

STATE OF MICHIGAN
COURT OF APPEALS

7800 W. OUTER ROAD HOLDINGS, L.L.C.,

Plaintiff-Appellee,

v

COLLEGE PARK PARTNERS, L.L.C.,

Defendant-Appellant.

UNPUBLISHED

June 26, 2012

No. 303182

Wayne Circuit Court

LC No. 10-011863-CH

Before: K. F. KELLY, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right an order denying defendant's motion for instruction that it has no further financial obligation to plaintiff or the receiver. We affirm.

Defendant argues that plaintiff, through the appointed receiver, wrongfully seized pre-default rents and tax refunds since plaintiff's right to rents and tax refunds was limited to only those funds that accrued after default. We disagree.

This Court reviews the interpretation of a statute and a contract de novo. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004). "Under Michigan law, a mortgage is not an estate in land; it is a lien on real property intended to secure performance or payment of an obligation." *Prime Fin Services LLC v Vinton*, 279 Mich App 245, 256; 761 NW2d 694 (2008) (internal citations omitted). Generally, a foreclosure sale extinguishes a mortgage. *Wells Fargo Bank, NA v Cherryland Mall Ltd Partnership*, 295 Mich App 99, 108; ___ NW2d ___ (2011). "[A]bsent agreement to the contrary, mortgages are nonrecourse in Michigan," which signifies that the borrower is released from any personal obligation relating to the deficiency remaining after the foreclosure sale. *Id.* at 108-109. While the lender may not attempt to collect a deficiency, the lender may enforce additional security agreements, such an assignment of rents. See *Smith v Mut Benefit Life Ins Co*, 362 Mich 114, 125; 106 NW2d 515 (1960). As stated by our Supreme Court in discussing the impact of a foreclosure sale of a nonrecourse mortgage on an assignment of rents agreement:

The only question remaining to be disposed of by this Court is whether or not the note under its terms limited the collection of rents provision in the mortgage. We think it did not. The language in the mortgage note was placed therein to limit the taking of a deficiency judgment which would create personal liability on the part of the mortgagors. No personal liability against the

mortgagors is asked for or claimed. This provision does not in any way conflict with the assignment of rents provision of the mortgage. The mortgagee seeks only to obtain income from the property during the pendency of the foreclosure. [*Smith*, 362 Mich at 125-126.]

MCL 554.231, which governs the assignment of rents as an additional mortgage security in mortgage agreements, provides:

Sec. 1. Hereafter, in or in connection with any mortgage on commercial or industrial property other than an apartment building with less than 6 apartments or any family residence to secure notes, bonds or other fixed obligations, it shall be lawful to assign the rents, or any portion thereof, under any oral or written leases upon the mortgaged property to the mortgagee, as security in addition to the property described in such mortgage. Such assignment of rents shall be binding upon such assignor only in the event of default in the terms and conditions of said mortgage, and shall operate against and be binding upon the occupiers of the premises from the date of filing by the mortgagee in the office of the register of deeds for the county in which the property is located of a notice of default in the terms and conditions of the mortgage and service of a copy of such notice upon the occupiers of the mortgaged premises.

“Notably, the statutory language states that such an ‘assignment of rents shall be binding upon such assignor only in the event of default. . . .’ Thus, the mortgagor’s default is sufficient to finalize the mortgagee’s interest in the rents as against the mortgagor.” *Otis Elevator Co v Mid-Am Realty Investors*, 206 Mich App 710, 713-714; 522 NW2d 732 (1994). Further, MCL 554.232, which also governs the assignment of rents, provides:

Sec. 2. The assignment of rents, when so made, shall be a good and valid assignment of the rents to accrue under any lease or leases in existence or coming into existence during the period the mortgage is in effect, against the mortgagor or mortgagors or those claiming under or through them from the date of the recording of such mortgage, and shall be binding upon the tenant under the lease or leases upon service of a copy of the instrument under which the assignment is made, together with notice of default as required by section 1.

Thus, upon default the lender may enforce any obligations under an assignment of rents agreement regardless if the mortgage is nonrecourse as the lender is seeking to collect income generated from the property itself, not seeking a personal judgment against the borrower for the deficiency.

Here, the pertinent sections of the assignment of rents provide:

C. Borrower desires to assign to Lender the rents, leases, contracts and profits of and from the Property and the proceeds therefrom, as primary and not as secondary security for the payment of the Note and the Indebtedness (as such term is hereinafter defined), and for the performance of the obligations in the Security Instrument and the other Loan Documents.

* * *

1. **Assignment.** Borrower absolutely and unconditionally assigns, transfers, sets over and conveys to Lender the following, absolutely and not as additional security:

* * *

(e) all rents, subrents, fees, issues, proceeds, profits, income, payments (including payments pursuant to the exercise of any purchase option by any tenant under the Lease), benefits and advantages of any kind from the Leases, the Contracts or otherwise payable with respect to the Property (the “**Rents**”)[.]

* * *

6. **Lender’s Remedies Upon Default.** Upon the occurrence of an Event of Default, Borrower’s license to collect and retain the Rents under Section 5 above shall immediately terminate. Lender will have the right at its option to enforce and to exercise any or all of its rights under this Assignment or otherwise, but Borrower expressly agrees that Lender’s exercise of any rights hereunder or Lender’s affirmative act to collect the Rents or other income or to acquire possession of the Leased Property shall not be a prerequisite or precondition to the full enforceability of Lender’s rights hereunder.

* * *

6.2 Lender, at its option, and without any notice whatsoever to Borrower, shall have the right and is hereby authorized to: . . . (e) collect all Rents from the Property; . . . (m) have a receiver appointed; and (n) use such measures, legal or equitable, as in its sole discretion may carry out and effectuate the provisions of this Assignment. [Emphasis in original.]

Further, the mortgage at issue provides the following regarding rents and tax refunds:

SECTION 1.1 PROPERTY MORTGAGED. Borrower does hereby irrevocably deed, mortgage, grant, bargain, sell, alien, enfeoff, hypothecate, remise, release, pledge, assign, warrant, transfer, confirm, convey, and grant to Lender a lien on, pledge of, and security interest in, the following property, rights, interests, and estates now owned or hereafter acquired by Borrower to the full extent of Borrower’s right, title, and interest therein, including hereafter acquired by Borrower to the full extent of Borrower’s right, title, and interest therein, including hereafter acquired rights, interests, and property, and all products and proceeds thereof and additions and accessions thereto (sometimes collectively referred to herein as the “**Property**”):

(a). Land. The real property described in Exhibit A attached hereto and made a part hereof (the “**Land**”); TOGETHER with

* * *

(f) Leases and Rents. All leases and other agreements affecting the use, enjoyment or occupancy of all or any part of the Land or the Improvements heretofore or hereafter entered into... and all right, title and interest of Borrower, its successors and assigns therein and thereunder, including cash or securities deposited thereunder to secure the performance by the lessees of their obligations thereunder and all rents, additional rents, royalties, licenses, payments . . . from the Land or the Improvements whether paid or accruing before or after the filing by or against Borrower for any petition for relief under the Bankruptcy Code (collectively, the “**Rents**”) and all proceeds from the sale or other disposition of the Leases and the right to receive and the Rents to the payment of the Debt;

* * *

(i) Tax Certiorari. All refunds, rebates or credits in connection with a reduction in real estate taxes and assessments charged against the Property as a result of tax certiorari or any applications or proceedings for reduction[.]

* * *

SECTION 1.2 ASSIGNMENT OF LEASES AND RENTS. Borrower hereby absolutely and unconditionally assigns to Lender Borrower’s right, title, and interest in and to all current and future Leases and Rents, it being intended by Borrower that this assignment constitutes a present, absolute assignment and not an assignment for additional security only. Nevertheless, subject to the terms of this Section 1.2 and Section 3.7, Lender grants to Borrower a revocable license to collect and receive the Rents. Borrower shall hold a portion of the Rents sufficient to discharge all current sums due on the Debt for use in the payment of such sums.

* * *

SECTION 1.3 SECURITY AGREEMENT. This Security Instrument is both a real property mortgage and a “security agreement” within the meaning of the Uniform Commercial Code. The Property includes both real and personal property and all other rights and interests, whether tangible or intangible in nature, of Borrower in the Property. By executing and delivering this Security Instrument, Borrower hereby grants to Lender, as security for the Debt, a security interest in any of the Property that is deemed to be personal property to the full extent that such property may be subject to the Uniform Commercial Code.

* * *

SECTION 3.7 LEASES AND RENTS. Borrower shall comply at all times with that certain Assignment of Leases and Rents of even date herewith executed by Borrower in favor of Lender, which is incorporated herein by this reference as though fully set forth herein.

* * *

SECTION 11.1 REMEDIES. Upon the occurrence of any Event of Default, Borrower agrees that Lender may take such action, without notice or demand, as it deems advisable to protect and enforce its rights against Borrower and in and to the Property, including, but not limited to the following actions, each of which may be pursued concurrently or otherwise, without notice or demand, at such time and in such order as Lender may determine, in its sole discretion, without impairing or otherwise affecting the other rights and remedies of Lender:

* * *

(h) subject to any applicable law, the license granted to Borrower under Section 1.2 shall automatically be revoked and Lender may enter into or upon the Property, either personally or by its agents, nominees or attorneys and dispossess Borrower and its agents and servants therefrom, without liability for trespass, damages or otherwise and exclude Borrower and its agents or servants wholly therefrom . . . (iv) exercise all rights and powers of Borrower with respect to the Property, whether in the name of Borrower or otherwise, including without limitation, the right to make, cancel, enforce or modify Leases, obtain and evict tenants, and demand, sue for, collect and receive all Rents of the Property and every part thereof [Emphasis in original.]

Under the assignment of rents agreement at issue, the lender is entitled to “all rents” upon default. The agreement does not distinguish between rents collected and retained before default and those retained after default. The mortgage also provides that the lender is entitled to all rents and all tax refunds in connection with the property upon the borrower’s default. The mortgage does not restrict the ability of the lender to collect rents and tax refunds to those that were only collected after default. The mortgage is clear that the lender is entitled to “all rents” and “all refunds” upon default.

“If a contract’s language is not ambiguous, this Court will construe the contract and enforce its terms as written.” *Trader v Comerica Bank*, 293 Mich App 210, 216; 809 NW2d 429 (2011). The contract must be construed as a whole and its language should be accorded its plain and ordinary meaning. *Comerica Bank v Cohen*, 291 Mich App 40, 46; 805 NW2d 544 (2010). “A contract is ambiguous when two provisions ‘irreconcilably conflict with each other,’ or ‘when [a term] is equally susceptible to more than a single meaning.’” *Coates v Bastian Brothers, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007) (internal citations omitted). Thus, the trial court properly, without disturbing the nonrecourse nature of the mortgage, enforced the clear provisions of the assignment of rents and mortgage entitling plaintiff to the rental income and tax refunds associated with the mortgaged property. *Smith*, 362 Mich at 125-126; *Wells Fargo Bank*, 295 Mich App at 108-109.

Further, the assignment of rents statutes do not impose a temporal limitation preventing collection of rental income collected before default, and this Court “may not read into the statute what is not within the Legislature’s intent as derived from the language of the statute.” *American Federation of State, Co & Muni Employees v City of Detroit*, 468 Mich 388, 400; 662

NW2d 695 (2003). While defendant argues that there would be negative policy implications in allowing the mortgagee to hold claim to rents and tax refunds collected before default, “it is the role of the Legislature to address matters of public policy. . . .” *Wells Fargo Bank*, 295 Mich App at 127. Accordingly, the trial court did not err in concluding that the plaintiff, through the receiver, was entitled to obtain all rents and tax refunds associated with the mortgaged property.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ David H. Sawyer

/s/ Amy Ronayne Krause