

STATE OF MICHIGAN
COURT OF APPEALS

DAY LIVING TRUST,

Plaintiff/Counter Defendant,

v

PETER J. KELLEY and CATHARINE J.
KELLEY,

Defendants/Counter Plaintiffs-
Appellees,

and

FINANCIAL ASSOCIATES OF AMERICA,
LTD,

Counter Defendant-Appellant.

UNPUBLISHED
June 6, 2013

No. 309531
Washtenaw Circuit Court
LC No. 11-000376-CH

DAY LIVING TRUST,

Plaintiff/Counter Defendant,

v

PETER J. KELLEY and CATHARINE J.
KELLEY,

Defendants/Counter Plaintiffs-
Appellees,

and

FINANCIAL ASSOCIATES OF AMERICA,
LTD,

Counter Defendant,

No. 309566
Washtenaw Circuit Court
LC No. 11-000376-CH

and

J. EDWARD KLOIAN,

Appellant.

Before: M. J. KELLY, P.J., and CAVANAGH and MURRAY, JJ.

PER CURIAM.

Financial Associates of America, LTD (FAA) appeals as of right an order denying its motion to set aside a default and default judgment in this quiet title action. J. Edward Kloian (Kloian) appeals as of right a final judgment entered following an order granting a motion for summary disposition in favor of defendants, Peter J. Kelley and Catharine J. Kelley (the Kelleys), and against the Day Living Trust (plaintiff), which had transferred the subject property to Kloian before the trial court granted the motion, in this quiet title action. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

On January 25, 2011, plaintiff filed an action in the district court to evict the Kelleys from a house located at 228 Packard in Ann Arbor. The Kelleys filed an answer to plaintiff's complaint, as well as a counter-complaint to quiet title, alleging that they were the fee simple owners of the subject property.

The Kelleys' counter-complaint averred that they obtained title to the subject property by warranty deed on August 9, 1994, at which time they also executed a mortgage on the property to The Mortgage Company of Michigan in the amount of \$90,000.¹ The Mortgage Company of Michigan subsequently assigned its interest in the mortgage to UNICOR Mortgage, which later assigned its interest in the mortgage to United Companies Lending Corporation (United). On July 17, 1995, United assigned its interest in the mortgage to Bankers Trust Company of California (Bankers Trust), and the assignment was recorded on March 4, 1996.² Notwithstanding this assignment of interest, United initiated a foreclosure proceeding and, on September 21, 1995, FAA obtained a sheriff's deed for the subject property.³ FAA's resident

¹ The Kelleys' mortgage document stated: "Borrower does hereby mortgage, warrant, grant and convey to Lender, with power of sale," the subject property.

² It appears that Bankers Trust was a trustee for United. The assignment, for consideration in the amount of \$10, included that United conveyed the Kelleys' mortgage to Bankers Trust "as custodian or trustee under the applicable custodial or trust agreement"

³ There is no evidence in the lower court record that Bankers Trust challenged the validity of United's foreclosure proceeding or the sheriff's deed related to the subject property. There is also no evidence that the Kelleys challenged the foreclosure proceeding either when it was initiated or while it was in progress. And there is no evidence that the Kelleys redeemed the subject property or otherwise satisfied their indebtedness arising from the executed mortgage.

agent was Kloian. The Kelleys averred that, in 1999, Kloian filed for Chapter 7 bankruptcy and, because of his interest in FAA, the bankruptcy court and its trustee assumed control over the subject property. Thereafter, the trustee collected rental payments from the Kelleys with regard to the subject property. During the administration of the bankruptcy estate, FAA and Kloian filed eviction proceedings against the Kelleys, which they alleged was contrary to an automatic stay. And, on May 11, 2004, FAA sold the subject property to plaintiff by land contract.

In the one-count counter-complaint, the Kelleys alleged that the sheriff's sale to FAA was defective because United had no interest in the subject property at the time of the foreclosure proceedings. Thus, FAA never had a valid title to the property and its sale of the property to plaintiff was invalid, as well as in violation of the bankruptcy stay.⁴ Accordingly, the Kelleys requested the district court to declare that they had a valid and superior title against any claims of plaintiff.

Subsequently, the Kelleys filed a motion to remove this matter to the circuit court. By order entered March 25, 2011, the Kelleys' counter-complaint was removed for determination on its merits to the circuit court, but the district court retained jurisdiction of plaintiff's cause of action for possession, holding it in abeyance pending the resolution of the Kelleys' counter-complaint.

Thereafter, the Kelleys filed their first amended counter-complaint in the circuit court and added FAA as a counter-defendant. In Count I, the Kelleys sought to quiet title against FAA, alleging that United had no interest in the property; thus, its foreclosure action was invalid and the sheriff's deed was void ab initio. In Count II, the Kelleys sought to quiet title against plaintiff, alleging that FAA did not have a valid title to the property to transfer to plaintiff.

On April 13, 2011, the Kelleys filed a motion to extend the summons with regard to service on FAA through its registered agent, Kloian. The Kelleys averred that they hired a licensed private investigator and process server, John Israel, to obtain service of their counter-complaint and summons on FAA's registered agent, Kloian. Despite three attempts to serve Kloian, service could not be made. During the first attempt, Israel went to Kloian's residence, saw his car was home, and knocked on the door but Kloian did not answer. Israel continued to watch the house and, when he saw Kloian exit, he approached Kloian who got into his vehicle and drove away. Israel followed Kloian until Kloian exceeded the speed limit and Israel had to abandon the effort. During the second attempt, a woman answered Kloian's door and said he was not home. Shortly thereafter, Israel saw Kloian exit his house and leave. A third attempt to obtain service was also unsuccessful. The Kelleys averred that Kloian was present at all prior proceedings, including when the district court granted the Kelleys' motion to remove the action to the circuit court. Further, plaintiff's attorney copied Kloian on correspondence regarding this action, including plaintiff's answer to the Kelleys' counter-complaint. Despite being aware that FAA was a named party in the lawsuit, Kloian purposefully avoided service of process.

⁴ The Kelleys' averments do not explain their purported right or standing to challenge any event that occurred during Kloian's bankruptcy proceedings, including the conveyance of the subject property to plaintiff, which was a matter within the purview of the presiding bankruptcy court.

Thereafter, the circuit court extended the summons until October 13, 2011. On April 25, 2011, Kloian was served the summons and first amended counter-complaint, as well as the March 25, 2011 order transferring the action to the circuit court and other documents.

On May 4, 2011, the district court, however, entered an order dismissing the Kelleys' claims against FAA on the ground that FAA had not been timely served process. The Kelleys then filed a motion to set aside the order of dismissal on the ground that, at the time the order was entered, the district court did not have jurisdiction because the action was pending in the circuit court; thus, the order was entered in error. On June 16, 2011, the district court set aside the order.

On May 20, 2011, a default was entered against FAA in the circuit court and a copy of the default was mailed to FAA through its registered agent, Kloian. After FAA failed to appear or otherwise respond, on June 7, 2011, the Kelleys filed a motion for the entry of a default judgment against FAA and to quiet title to the subject property in their name.

On June 10, 2011, FAA moved to set aside the default, arguing that (1) Kloian was not properly served process, (2) the district court's order of dismissal excused FAA's failure to file a responsive pleading, and (3) FAA was not a proper defendant because FAA was not liable to the Kelleys. Accordingly, FAA argued, it established good cause to set aside the default. Further, FAA attached an affidavit of meritorious defense setting forth several claims.

On September 1, 2011, an evidentiary hearing was held on FAA's motion to set aside the default and the Kelleys' motion for entry of a default judgment against FAA. At the hearing Kloian testified that he was served process on April 29, 2011, but on cross-examination, Kloian admitted that the Washtenaw County Clerk date stamp on the proof of service stated that it was received by the court on April 28, 2011. The process server, Israel, testified that he had served Kloian in the past, knew where he lived, what type of vehicle he drove, and what he looked like. During his first attempt to serve Kloian, he followed Kloian to a restaurant and, when Israel pulled up next to him, Kloian "drove past me, gave me a wave, and continued on." Eventually Israel served Kloian, on April 28, 2011, at a restaurant. On cross-examination, Israel testified that he attempted and failed to serve Kloian on three prior occasions with regard to this matter.

Following closing arguments, the circuit court issued its ruling, holding that the Kelleys' evidence regarding the date in which Kloian was served, April 28, 2011, including Israel's testimony and the court's date stamp, was more credible than Kloian's testimony; thus, the entry of default on May 20, 2011, was timely. Further, Kloian's purported confusion created by the district court's erroneous order of dismissal was unreasonable and without merit. The district court did not have jurisdiction to enter the dismissal order because, on March 25, 2011, this matter was removed to the circuit court and Kloian was aware of the removal. Further, Kloian had been before that court numerous times in the past and was well-versed in his legal rights and responsibilities. Accordingly, the circuit court held that good cause did not exist to set aside the default against FAA. And, after considering each claim, the trial court rejected FAA's asserted meritorious defenses. After concluding that FAA failed to establish good cause or a meritorious defense in support of its motion to set aside the default, the court granted the Kelleys' motion for entry of a default judgment. On September 8, 2011, an order denying FAA's motion to set aside the default was entered. On September 20, 2011, an order of default judgment was entered

against FAA, declaring that the subject property “is forever quieted as to any claim or interest of [FAA], and all persons or entities claiming through or under it.” Thus, the Kelleys’ title in the subject property was deemed valid against any and all claims of FAA and any and all rights or interest of FAA, as well as all persons or entities claiming through or under FAA.

Pursuant to MCR 2.612(C)(1), plaintiff filed a motion for relief from the default judgment entered against FAA, arguing that the default judgment did not accurately reflect the circuit court’s ruling because it adjudicated plaintiff’s interest in the subject property through the default of FAA. The Kelleys opposed the motion, arguing that plaintiff failed to file any objections or raise any arguments opposing their request for a default judgment against FAA; thus, the default judgment was valid, final, and conclusive as to plaintiff’s purported rights. By order entered on January 4, 2012, the circuit court agreed with the Kelleys, holding that the default judgment remained in full force and effect.

On February 14, 2012, the Kelleys filed a motion for summary disposition pursuant to MCR 2.116(C)(10) regarding plaintiff’s purported interest in the subject property. The Kelleys argued, first, that the default judgment against FAA extinguished any right, title, or interest plaintiff claimed in the subject property. That is, FAA never obtained valid title to the property and could not sell the property to plaintiff; thus, any interest plaintiff claimed as a successor of FAA was extinguished. Second, the Kelleys argued, the 1995 foreclosure proceeding and sale were void; thus, the resulting sheriff’s deed that FAA obtained, and then transferred to plaintiff, was invalid. Third, the Kelleys argued, FAA’s land contract sale of the subject property to plaintiff in 2004 was in violation of the automatic stay in the bankruptcy proceeding; thus, it was invalid.

Plaintiff and FAA opposed the motion for summary disposition arguing, first, that: “The real issue is whether the Statute of Limitations expired prior to Kelleys’ claim of a defective Sheriff’s deed.” Second, plaintiff and FAA argued that questions of fact existed regarding whether United possessed a valid interest in the property. Third, questions of fact existed as to whether FAA had a valid interest in the property, including whether the statute of limitations expired prior to the Kelleys’ claim that the sheriff’s deed was defective. And, fourth, they argued that there was no evidence before the trial court regarding the bankruptcy proceeding, particularly with regard to the so-called “automatic stay” purportedly in place at the time FAA sold the property to plaintiff.

On March 2, 2012, plaintiff filed a “motion for substitution of a party on transfer and change of interest.” Plaintiff indicated that it transferred its interest in the subject property to Kloian by quit claim deed on February 22, 2012, and Kloian desired “to continue this action and be substituted for [plaintiff] under the terms of MCR 2.202(B).” The Kelleys opposed the motion, arguing that this conveyance was perpetrated to cause delay and frustrate resolution of this litigation.

On March 15, 2012, a hearing was held on the various motions. The circuit court held that plaintiff and FAA failed to establish that a genuine issue of material fact existed; thus, the Kelleys’ motion for summary disposition was granted. In particular, the trial court held that (1) FAA had no interest in the subject property to transfer to plaintiff, (2) the sheriff’s deed resulting from the foreclosure proceeding was invalid and void ab initio because United had no interest in

the property at the time of those proceedings, and (3) FAA failed to provide evidence that its transfer of the property to plaintiff was consistent with the bankruptcy procedures. Thus, the Kelleys' motion for summary disposition was "granted on all grounds." In light of this ruling, the court held that plaintiff's motion for substitution of parties was moot. On that same date, the circuit court entered an order granting the Kelleys' motion for summary disposition and holding that the subject property "is forever quieted as to any claim or interest of the [plaintiff], and all persons or entities claiming through or under it." Further, the court held that the memorandum of land contract dated May 11, 2004, memorializing the sale of the subject property from FAA to plaintiff was null and void. The court concluded that the Kelleys' title in the property was valid against any claims of plaintiff, as well as all persons or entities claiming through or under it, and any right, title, or interest of plaintiff, and all persons or entities claiming through or under it, were extinguished.

On April 5, 2012, FAA filed its claim of appeal, challenging the circuit court order denying its motion to set aside the default and the default judgment. On that same date, Kloian filed a claim of appeal, challenging the final judgment entered on March 15, 2012, following the circuit court order granting the Kelleys' motion for summary disposition. Kloian claimed that he was an aggrieved party because he had a recorded interest in the subject property which was eliminated by the final judgment. By order dated June 7, 2012, this Court consolidated FAA's and Kloian's appeals.⁵

On appeal, FAA argues that the circuit court abused its discretion when it denied FAA's motion to set aside the default entered against it. We disagree.

"The ruling on a motion to set aside a default or a default judgment is entrusted to the discretion of the trial court." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). Appellate review is sharply limited where there has been a valid exercise of discretion. *Id.* Accordingly, unless there has been a clear abuse of discretion, the trial court decision must be affirmed. *Id.* An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). Although the law favors resolution of claims on the merits, public policy is generally against setting aside defaults and default judgments that have been properly entered. *Alken-Ziegler, Inc*, 461 Mich at 229.

Generally, a motion to set aside a default "shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." MCR 2.603(D)(1). The trial court should consider the totality of the circumstances in determining whether the defaulting party has established good cause and a meritorious defense. *Shawl v Spence Bros, Inc*, 280 Mich App 213, 236-237; 760 NW2d 674 (2008). "Good cause" can be shown by a substantial defect or irregularity in the proceeding or by a reasonable excuse for failure to comply with the requirements which created the default. *Id.* at 221 (quotation marks and citations omitted). Relevant factors to consider with regard to whether a party has shown good cause include (1)

⁵ On April 25, 2012, plaintiff filed a claim of cross-appeal, but we dismissed the claim on September 4, 2012.

whether the party completely failed to respond or simply missed the deadline, (2) circumstances behind the failure to file or file timely, and (3) whether the failure was knowing or intentional. *Id.* at 238. A meritorious defense is established by providing an affidavit of facts laying out the defense. *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 392; 808 NW2d 511 (2011); see also MCR 2.603(D)(1). The “good cause” and “meritorious defense” requirements of MCR 2.603(D)(1) are independent inquiries and whether a meritorious defense has been asserted is not to be considered in determining whether the good cause requirement has been established. *Alken-Ziegler, Inc*, 461 Mich at 230-234.

In this case, FAA argues that there was good cause to set aside the default because the district court had entered an order dismissing the Kelleys’ counter-complaint after its registered agent, Kloian, was served. Consequently, there was a substantial defect or irregularity in the proceeding on which the default was based and Kloian had a reasonable excuse for failing to answer the counter-complaint. The circuit court rejected these claims as establishing the requisite good cause, as do we.

In its brief on appeal, FAA argues that when Kloian “was served with the First Amended Counter Complaint, there is no evidence to suggest that [he] had knowledge that the [action] had been removed to the Circuit Court or that the District Court no longer had jurisdiction over the matter.” However, first, the Kelleys’ counter-complaint was a clearly captioned circuit court action. And Kloian was served several days before the district court erroneously entered an order dismissing the action which was not pending in that court.

Second, the proof of service, which is attached to FAA’s brief on appeal, clearly provides that the following documents were served on Kloian: “March 25, 2011 Order transferring action to Circuit Court; Defendant Peter and Catharine Kelley’s First Amended Counter-Complaint and Jury Demand; Plaintiff’s Motion for Reconsideration of March 25, 2011 Order; Brief in Support; Notice of Hearing; and Plaintiff’s Answer to Defendant’s First Amended Counter-Complaint with Affirmative Defenses.” Thus, contrary to FAA’s claim, there is evidence that Kloian had knowledge that the matter had been removed to the circuit court.

Third, after Kloian evaded service of process on three separate occasions, as testified to by the Kelleys’ process server, Israel, the Kelleys filed a motion to extend the summons. In their motion, the Kelleys averred that Kloian was present at all prior proceedings and specifically at the hearing in which the district court removed the action to the circuit court. The Kelleys also argued that plaintiff’s attorney had copied Kloian on correspondence related to this action, including plaintiff’s answer to the Kelleys’ counter-complaint that was pending in the circuit court. In the Kelleys’ brief on appeal, they again argue that Kloian “attended every district court hearing related to the above captioned matter.” Further, Kloian testified at the evidentiary hearing which was held to determine whether the default should be set aside; however, when he was under oath and given the opportunity to explain any such “confusion” related to where and whether the action was pending, he offered no such testimony. Instead, his testimony related only to his claim that he was served on April 29, 2011, and, thus, his answer was not due at the time the default was entered.

Fourth, as the circuit court noted, Kloian, FAA’s registered agent, had extensive experience with the legal system; thus, he was familiar with the court system and matters of

litigation, including jurisdiction and the requirement that a complaint be answered within a certain time either by himself or through counsel, as well as the potential ramifications for failing to do so.

Considering the totality of the circumstances, the circuit court did not abuse its discretion when it concluded that FAA failed to establish good cause sufficient to set aside the default. The district court's entry of an erroneous order of dismissal related to this matter—in which it did not have jurisdiction and of which all parties were aware had been removed to the circuit court—did not constitute a “substantial defect or irregularity” in the proceeding. Further, FAA did not have a “reasonable excuse” for failing to answer the counter-complaint which was properly served on its registered agent. See *Shawl*, 280 Mich App at 221.

We reject FAA's contention that, because of the strength of its meritorious defenses, manifest injustice would result if the default is not set aside. FAA's argument is premised on a “blurring of the separate inquires of ‘good cause’ and ‘meritorious defense’” that our Supreme Court specifically rejected in *Alken-Ziegler, Inc*, 461 Mich at 229-234. In that case, the Court reaffirmed that MCR 2.603(D)(1) provides that both good cause and a meritorious defense be established and the issue whether a meritorious defense has been asserted is not to be considered in determining whether the good cause requirement has been established. *Id.* at 232. The Court explained that the “manifest injustice” prong of the “good cause” test “is the result that would occur if a default were to be allowed to stand where a party has satisfied the ‘meritorious defense’ and ‘good cause’ requirements of the court rule.” *Id.* at 233. Here, FAA has failed to satisfy the good cause requirement; therefore, we need not consider whether the trial court abused its discretion in concluding that FAA failed to satisfy the meritorious defense requirement of MCR 2.603(D)(1). Accordingly, we affirm the circuit court's order denying FAA's motion to set aside the default.

Next, we consider FAA's argument that the circuit court abused its discretion when it granted the Kelleys' motion for entry of default judgment against FAA, and Kloian's argument that the trial court erroneously granted the Kelleys' motion for summary disposition with regard to their quiet title claim against plaintiff, which had conveyed all interest in the subject property to Kloian just prior to that decision. We conclude that the Kelleys were not entitled to a default judgment against FAA and that the Kelleys' motion for summary disposition was erroneously granted against plaintiff.

The trial court's decision on a motion for entry of a default judgment is reviewed for an abuse of discretion. *Barclay v Crown Bldg & Dev, Inc*, 241 Mich App 639, 642; 617 NW2d 373 (2000). A trial court's decision on a motion for summary disposition is reviewed de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). The moving party must specifically identify the matters that have no disputed factual issues, MCR 2.116(G)(4), and has the initial burden of supporting that position with documentary evidence, MCR 2.116(G)(3)(b). “The affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1) – (7) or (10).” MCL 2.116(G)(5). A motion grounded on MCR 2.116(C)(10) is properly granted if, “[e]xcept as to the amount of damages, there is no

genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” See also *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007).

Generally, a default settles the question of liability as to well-pleaded factual allegations and the defaulting party is precluded from litigating that issue. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 78-79; 618 NW2d 66 (2000). However, the entry of a default does not transform a legally deficient complaint into a legally sufficient complaint. “The entry of a default does not operate as an admission that the complaint states a cause of action. If the complaint fails to state a cause of action, it will not support a judgment.” *State ex rel Saginaw Prosecuting Attorney v Bobenal Investments, Inc*, 111 Mich App 16, 22; 314 NW2d 512 (1981); see also *Smak v Gwozdik*, 293 Mich 185, 188-189; 291 NW 270 (1940). Further, conclusions of law unsupported by sufficient factual allegations are not deemed admitted by a defaulting party. See *Cogswell v Kells*, 293 Mich 541, 545; 292 NW 483 (1940); *Bonnici v Kindsvater*, 275 Mich 304, 309-310; 266 NW 360 (1936).

Here, the Kelleys’ counter-complaint set forth a quiet title claim against FAA which included the following allegations:

23. Defendant FAA purportedly obtained title to the Property on September 21, 1995 pursuant to a sheriff deed on foreclosure sale, foreclosing on the mortgage allegedly held by [United]. Exhibit G.
24. The Sheriff’s sale of the Property to FAA described above was defective because [United] sold its interest in the mortgage to Bankers Trust on July 17, 1995, prior to the sheriff’s sale, divesting itself of “all and singular the contract lien, rights, equities, claims, title interest and estate in and for said real estate . . . without recourse, forever”. Exhibit F.
25. [United] had no interest in the Property to foreclose upon and any Sheriff’s Deed issued as a result of said foreclosure is invalid. Exhibit F.
26. The Sheriff’s Deed is *void ab initio*.
27. The Kelleys hold fee simple title to the Property because such title has not been conveyed by them, because the Sheriff’s sale was defective.

Accordingly, the Kelleys alleged that their claim of title to the subject property was superior to FAA’s claim of title because the foreclosure proceeding was invalid; thus, the sheriff’s deed that was issued to FAA was void and the Kelleys held fee simple title to the property. However, the assertions that the foreclosure proceeding was “invalid,” that the resulting sheriff’s deed was “void,” and that the Kelleys “hold fee simple title to the Property,” are conclusions of law wholly unsupported by sufficient factual allegations and are not deemed admitted by the defaulting party, FAA. See *Cogswell*, 293 Mich at 545; *Bonnici*, 275 Mich at 309-310. The Kelleys never sued United or filed a legal action directly challenging the 1995 foreclosure, and they did not redeem the property.

Further, this quiet title action constitutes an impermissible attempt to set aside a statutory foreclosure sale that occurred about 16 years ago and does not set forth a cause of action. See *Sweet Air Inv, Inc v Kenney*, 275 Mich App 492, 497; 739 NW2d 656 (2007) (citation omitted). It is undisputed that United initiated foreclosure by advertisement proceedings, FAA purchased the subject property for \$99,200, and FAA was issued a sheriff's deed. Following foreclosure, the rights and obligations of the interested parties are governed by statute. *Senters v Ottawa Sav Bank, FSB*, 443 Mich 45, 50; 503 NW2d 639 (1993). MCL 600.3236 provides that, if the mortgagor does not redeem the property within the requisite period of time, the sheriff's deed "shall thereupon become operative, and shall vest in the grantee therein named, his heirs or assigns, all the right, title, and interest" in the subject property. The sheriff's deed in this case stated that the deputy sheriff "granted, conveyed, bargained and sold, and by this deed do grant, convey, bargain and sell unto the grantee, its successors and assigns, Forever, All the estate, right, title and interest which said Mortgagor(s) had in said land and tenements and every part thereof, on the 9th day of August A.D. 1994, that being the date of said mortgage, or at any time thereafter, To Have and to Hold the said lands and tenements and every part thereof to the said grantee, its successors and assigns forever, to their sole and only use, benefit and behalf forever . . ." And the Evidence of Sale provided, in pertinent part: "I DO HEREBY CERTIFY, That the within Sheriff's Deed will become operative at the expiration of 6 months from the date of such sale . . . unless redeemed according to the law"

The Kelleys did not redeem the property; thus, the sheriff's deed became operative and FAA was vested with "all the right, title, and interest" in the subject property by operation of law. Once the redemption period expired, all of the Kelleys' rights in and title to the subject property were extinguished. See *Piotrowski v State Land Office Bd*, 302 Mich 179, 187; 4 NW2d 514 (1942). Accordingly, the Kelleys did not have standing to challenge FAA's sheriff's deed to the subject property. See *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). The Kelleys simply had no legal or equitable interest in that property after the redemption period expired. See, e.g., *Dingman v OneWest Bank, FSB*, 859 F Supp 2d 912, 917 (2012).

The Kelleys' reliance on MCL 600.5801(1) in support of their claim that a five-year statute of limitations applies with regard to a challenge to the validity of a sheriff's deed is without merit. MCL 600.5801(1) provides:

Defendant claiming title under fiduciary's deed or court-ordered sale. When the defendant claims title to the land in question by or through some deed made upon the sale of the premises by an executor, administrator, guardian, or testamentary trustee; or by a sheriff or other proper ministerial officer under the order, judgment, process, or decree of a court or legal tribunal of competent jurisdiction within this state, or by a sheriff upon a mortgage foreclosure sale the period of limitation is 5 years.

It is well-established that plain statutory language must be construed and enforced as written. *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005) (citation omitted). And according to the plain language of the statute, the Kelleys were not defendants claiming title to the subject property "by or through some deed made upon the sale of the premises . . . by a sheriff upon a mortgage foreclosure sale" MCL 600.5801(1). The

Kelleys did not acquire the sheriff's deed; FAA acquired the sheriff's deed. Thus, this statute of limitations is inapplicable as to the Kelleys, who do not claim title to the property by virtue of a deed issued pursuant to the sheriff's sale.

Our Supreme Court has repeatedly held that a mortgagor must challenge the validity of a foreclosure by advertisement promptly and without delay. See *White v Burkhardt*, 338 Mich 235, 239; 60 NW2d 925 (1953); *Fox v Jacobs*, 289 Mich 619, 624-625; 286 NW2d 854 (1939); *Kuschinski v Equitable & Central Trust Co*, 277 Mich 23, 26-27; 268 NW 797 (1936). Further, in *Hogan v Hester Invest Co*, 257 Mich 627, 636; 241 NW2d 881 (1932), the Court held that the plaintiff could not challenge the validity of a foreclosure by advertisement proceeding after the subject property has been sold to a bona fide purchaser. In this case, the Kelleys did not challenge the validity of the foreclosure by advertisement for about 16 years; clearly, this challenge was not brought promptly and without delay. And the end result of the circuit court's holding in this case is that a foreclosure sale that occurred about 16 years ago, without challenge, would be set aside. This result is plainly wrong. See *Sweet Air Inv, Inc*, 275 Mich App at 497 (citation omitted). Further, the Kelleys' claims regarding Kloian's personal involvement in a bankruptcy proceeding in 1999, about four years after FAA acquired the sheriff's deed at issue, are irrelevant and do not impact the conclusion that the Kelleys failed to state a cause of action. And the Kelleys had no legal right to challenge the propriety of FAA's conveyance of the property to plaintiff in 2004, about nine years after FAA acquired the sheriff's deed, because FAA possessed "all the right, title, and interest" in the subject property. See MCL 600.3236. Accordingly, the circuit court abused its discretion when it granted the Kelleys' motion for entry of a default judgment against FAA and the default judgment is vacated.

Next, we consider Kloian's argument that the trial court erroneously granted the Kelleys' motion for summary disposition pursuant to MCR 2.116(C)(10) with regard to their quiet title claim against plaintiff, which had conveyed all interest in the subject property to Kloian just prior to that decision. In their complaint to quiet title against plaintiff, the Kelleys alleged, in pertinent part, that the purported transfer of the subject property from FAA to plaintiff was defective because "FAA never obtained valid title to the Property and any subsequent attempt to transfer title to Plaintiff is also invalid" and that the transfer violated an automatic stay in Kloian's bankruptcy case.

In their motion for summary disposition, the Kelleys argued that (1) the default judgment against FAA extinguished any right, title, or interest plaintiff claimed in the subject property, (2) the 1995 foreclosure proceeding was invalid causing FAA's sheriff's deed to be void, and (3) FAA's conveyance of the subject property to plaintiff was in violation of the automatic stay in the bankruptcy proceeding and was invalid. As the moving parties, the Kelleys were required to specifically identify the matters that have no disputed factual issues, MCR 2.116(G)(4), and they had the initial burden of supporting that position with documentary evidence, MCR 2.116(G)(3)(b). See also *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

First, as discussed above, the default judgment entered against FAA was erroneous. Second, the Kelleys failed to produce any documentary evidence establishing their claim that the 1995 foreclosure proceeding was legally invalid and that FAA's sheriff's deed was legally void. Third, the Kelleys failed to produce any documentary evidence establishing their right to

challenge FAA's conveyance of the subject property to plaintiff during Kloian's bankruptcy case or any evidence that the conveyance was deemed invalid by the bankruptcy court presiding over that matter. Accordingly, the Kelleys failed to establish that no genuine issue of material fact existed and that they were entitled to judgment as a matter of law with regard to their quiet title action against plaintiff. See MCR 2.116(C)(10). Therefore, we reverse the trial court's order granting the Kelleys' motion for summary disposition.

In light of our conclusions, we vacate in its entirety the September 20, 2011 order of default judgment entered against FAA which erroneously held that the subject property "is forever quieted [in the Kelleys] as to any claim or interest of [FAA], and all persons or entities claiming through or under it." We also vacate in its entirety the January 4, 2012 order which held that the default judgment "remained in full force and effect." We also vacate the March 15, 2012 order of the circuit court in its entirety. The order erroneously granted the Kelleys' motion for summary disposition and held that the subject property "is forever quieted as to any claim or interest of the [plaintiff], and all persons or entities claiming through or under it." The order also erroneously declared the memorandum of land contract dated May 11, 2004, which pertained to the sale of the subject property from FAA to plaintiff, null and void. The order also erroneously declared that the Kelleys' title in the property was valid against any claims of plaintiff, as well as all persons or entities claiming through or under it, and that any such right, title, or interest was extinguished. The Kelleys do not have title or any legal right, claim, or interest in the subject property. Therefore, this matter should be remanded to the district court, which retained jurisdiction, for resolution of the previously filed eviction proceedings against the Kelleys.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray