disposition in favor of these defendants under MCR 2.116(C)(8) and (C)(10), MCR 2.116(C)(10) is the appropriate basis for review because the parties and the trial court relied on matters outside of the pleadings for these defendants' motions. See *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008) ("Where a motion for summary disposition is brought under both MCR 2.116(C)(8) and (C)(10), but the parties and the trial court relied on matters outside the pleadings, . . . MCR 2.116(C)(10) is the appropriate basis for review."). When reviewing a motion under MCR 2.116(C)(10), we consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *The Cadle Co v City of Kentwood*, 285 Mich App 240, 247; 776 NW2d 145 (2009). A motion for summary disposition under MCR 2.116(C)(10) may be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Campbell v Dep't of Human Servs*, 286 Mich App 230, 235; 780 NW2d 586 (2009).

A trespass is an invasion of the plaintiff's interest in the exclusive possession of his or her land. *Terlecki v Stewart*, 278 Mich App 644, 653-654; 754 NW2d 899 (2008). "In Michigan, recovery for trespass to land is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession." *Id.* at 654 (quotation marks and citation omitted). Because a claim for trespass requires an *unauthorized* invasion onto another's land, consent is an affirmative defense to a trespass claim. *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 705-706; 609 NW2d 607 (2000).

"The tort of conversion is any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999) (quotation marks and citation omitted). A claim for conversion does not lie with respect to real property. *Eadus v Hunter*, 268 Mich 233, 237; 256 NW2d 323 (1934); *Embrey v Weissman*, 74 Mich App 138, 143; 253 NW2d 687 (1977). Indeed, any property that is part of the realty, i.e., fixtures, cannot be the subject of conversion. *Eadus*, 268 Mich at 237; *Embrey*, 74 Mich App at 143.

We conclude that the trial court did not err by granting summary disposition on plaintiffs' conversion claim. Plaintiffs essentially claim that Elite and Seterus converted the subject property because of Elite's entry onto the property, changing of the lock, removal of the water meter, and installation of the lock box. However, the subject property is real property that cannot be the subject of a conversion claim. See *Eadus*, 268 Mich at 237; *Embrey*, 74 Mich App at 143. Furthermore, the locks and water meter that were part of the model home cannot be the subject of a conversion claim because they were fixtures, i.e., part of the realty. See *Eadus*, 268 Mich at 237; *Embrey*, 74 Mich App at 143.

With respect to plaintiffs' trespass claim, we initially note that plaintiffs do not provide this Court with any citation to binding legal authority regarding trespass. Indeed, plaintiffs do not even define or provide the elements for the tort of trespass. Plaintiffs may not leave it to this Court to search for authority to sustain or reject their position. See *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 220; 761 NW2d 293 (2008). Nevertheless, we conclude that the trial court did not err by granting summary disposition on plaintiffs' trespass claim.

In their mortgage, plaintiffs authorized their Lender to "do and pay for whatever is reasonable and appropriate to protect [the] Lender's interest in the Property and rights under this Security Instrument" when *any* of the following circumstances occurred:

- (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Agreement (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property [ . . . ]

It is undisputed that plaintiffs defaulted in April 2009 by failing to timely make their mortgage payments; therefore, plaintiffs failed to perform a covenant contained in the mortgage.

Plaintiffs' default triggered the lender's authority to do whatever was reasonable and appropriate to protect its interest in the subject property and its rights under the mortgage.<sup>2</sup>

Plaintiffs contend that whether the actions taken by Elite and Keller Williams were reasonable and appropriate is a genuine issue of material fact that precluded the trial court from granting summary disposition on the trespass claim. The mortgage states that "Lender may do and pay for whatever is reasonable and appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property." The mortgage then states, "Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off."

With respect to Keller Williams, we conclude that there is no genuine issue of material fact that Keller Williams's actions were reasonable and appropriate to protect the lender's interest and were, therefore, authorized by plaintiffs. See *American Transmission, Inc*, 239 Mich App at 705-706. Shebak simply entered onto the subject property and posted a notice stating that Keller Williams sought information regarding occupancy. The home was not a personal residence but, rather, a model home and office available for public inquiry. Reasonable minds would agree that Shebak's entrance onto the property to post the notice was not unreasonable or inappropriate. See *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003) ("A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.").

With respect to Elite, we likewise conclude that there is no genuine issue of material fact that Elite's actions were reasonable and appropriate to protect the lender's interest and were, thus, authorized by plaintiffs. See *American Transmission, Inc*, 239 Mich App at 705-706. When Fiyalko entered the subject property on January 3, Elite was tasked to determine whether the property was secure and needed to be repaired and winterized. Winterization was reasonable and appropriate to protect the lender's interest in the property because it was, in fact, winter. Moreover, although Ann told Fiyalko over one month earlier that plaintiffs were maintaining the property, Fiyalko could not reach plaintiffs to determine whether they were still maintaining the property. Fiyalko left a message that was not returned. And, the record evidence illustrates that Ann, on several occasions, chose not to answer the door when Fiyalko attempted to contact plaintiffs at their home. Given Fiyalko's inability to contact plaintiffs despite his efforts, the fact that the subject property was not being used as a personal residence, and Elite's need to not only determine whether the subject property was being maintained in the winter months but to actually maintain it if it was not being maintained, reasonable minds could not conclude that it was unreasonable or inappropriate for Fiyalko to go into the model home and winterize it. See

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<sup>2</sup> Given this conclusion, we decline to address plaintiffs' argument regarding whether Joseph's filing for personal bankruptcy triggered the lender's authority to do whatever was reasonable and appropriate to protect its interest in the subject property and its rights under the mortgage, particularly where the trial court did not address and decide this issue.

*id.* Furthermore, an entry door to the model home was unlocked, which at that moment signified that the home was unsecure. Reasonable minds could not conclude that Fiyalko acted unreasonably or inappropriately by both changing the lock to one of the entrances to the model home and by placing a lock box, particularly when Fiyalko's actions did not preclude plaintiffs' from entering the model home. See *id.*

With regard to Seterus's liability for trespass, we conclude that plaintiffs have abandoned the issue. In a cursory fashion, plaintiffs assert that Seterus acted in concert with Safeguard, Elite, and Keller Williams and ratified their actions. Plaintiffs provide no citation to legal authority to establish that Seterus is vicariously liable for a trespass. Plaintiffs may not give issues cursory treatment with little or no citation to supporting authority. See *Ypsilanti Fire Marshal v Kircher*, 273 Mich App 496, 530; 730 NW2d 481 (2007).

Accordingly, we conclude that the trial court did not err by granting summary disposition in favor of these defendants with respect to plaintiffs' trespass and conversion claims.

## B. DEFAMATION

Plaintiffs next argue that the trial court erred by granting summary disposition in favor of Safeguard, Elite, and Seterus with respect to plaintiffs' defamation claim. Plaintiffs contend that the following notices or signs posted on their property contain statements that are actionable for libel: (1) the sign-in sheet; (2) the electrical "attention" checklist; and (3) the green Safeguard notice tag placed on a door of their residence. We disagree.

We review *de novo* the trial court's summary-disposition ruling on this issue. See *Maiden*, 461 Mich at 118. Although the trial court stated that it granted summary disposition in favor of these defendants under MCR 2.116(C)(8) and (C)(10), MCR 2.116(C)(10) is again the appropriate basis for review because the parties and the trial court relied on matters outside of the pleadings. See *Silberstein*, 278 Mich App at 457.

The elements of libel are as follows: (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged communication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm (defamation *per se*) or the existence of special harm caused by publication (defamation *per quod*).<sup>3</sup> *Collins v Detroit Free Press, Inc*, 245 Mich App 27, 32; 627 NW2d 5

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<sup>3</sup> We reject plaintiffs' reliance on *Heritage Optical Ctr, Inc v Levine*, 137 Mich App 793, 797; 359 NW2d 210 (1984), for the proposition that they do not have to establish publication. Plaintiffs are correct that "[f]alse and malicious statements injurious to a person in his or her business are actionable *per se*, and special damages need not be alleged or proved." *Id.* However, nothing in *Heritage Optical* stands for the proposition that a business-defamation plaintiff does not have to establish publication. Indeed, *Heritage Optical* involved an allegation of defamatory telephone communications to third parties, and the Court explicitly stated that publication is a requirement for business defamation. *Id.* at 765-767.

(2001), quoting *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 251; 487 NW2d 205 (1992).

A statement is defamatory “if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” *Rouch*, 440 Mich at 251, quoting 3 Restatement Torts, 2d, § 559, p 156. “The general rule . . . is that the communication of libelous . . . matter only to the person defamed, does not amount to a publication sufficient to sustain a civil action for damages, or in other words, that communication to a third person is essential to actionable publication.” *Grist v Upjohn Co*, 16 Mich App 452, 483; 168 NW2d 389 (1969) (quotation omitted). “Truth is an absolute defense to a defamation claim.” *Wilson v Sparrow Health Sys*, 290 Mich App 149, 155; 799 NW2d 224 (2010). However, “it is not necessary for ‘defendants to prove that a publication is literally and absolutely accurate in every minute detail.’” *Collins*, 245 Mich App at 33, quoting *Rouch*, 440 Mich at 258. Rather, a defendant need only show that the statement is substantially true. *Id.* “Therefore, if the gist of an article or the sting of the charge is “substantially accurate,” the defendant cannot be liable.” *Hawkins v Mercy Health Servs, Inc*, 230 Mich App 315, 333; 583 NW2d 725 (1998). Liability will not be imposed for a “slight inaccuracy” in one of the statement’s details if the inaccuracy would have no different effect on the reader than the literal truth would produce. *Rouch*, 440 Mich at 259.

We first conclude that the trial court did not err by determining that neither the checklist nor the sign-in sheet are actionable for libel. The attention checklist is merely a set of instructions and does not refer to plaintiffs, their business, foreclosure, or property damage. It does not contain any false information concerning plaintiffs. See *id.* at 251. The sign-in sheet is a request by Safeguard to have people entering the model home sign in and provide a brief explanation for their visit. It states that IBM is the mortgagee and that Safeguard should be called in the event of an emergency on the subject property. It does not refer to plaintiffs, their business, foreclosure, or property damage. As with the checklist, no false statement is made on the sign-in sheet. See *id.* Furthermore, neither the checklist nor the sign-in sheet contain a statement that would lower plaintiffs in the estimation of the community or deter third persons from associating or dealing with them. See *id.*

We also conclude that the trial court did not err by determining that the Safeguard tag is not actionable for libel. Similar to the checklist and the sign-in sheet, the Safeguard tag does not refer to plaintiffs, their business, or foreclosure. The statements in the tag that Safeguard would be maintaining the property and that vacant properties may become unsecure or have an emergency are not false statements. The statements that the subject property was “found to be vacant” and that Safeguard would be maintaining the property “to ensure it does not sustain additional damages” are substantially true; Elite actually determined that the subject property was vacant after it visited the property on several occasions, learned that it was not being occupied as a residence, could not contact plaintiffs after several attempts, and found the back door of the model home unlocked in the winter. Moreover, Safeguard (through Elite) was maintaining the property to prevent future damage. Admittedly, one may imply from the statements that the subject property had suffered damage; however, defendants need not prove that the statements were literally and absolutely accurate in every minute detail. See *Collins*, 245 Mich App at 33. The gist of the statements in the tag was substantially accurate: Safeguard was maintaining the property to ensure that it did not suffer damage. See *Hawkins*, 230 Mich App at

333. The “slight inaccuracy” caused by the use of the word “additional” does not make the statement actionable, particularly when home vacancy and home damage to unknown extents and for unknown reasons do not lower people in the community or deter third persons from associating with them. See *Rouch*, 440 Mich at 251, 259.

Moreover, there is no record evidence that the statements in the tag were communicated to a third party. See *Collins*, 245 Mich App at 32 (libel requires communication to a third party); *Grist*, 16 Mich App at 483 (stating the same). Although publication may exist where “the conditions are such that the utterer of the defamatory matter intends or has reason to suppose that in the ordinary course of events the matter will come to the knowledge of some third person,” *Grist*, 16 Mich App at 485, this is not such a case. The Safeguard tag was placed at plaintiffs’ home for plaintiffs to see; it was not placed in a public area such that there would be reason to believe that the tag would be viewed by a third person in the ordinary course of events. Moreover, the documentary evidence illustrates that Ann removed the Safeguard tag from the door of plaintiffs’ residence within just a few hours of its placement, and there is no evidence that anyone other than Ann was in a position to view the statements on the tag when it was on the door.

Accordingly, we conclude that the trial court did not err by granting summary disposition in favor of these defendants with respect to plaintiffs’ defamation claim.

### C. CLAIMS OF FRAUD AND ESTOPPEL AGAINST CHASE

Plaintiff’s final claim on appeal is that the trial court erred by granting summary disposition in favor of Chase on their claims of fraud and estoppel. We disagree.

#### 1. STANDING

To the extent the trial court granted summary disposition in favor of Chase on the basis that plaintiffs lacked standing after the expiration of the redemption period to bring claims for fraud and estoppel, the trial court’s decision is properly reviewed under MCR 2.116(C)(5). See *Rohde v Ann Arbor Pub Sch*, 265 Mich App 702, 705; 698 NW2d 402 (2005) (motion on the basis of lack of standing made and considered under subrule (C)(5)); *Limbach v Oakland Co Bd of Co Rd Comm’rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997) (“[A]n order granting summary disposition under the wrong subrule may be reviewed under the correct rule.”). “[S]ummary disposition [under MCR 2.116(C)(5)] is merited when the plaintiffs lack the capacity to sue. In reviewing these motions, this Court must consider the parties’ pleadings, depositions, admissions, affidavits, and other documentary evidence to determine whether the defendant is entitled to judgment as a matter of law.” *In re Estate of Quintero*, 224 Mich App 682, 692; 569 NW2d 889 (1997).

If a mortgagor does not redeem his or her property within the appropriate redemption period, the purchaser of the sheriff’s deed is vested with “all the right, title, and interest” in the property. *Piotrowski v State Land Office Bd*, 302 Mich 179, 187; 4 NW2d 514 (1942). Stated differently, if the mortgagor does not redeem his or her property within the appropriate redemption period, all of the mortgagor’s rights in and to the property are extinguished. *Id.* “The law in Michigan does not allow an equitable extension of the period to redeem from a

statutory foreclosure sale in connection with a mortgage foreclosed by advertisement and posting of notice in the absence of a clear showing of fraud, or irregularity.” *Schulthies v Barron*, 16 Mich App 246, 247-248; 167 NW2d 784 (1969), citing *Heimerdinger v Heimerdinger*, 299 Mich 149; 299 NW2d 844 (1941).

We have previously held that a plaintiff does not have standing to collaterally attack a foreclosure after the expiration of the redemption period even though the plaintiff filed suit to bring the collateral attack before the redemption period expired. See, e.g., *Awad v Gen Motors Acceptance Corp*, unpublished opinion per curiam of the Court of Appeals, issued April 24, 2012 (Docket No. 302692); *Overton v Mtg Electronic Registration Sys*, unpublished opinion per curiam of the Court of Appeals, issued May 28, 2009 (Docket No. 284950). In *Awad*, for example, the property at issue was sold at a sheriff’s sale on May 26, 2010. *Awad*, unpub op at 2. The plaintiff, thus, had until November 26, 2010, to redeem the property, but she did not do so. *Id.* Instead, the plaintiff filed suit against the defendant on November 8, 2010, asserting that the foreclosure was improper and that the sheriff’s deed was void. *Id.* We concluded that the plaintiff did not have standing to challenge the foreclosure. *Id.* at 4-6. We explained that all of the plaintiff’s rights in and title to the property were extinguished once the redemption period expired without an attempt by the plaintiff to redeem the property or raise her arguments when foreclosure proceedings began. *Id.* We also explained that the plaintiff’s suit did not toll the redemption period. *Id.* Although our decision in *Awad* is unpublished and, therefore, not binding precedent, MCR 7.215(c)(1), we may consider it for its persuasive value as it relates to the present case. See *Nuculovic v Hill*, 287 Mich App 58, 68; 783 NW2d 124 (2010).

In this case, plaintiffs’ fraud and estoppel claims are a collateral attack on the foreclosure. Plaintiffs’ allegation of estoppel in their complaint states that Chase was “estopped from asserting a default and pursuing foreclosure” and that plaintiffs “were wrongfully subjected to the process of foreclosure.” Plaintiffs request that the “loan modification agreement” be specifically enforced. Plaintiffs’ allegation of fraud alleges that foreclosure proceedings were initiated contrary to Chase’s obligation to forbear. Although plaintiffs do not request to set aside the foreclosure or to enforce a forbearance agreement as remedies for fraud, they do request damages, which could be interpreted as a request for damages connected to a wrongful foreclosure and, thus, a challenge to the foreclosure itself. The redemption period expired on July 18, 2011, and there is no evidence that plaintiffs attempted to redeem the subject property or raise these arguments when foreclosure proceedings began. Therefore, plaintiffs arguably do not have standing to challenge the foreclosure through their estoppel and fraud claims because their rights in and to the property have been extinguished. See *Piotrowski*, 302 Mich at 187; *Schulthies*, 16 Mich App at 247-248; *Awad*, unpub op at 4-6.

## 2. FAILURE TO STATE A CLAIM

Notwithstanding that plaintiffs arguably do not have standing given the nonbinding authority addressing the issue, we conclude that the trial did not err by dismissing plaintiffs’ fraud and estoppel claims under MCR 2.116(C)(8) for failure to state a claim.

“A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant.” *Maiden*, 461 Mich at 119. A court may grant a motion under MCR

2.116(C)(8) only where the claims alleged are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Id.* (citation omitted).

To establish fraud, a plaintiff must show the following:

(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [*Custom Data Solutions, Inc v Preferred Capital, Inc*, 274 Mich App 239, 243; 733 NW2d 102 (2006) (citation omitted).]

Claims of fraud must be pleaded with particularity. MCR 2.112(B)(1); see also *Cooper v Auto Club Ins Ass’n*, 481 Mich 399, 414; 751 NW2d 443 (2008). This standard must be satisfied with regard to each element of the claim. *Cooper*, 481 Mich at 414.

The elements of promissory estoppel are as follows:

(1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided. [*Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 686-687; 599 NW2d 546 (1999).]

We conclude that plaintiffs failed to state a claim for fraud. Plaintiffs’ entirely failed to allege that Chase made a representation with the intention that plaintiffs would act upon it. See *Custom Data Solutions*, 274 Mich App at 243. Moreover, plaintiffs failed to plead the material-representation element with particularity. See *id.*; *Cooper*, 481 Mich at 414. Although plaintiffs allege that Chase made material representations while negotiating a forbearance agreement in August 2009, their factual allegations regarding the misrepresentations are too general to meet the heightened pleading standard of MCR 2.112(B)(1). Specifically, plaintiffs vaguely allege in paragraph 36 of their amended complaint that Chase made a material representation “regarding the efficacy of the [forbearance] agreement.” In the same paragraph, plaintiffs also allege that Chase made a misrepresentation “regarding . . . its commitment not to initiate any type of foreclosure of the mortgage as long as Plaintiffs were in compliance with the terms of the loan modification agreement.” This allegation lacks particularity. Although plaintiffs allege that there was a misrepresentation about a commitment not to foreclose as long as plaintiffs complied with the terms of the forbearance agreement, plaintiffs do not allege what particularly the misrepresentation was. Moreover, plaintiffs do not explain with any particularity what the “terms” of the forbearance agreement were, i.e., what plaintiffs’ obligations were. Thus, although plaintiffs allege that they made payments of approximately \$10,000 to Chase “in performance of” a forbearance agreement, plaintiffs do not allege that they *complied* with the terms of the forbearance agreement merely by making these payments. As a result, one reading plaintiffs’ allegation of fraud would have to speculate that plaintiffs complied with the terms of the forbearance agreement by merely making these payments totaling \$10,000.

We also conclude that plaintiffs failed to state a claim for estoppel. To establish estoppel, plaintiffs must show that a promise made by Chase must be enforced to avoid injustice. See *Novak*, 235 Mich App at 686-687. However, plaintiffs' do not even allege that they will suffer injustice if a promise made by Chase is not enforced. Furthermore, plaintiffs' factual allegations do not illustrate circumstances where enforcement of a promise by Chase not to foreclose would avoid an injustice because plaintiffs have not alleged that their payment of approximately \$10,000 to Chase constituted compliance with the forbearance agreement such that the agreement prohibited Chase from foreclosing.

Accordingly, the trial court did not err by holding that plaintiffs failed to state claims for fraud and estoppel.

### 3. STATUTE OF FRAUDS

The trial court also granted summary disposition in favor of Chase under MCR 2.116(C)(7) on the basis that the statute of frauds, MCL 566.132(2), bars their claims. We agree that MCR 2.116(C)(7) also provided a basis for summary disposition in favor of Chase.

“When reviewing a motion under MCR 2.116(C)(7), a reviewing court must consider all affidavits, pleadings, and other documentary evidence submitted by the parties and construe the pleadings and evidence in favor of the nonmoving party.” *Anzaldúa v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011). “The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant.” *Maiden*, 461 Mich at 119. Absent a disputed question of fact, the determination whether a cause of action is barred by the statute of frauds is a question of law that this Court reviews de novo. See *Doe v Roman Catholic Archbishop of Archdiocese of Detroit*, 264 Mich App 632, 638; 692 NW2d 398 (2004) (“Absent a disputed question of fact, the determination whether a cause of action is barred by a statute of limitation is a question of law that this Court reviews de novo.”).

The statute of frauds provides as follows:

(2) An action shall not be brought against a financial institution to enforce any of the following promises or commitments of the financial institution unless the promise or commitment is in writing and signed with an authorized signature by the financial institution:

(a) A promise or commitment to lend money, grant or extend credit, or make any other financial accommodation.

(b) A promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation.

(c) A promise or commitment to waive a provision of a loan, extension of credit, or other financial accommodation. [MCL 566.132(2).]

MCL 566.132(2) is “an unqualified and broad ban.” *Crown Technology Park v D&N Bank, FSB*, 242 Mich App 538, 550; 619 NW2d 66 (2000). A party may not bring a claim to enforce

the terms of an oral promise concerning a loan—no matter how the party labels the claim. *Id.* This includes claims of promissory estoppel. *Id.* at 548-553.

In this case, the forbearance agreement entered into by plaintiffs states that Chase may terminate the forbearance plan and continue foreclosure proceedings if plaintiffs did not meet the terms of the agreement. The forbearance agreement also states that, after the final payment of the forbearance plan, regular payments would become due in addition to any delinquent payments, fees, or charges. Finally, the forbearance agreement states that Chase would resume foreclosure activity if plaintiffs' account was not current once the forbearance period ended. The documentary evidence illustrates that plaintiffs did not make all of their payments under the terms of the forbearance agreement; indeed, plaintiffs acknowledge not paying the \$53,713.51 sum due on June 28, 2010. Moreover, there is no record evidence demonstrating that plaintiffs made regular payments after a final payment of the forbearance plan or that plaintiffs' account was current once the forbearance period ended. Thus, Chase could resume foreclosure proceedings pursuant to the terms of the forbearance agreement.

Plaintiffs insist that they made their payments under the forbearance agreement as directed by Chase. According to plaintiffs, Chase told them that they did not have to make the \$53,713.51 payment and then left them in the dark by failing to give them final or additional directions regarding completion of their forbearance obligation. Thus, plaintiffs argue that they were defrauded by Chase into making payments and that Chase "was estopped to renege on its promise of forbearance." We reject this argument. In their estoppel claim, plaintiffs are attempting to have a court enforce an oral promise by Chase that is plainly inconsistent with the forbearance agreement in an attempt to demonstrate that they were subjected to a wrongful foreclosure. Regardless of how plaintiffs label their claim, MCL 566.132(2) bars plaintiffs from bringing a claim to enforce the terms of an oral promise concerning the loan. See *id.* at 550. Thus, the statute of frauds bars plaintiffs' estoppel claim.

The statute of frauds also bars plaintiffs' fraud claim. In *Crown Technology Park*, 242 Mich App at 553-554, this Court concluded that a negligence claim was barred by MCL 566.132(2) where the claim was "intimately related" to the plaintiff's promissory-estoppel claim. Even though the negligence claim did not "rely on enforcing the terms of an alleged oral promise," the claim was—"at its core"—an action to enforce an oral promise. *Id.* Similarly, although plaintiffs through their fraud claim do not expressly request the enforcement of an oral promise to forbear, the claim is "intimately related" to the promissory estoppel claim as both claims concern an alleged oral promise by Chase. See *id.* The fraud claim at its core asks a court to acknowledge the existence and breach of an oral promise made by Chase that is contrary to the terms of the written forbearance agreement. Courts will "not defeat MCL 566.132(2) . . . by relying on the superficial language of the complaint while ignoring its substance." *Id.* at 554.

Accordingly, the trial court properly determined that the statute of frauds bars plaintiffs' estoppel and fraud claims.

Affirmed.

/s/ William B. Murphy  
/s/ Peter D. O'Connell  
/s/ Jane M. Beckering