

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

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DANIEL F. MCGUIRE,

Plaintiff-Appellant,

v

COMPASS BANK,

Defendant-Appellee.

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UNPUBLISHED  
December 17, 2013

No. 310390  
Oakland Circuit Court  
LC No. 2012-125197-CZ

Before: METER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Plaintiff appeals as of right an order denying plaintiff's motion for a preliminary injunction and granting summary disposition to defendant. We affirm.

On March 4, 2003, plaintiff executed a mortgage in favor of Mortgage Electronic Systems, Inc., encumbering the real property located at 615 Dunleavy Drive, Highland, Michigan (hereinafter referred to as "the property"). This mortgage was subsequently assigned to defendant. Plaintiff defaulted on the mortgage loan and defendant initiated foreclosure proceedings on the property. On April 19, 2011, a foreclosure-by-advertisement sale was held and defendant was the successful bidder for the property. The sheriff's deed was recorded in the Oakland County Register of Deeds, along with the certificate of redemption period and affidavits of auctioneer, purchaser, publication, and posting.

Plaintiff filed a complaint on February 24, 2012, alleging that defendant did not provide plaintiff with notice of the foreclosure proceedings initiated against the property. Plaintiff requested that the trial court enter an order holding the foreclosure and sheriff's deed null and void. Plaintiff also requested that the court enter an ex-parte temporary restraining order preventing defendant from taking any further foreclosure and eviction actions. The trial court granted the ex-parte temporary restraining order and entered an order for defendant to appear before the court to show cause why a preliminary injunction should not be granted.

Before the show-cause hearing, defendant filed a motion for summary disposition under 2.116(C)(8) and (C)(10), asserting that it provided plaintiff with notice of the foreclosure in compliance with MCL 600.3208. Defendant attached as exhibits the affidavits of posting and publication, along with photographs taken of the notice at the time of the posting. On April 6, 2012, the trial court issued an order denying plaintiff's motion for a preliminary injunction and granting defendant's motion for summary disposition under MCR 2.116(I)(1). The court held

that plaintiff's allegations regarding lack of notice of the foreclosure were without merit and defendant was entitled to summary disposition because the proofs showed no genuine issue of material fact.

On appeal, plaintiff contends that the trial court erred in granting defendant's motion for summary disposition because there was a genuine issue of material fact regarding whether defendant did, in fact, post notice on the property. We disagree.

This court reviews de novo a trial court's decision concerning a motion for summary disposition. *Botsford Continuing Care Corp v Intelistaf Healthcare, Inc*, 292 Mich App 51, 60; 807 NW2d 354 (2011). 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). This Court reviews a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Review is limited to the evidence that had been presented to the trial court at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009). A motion based on MCR 2.116(C)(10) is appropriately granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Greene v AP Products, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (citations and quotation marks omitted). The pertinent question is whether the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Debano-Griffin v Lake County*, 493 Mich 167, 175; 828 NW2d 634 (2013). Further, MCR 2.116(I)(1) provides that "[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay."

In general, the right to foreclosure by advertisement is statutory. *Church & Church, Inc v A-1 Carpentry*, 281 Mich App 330, 339; 766 NW2d 30 (2008), *aff'd* on other grounds 483 Mich 885 (2009). Foreclosure by advertisement is governed by MCL 600.3201<sup>1</sup> *et seq.* MCL 600.3208 states:

Notice that the mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, shall be given by publishing the same for 4 successive weeks at least once in each week, in a newspaper published in the county where the premises included in the mortgage and intended to be sold, or some part of them, are situated. If no newspaper is published in the county, the notice shall be published in a newspaper published in an adjacent county. In every case within 15 days after the first publication of the notice, a true copy shall

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<sup>1</sup> MCL 600.3201 provides: "Every mortgage of real estate, which contains a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement, in the cases and in the manner specified in this chapter. However, the procedures set forth in this chapter shall not apply to mortgages of real estate held by the Michigan state housing development authority."

be posted in a conspicuous place upon any part of the premises described in the notice.

Additionally, MCL 600.3256 provides:

(1) Any party desiring to perpetuate the evidence of any sale made in pursuance of the provisions of this chapter, may procure:

(a) An affidavit of the publication of the notice of sale, and of any notice of postponement, to be made by the publisher of the newspaper in which the same was inserted, or by some person in his employ knowing the facts; and

(b) An affidavit of the fact of any sale pursuant to such notice, to be made by the person who acted as auctioneer at the sale, stating the time and place at which the same took place, the sum bid, and the name of the purchaser; and

(c) An affidavit setting forth the time, manner and place of posting a copy of such notice of sale to be made by the person posting the same.

(2) Where any or all of such affidavits are endorsed upon or annexed to 1 instrument, a single copy of the notice of sale, and a single copy of any notice of postponement, shall be sufficient to annex to such instrument, and reference made in any of such affidavits to copy of notice of sale and to copy of any notice of postponement of sale as annexed or attached shall be deemed to refer to such single copy of notice of sale and to such single copy of any notice of postponement.

Plaintiff contends that there was a genuine issue of material fact regarding whether defendant posted notice on the property. Viewing the evidence in the light most favorable to plaintiff, there was no genuine issue of material fact that notice was posted on the property in compliance with MCL 600.3208. Pursuant to MCL 600.3208 and MCL 600.3256, in its motion for summary disposition, defendant proffered an affidavit of Craig Domanski that stated that on July 28, 2010, Domanski went to the property and posted notice of the foreclosure sale in a conspicuous place on the property. In addition, defendant proffered an affidavit of Noelle Klomp, who is the legal manager for the Oakland Press, which stated that notice of the foreclosure sale was published on July 26, 2010, August 2, 2010, August 9, 2010, and August 16, 2010, in the Oakland Press.

Domanski's affidavit, dated July 28, 2010, provided evidence of defendant's posting notice "in a conspicuous place upon any part of the [property]." MCL 600.3208; MCL 600.3256(1)(c). Klomp's affidavit not only provided evidence of defendant's "publishing the [notice of foreclosure] for 4 successive weeks at least once in each week, in a newspaper published in the county where the premises . . . are situated," but was also evidence that the notice was posted on the property "within 15 days after the first publication of the notice . . . ." MCL 600.3208; MCL 600.3256(1)(a). Because these affidavits were recorded at the Oakland

County Register of Deeds, in accordance with MCL 600.3264,<sup>2</sup> these affidavits were presumptive evidence that defendant complied with the notice requirements set forth in MCL 600.3208.

Plaintiff, on the other hand, did not proffer any evidence that defendant failed to comply with the notice requirements. In his verified complaint, plaintiff alleged that he lived close to the property in question and never “receive[d] notice”; plaintiff contends that this established a genuine issue of material fact regarding whether defendant actually posted notice.<sup>3</sup> However, we note that personal or actual notice of the foreclosure is not required by case law or by statute in Michigan. *Cheff v Edwards*, 203 Mich App 557, 559-561; 513 NW2d 439 (1994) (holding that, although personal notice or service may be desirable, it is not required by MCL 600.3208). Thus, even if plaintiff’s allegations in his complaint are true, the fact that plaintiff did not actually receive any notice is irrelevant. The allegations do not put the content of Domanski’s and Klomp’s affidavits in dispute, but rather, simply dispute whether plaintiff observed the notice. The language of MCL 600.3208 does not require that the defaulting party observe or receive notice of the foreclosure. It only requires that defendant post notice in a conspicuous place on the property within 15 days of the first publication of notice in a newspaper in the county in which the property is located. MCL 600.3208. While the sworn affidavits proffered by defendant provided evidence that it provided notice in compliance with MCL 600.3208, plaintiff presented no evidence to the contrary that created a genuine issue of material fact.

Plaintiff also asserts that the photographs of the alleged posting attached to defendant’s motion for summary disposition did not provide adequate evidence that the posting occurred. This contention is meritless because MCL 600.3208 does not require the foreclosing party to take photographs of the posted notice. Even without the attached photographs, there was no genuine issue of material fact that defendant complied with the statutory requirements. Because defendant provided uncontroverted evidence that it complied with the notice requirements set forth in MCL 600.3208, no genuine issue of material fact existed that defendant provided notice pursuant to the statutory requirements. The trial court did not error in granting summary disposition to defendant.

Defendant contends that plaintiff lacks standing to challenge the foreclosure after the expiration of the redemption period because he no longer holds an interest in the property. However, because of the resolution of the first issue, we need not address this contention.

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<sup>2</sup> MCL 600.3264 provides: “[s]uch affidavits shall be recorded at length by the register of deeds of the county in which the premises are situated, in a book kept for the record of deeds; and such original affidavits, the record thereof, and certified copies of such record, shall be presumptive evidence of the facts therein contained.”

<sup>3</sup> Plaintiff is apparently asking us to infer that because he lived close to the property, he necessarily would have seen any notice if it had in fact been posted.

Affirmed.

/s/ Patrick M. Meter  
/s/ Mark J. Cavanagh  
/s/ Henry William Saad