

STATE OF MICHIGAN
COURT OF APPEALS

NAZIH FAWAZ and IMAN FAWAZ,
Plaintiffs-Appellants,

UNPUBLISHED
May 1, 2012

v

AURORA LOAN SERVICES LLC,
Defendant-Appellee.

No. 302840
Wayne Circuit Court
LC No. 10-003029-CH

Before: BORRELLO, P.J., and JANSEN and GLEICHER, JJ.

PER CURIAM.

In this action to quiet title, plaintiffs appeal as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). For the reasons set forth in this opinion, we affirm.

Plaintiffs obtained a loan from American Brokers Conduit Corporation secured by a mortgage on their residential property. Pursuant to the mortgage instrument, Mortgage Electronic Registration System (MERS) was designated as the mortgagee with the right of foreclosure and the power of sale. Plaintiffs defaulted, and MERS assigned the mortgage to defendant. Six months later, defendant foreclosed on the property by advertisement and a sheriff's sale was held where defendant was the highest bidder. Plaintiffs brought this action to quiet title on grounds that they had entered into loan modification negotiations with defendant. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10) and the trial court granted defendant's motion.

On appeal, plaintiffs contend that the foreclosure was void ab initio because defendant did not own or have any interest in the indebtedness secured by the mortgage. Plaintiffs failed to preserve this issue for appellate review because they did not first raise it in the trial court. *Midwest Bus Corp v Dep't of Treasury*, 288 Mich App 334, 351; 793 NW2d 246 (2010). However, given that the resolution of the issue is necessary for a proper determination of the case, and considering that it involves a question of law where the facts necessary for its resolution have been presented, we will nevertheless address the issue. See *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

Whether a party has authority to initiate foreclosure proceedings under a statute involves interpretation and application of a statute, which are questions of law that we review de novo. *Adams Outdoor Advertising, Inc v City of Holland*, 463 Mich 675, 681; 625 NW2d 377 (2001).

Similarly, we review a trial court’s decision to grant summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In this case, the trial court did not articulate whether it granted summary disposition pursuant to MCR 2.116(C)(8) or MCR 2.116(C)(10). A motion brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and should be granted “where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Id.* at 119 (quotation omitted). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a complaint and should be granted where “there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

MCL 600.3204(1) governs foreclosure by advertisement and it provides in relevant part as follows:

[A] party may foreclose a mortgage by advertisement if all of the following circumstances exist:

* * *

(d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage.

Plaintiffs argue that MERS, as mortgagee, did not own or have any interest in their indebtedness secured by the mortgage, and therefore, when MERS assigned its interest to defendant, such interest did not vest defendant with authority to foreclose by advertisement under MCL 600.3204(1)(d).

In *Residential Funding Co, LLC v Saurman*, 490 Mich 909; 805 NW2d 183 (2011), our Supreme Court held that MERS, as mortgagee, owned a sufficient interest in the indebtedness secured by the subject mortgage such that it could foreclose by advertisement under MCL 600.3204(1)(d). Specifically, our Supreme Court explained:

We clarify, however, that MERS’ status as an “owner of an interest in the indebtedness” does not equate to an ownership interest in the note. Rather, as record-holder of the mortgage, MERS owned a security lien on the propert[y], the continued existence of which was contingent upon the satisfaction of the indebtedness. This interest in the indebtedness—i.e., the ownership of legal title to a security lien whose existence is wholly contingent on the satisfaction of the indebtedness—authorized MERS to foreclose by advertisement under MCL 600.3204(1)(d). [*Saurman*, 490 Mich at 909.]

In this case, MERS, as record holder of the mortgage, owned an interest in plaintiffs’ indebtedness that was secured by the mortgage. *Id.* Specifically, MERS owned a security lien on plaintiffs’ property, “the continued existence of which was contingent upon the satisfaction of the indebtedness.” *Id.* Such interest authorized MERS to foreclose by advertisement under MCL 600.3204(1)(d). *Id.* Thus, when MERS assigned its interests in the mortgage to defendant, defendant stood in MERS shoes and had the same authority to foreclose under MCL

600.3204(1)(d). Therefore, the foreclosure was valid and the trial court did not err in granting defendant's motion for summary disposition.

Plaintiffs also contend that the trial court erred when it denied their "motion for leave to appeal." In a separate trial court proceeding, plaintiffs' applied for leave to appeal a district court order granting defendant a writ of restitution and the trial court denied plaintiffs' appeal. Plaintiffs failed to apply for leave to appeal that order in this Court and we therefore do not have jurisdiction to address plaintiffs' argument with respect to the order. See MCR 7.203(A)(1); MCR 7.203(B)(2); MCR 7.205(A) (an appellant must apply for leave to appeal an order of the circuit court on appeal from any other court within 21 days of entry of the order). To the extent plaintiffs contend that the trial court erred when it denied their motion to amend their pleading, they have abandoned that issue for review by failing to present a cognizable argument and by failing to cite any relevant legal authority. See *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 499; 668 NW2d 402 (2003) ("[a]n appellant may not merely announce its position or assert an error and leave it to this Court to discover and rationalize the basis for its claims, unravel or elaborate its argument, or search for authority for its position").

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Elizabeth L. Gleicher