

STATE OF MICHIGAN
COURT OF APPEALS

HUNTINGTON NATIONAL BANK,

Plaintiff-Appellee,

v

JOHN F. SOMERS AND DEBRA SOMERS,

Defendants-Appellants.

UNPUBLISHED

October 24, 2006

No. 270202

Antrim Circuit Court

LC No. 05-008150-CK

Before: Whitbeck, C.J., and Murphy and Smolenski, JJ.

PER CURIAM.

In this suit for recovery of a deficiency following foreclosure by advertisement, defendants appeal as of right the trial court's grant of summary disposition in favor of plaintiff. We reverse and remand.

In March 2000, defendants borrowed more than \$60,000 from plaintiff. The promissory note executed by defendants was secured by a second mortgage granted in favor of defendant. A third party held the note secured by the first mortgage. Defendants subsequently defaulted on both notes.

In February 2002, the holder of the note secured by the first mortgage foreclosed against the mortgaged property by advertisement. The United States Department of Agriculture (USDA) successfully purchased the property with a bid of \$71,908.22 at the sale held on February 15, 2002. The sheriff's deed evidencing this purchase was recorded in March 2002.

Plaintiff also foreclosed against defendants' property by advertisement. The auction for this foreclosure occurred on April 5, 2002. Plaintiff was the high bidder at this sale with a bid of \$105,000. On April 10, 2002, plaintiff sent a check for \$72,937.82 to the USDA to redeem the first mortgage.

In August 2005, plaintiff sued defendants for the deficiency between the sale price at auction and the amount owed on the promissory note.¹ In their answer to the complaint,

¹ Plaintiff's complaint does not explain how the deficiency was calculated. However, it is clear that the deficiency amount must have been calculated by adding the costs incurred to redeem the
(continued...)

defendants alleged several affirmative defenses. Defendants claimed that the bid price of \$105,000 exceeded the amount owed under the promissory note and, therefore, that the note had been fully satisfied. Defendants also alleged that, in the alternative, the \$105,000 bid price was below fair market value and that any deficiency found to exist should be reduced by the difference between the bid and the fair market value of the property at the time of the auction. Finally, defendants asserted a laches defense.

On September 19, 2005, defendants sent their first request for admissions from plaintiff. The request included the following paragraphs:

4. At the time of the foreclosure sale of the Mortgage, \$105,000 exceeded the amount owing under the Mortgage.
5. By virtue of [plaintiff's] purchase at foreclosure sale of the Mortgage, the Personal Loan Agreement secured by the Mortgage has been fully paid and satisfied.

On October 18, 2005, plaintiff responded to defendants' first request for admissions. In its response, plaintiff acquiesced to every admission except four and five, which it denied as untrue.

On October 31, 2005, defendants moved for a determination of the status of plaintiff's admissions. In their motion, defendants alleged that plaintiff had filed its response one day late. On that basis, defendants asked the trial court to deem requests four and five to be admitted under MCR 2.312(B)(1). At a hearing held on November 14, 2005, the trial court determined that requests four and five must be treated as admitted under the court rule, but noted that plaintiff may move to set aside the admissions. Plaintiff then attempted to orally move for the admissions to be set aside. However, the trial court stated that it did not have sufficient documentary evidence before it to rule on the merits of the motion. Therefore, the trial court directed plaintiff to "file your motion consistent with the Court rules so it can be noticed for hearing on December 12th." On the same day, the trial court entered an order deeming requests four and five to be admitted and stating that plaintiff's motion to set aside the admissions must be heard no later than December 12, 2005.

Plaintiff did not file its motion to have the admissions set aside until December 12, 2005. At a hearing held on that same day, the trial court noted that its previous order was not confusing and made clear that the motion to set aside had to be timely filed so that it could be heard by December 12. Because plaintiff failed to comply with that order, the trial court refused to set aside the admissions.

Defendants subsequently moved for summary disposition under MCR 2.116(C)(10). In their motion, defendants argued that they were entitled to summary disposition because plaintiff admitted that the foreclosure satisfied the debt secured by the mortgage. Plaintiff responded to defendants' motion for summary disposition and moved for summary disposition in its favor under MCR 2.116(I)(2). In its motion, plaintiff did not address the admissions, but rather argued

(...continued)

first mortgage to the unpaid balance of the note secured by the second mortgage.

that it could properly add the cost to redeem the property to the amount owed under the note, which left a deficiency of more than \$34,000.

In January 2006, the trial court issued its opinion and order. In its opinion, the trial court acknowledged the admissions, but nevertheless determined that plaintiff could properly add the amount it paid to redeem the first mortgage to the balance due under the note secured by the second mortgage. For this reason, the trial court found that the amount bid by plaintiff at the second foreclosure was inadequate to cover the total debt owed by defendants. The trial court further determined that defendants were not entitled to summary disposition in their favor. Instead, the trial court concluded that summary disposition in favor of plaintiff was warranted. The trial court entered judgment in favor of plaintiff in the amount of \$34,716.14.

After defendants unsuccessfully sought reconsideration of the trial court's opinion and order, defendants appealed as of right.

Defendants first argue that the trial court should have granted summary disposition in their favor. Specifically, defendants argue that admissions four and five establish that the note secured by the second mortgage was satisfied after the second mortgage foreclosure sale. Because these admissions are dispositive, defendants further contend, the trial court should have granted their motion for summary disposition. We agree.

This Court reviews de novo a trial court's decision to grant summary disposition. *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 153; 721 NW2d 233 (2006). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is appropriate if "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." MCR 2.116(C)(10). When examining whether summary disposition should be granted, the trial court must consider "affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Plaintiff failed to timely respond to defendants' request for admissions. As a result, the matters asserted by defendants in the request were deemed admitted by plaintiff. See MCR 2.312(B)(1). Likewise, although it was within the trial court's discretion to withdraw the admissions for good cause, see MCR 2.312(D)(1), the trial court refused to set aside the admissions after plaintiff failed to file a motion to withdraw the admissions within the deadline set by the trial court.² Therefore, the trial court was required to consider these admissions when examining whether defendants were entitled to summary disposition. MCR 2.116(G)(5).

Admissions under MCR 2.312 are "judicial" admissions as opposed to evidentiary admissions. *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 420; 551 NW2d 698

² Plaintiff has not appealed the trial court's refusal to hear either its oral motion or its later written motion to have the admissions withdrawn.

(1996). Judicial admissions are “formal concessions in the pleadings in the case or stipulations by a party or its counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.” *Id.*, quoting 2 McCormick, Evidence (4th ed), § 254, p 142. Judicial admissions conclusively establish the admitted fact. *Employers Mut Casualty Co v Petroleum Equip, Inc*, 190 Mich App 57, 62; 475 NW2d 418 (1991); MCR 2.312(D)(1); see also MRE 201(f). Unlike evidentiary admissions, judicial admissions are not subject to contradiction or explanation through the submission of other evidence. *Radtke, supra* at 421; *Woodrow v Johns*, 61 Mich App 255, 259; 232 NW2d 688 (1975).

In the present case, plaintiff admitted that “[b]y virtue of [plaintiff’s] purchase at foreclosure sale of the Mortgage, the [note] secured by the Mortgage has been fully paid and satisfied.” Although this admission can be interpreted as both a factual admission and an admission that, by operation of law, the foreclosure sale satisfied the note, a party may admit to both facts and “the application of law to fact.” MCR 2.312(A). Hence, plaintiff’s admission conclusively established that the note underlying the second mortgage was fully paid and satisfied by plaintiff’s purchase at the second foreclosure sale. For this reason, whether plaintiff could have recovered the expenses incurred in redeeming the first mortgage is irrelevant. Defendants were entitled to summary disposition in their favor.

Because of our resolution of this issue, we need not address defendants’ remaining claims of error.

Reversed and remanded for entry of a judgment of no cause for action in favor of defendants. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ William B. Murphy

/s/ Michael R. Smolenski