

STATE OF MICHIGAN
COURT OF APPEALS

CHARLES SAAD and SHANNON MORAN,
Plaintiffs-Appellants,

UNPUBLISHED
August 21, 2012

v

AURORA LOAN SERVICES, L.L.C.,
Defendant-Appellee.

No. 304813
Macomb Circuit Court
LC No. 2010-002416-CH

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

PER CURIAM.

Plaintiffs appeal as of right an order granting defendant’s motion for summary disposition in this foreclosure action. We affirm.

Plaintiffs defaulted on their mortgage and, following a foreclosure by advertisement, defendant purchased the property at a sheriff’s sale. Plaintiffs then filed their complaint for injunctive relief and alleged that (1) defendant violated the loan modification procedures set forth by statute, particularly MCL 600.3205c¹; (2) plaintiffs were entitled to relief under a promissory estoppel theory because defendant’s representative “made an assertion . . . that an affordable loan modification would be reached . . . before the sheriff sale date,” (3) defendant violated the Michigan Consumer Protection Act (MCPA), and (4) defendant was negligent with regard to the handling of the foreclosure proceeding.

Thereafter, defendant sent plaintiffs various discovery requests, including a request for admissions that: defendant did not violate MCL 600.3205c, plaintiffs did not have the financial ability to redeem the property, defendant neither violated the MCPA nor negligently handled the foreclosure proceeding, and any request for a loan modification was properly evaluated by defendant. After plaintiffs failed to respond to defendant’s request for admissions, defendant moved for summary disposition arguing that the allegations set forth in the request were deemed admitted, MCR 2.312(B); thus, defendant was entitled to judgment as a matter of law pursuant to MCR 2.116(C)(10). Further, defendant argued, plaintiffs failed to provide any documentary

¹ MCL 600.3205a-d have now been repealed, effective December 31, 2012. See MCL 600.3205e.

evidence in support of their claims. The trial court agreed with defendant, holding that there was no genuine issue of material fact in light of plaintiffs' admissions; thus, defendant was entitled to judgment as a matter of law. Plaintiffs' motion for reconsideration was denied and this appeal followed.

Plaintiffs argue that, despite their discovery admissions, genuine issues of material fact existed regarding their claim that defendant failed to comply with MCL 600.3205b because a meeting to discuss a loan modification was not held. However, plaintiffs did not raise this argument until they moved for reconsideration in the trial court; thus, they failed to preserve their claim for appellate review. See *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009) (an issue first presented in a motion for reconsideration is not properly preserved). Although this Court may overlook preservation requirements and review an unpreserved issue, we decline to do so in this case. See *Nuculovic v Hill*, 287 Mich App 58, 63; 783 NW2d 124 (2010); *Vushaj*, 284 Mich App at 519. Plaintiffs provided no evidence to the trial court in support of their allegation that a meeting with defendant had been requested. Although plaintiff Saad averred in an affidavit submitted with his motion for reconsideration that he requested such a meeting, this information was not before the trial court at the time defendant's motion was decided. Therefore, it would not be appropriate for this Court to consider the affidavit in evaluating the trial court's decision on summary disposition under MCR 2.116(C)(10). See *Maiden v Rozwood*, 461 Mich 109, 126 n 9; 597 NW2d 817 (1999) (in ruling on the trial court's grant of summary disposition, a reviewing court should not consider evidence that was not before the trial court at the time it reached its decision).

We also note that, contrary to plaintiffs' argument on appeal, plaintiffs' complaint did not allege a violation of MCL 600.3205b. In their brief on appeal, plaintiffs argue: "While the Plaintiffs may have admitted that the Defendant did not violate MCL 600.3205c, the cause of action stated was based on the fact that the Defendants violated MCL 600.3205b, not MCL 600.3205c." However, MCL 600.3205b is not referenced or cited in plaintiffs' complaint; rather, paragraph 25 provides: "There has been a violation of MCL 600.3205c by the Mortgage Servicer." Similarly, paragraph 26 provides: "Pursuant to MCL 600.3205c, the Mortgage Servicer shall be enjoined from foreclosure of the mortgage by advertisement." In any case, the trial court's summary dismissal of this claim is affirmed.

Plaintiffs also argue that, despite their discovery admissions, genuine issues of material fact existed with regard to their promissory estoppel claim because none of the admissions addressed their claim that an unnamed representative of defendant "made an assertion" that an affordable loan modification would be reached before the sheriff's sale. We agree that the trial court erred by granting summary disposition based solely on plaintiffs' admissions.

However, as defendant argued in the trial court, this claim is barred by the statute of frauds. That is, MCL 566.132(2) prevents the enforcement of an oral promise against a financial institution on the theory of promissory estoppel. *Crown Technology Park v D&N Bank, FSB*, 242 Mich App 538, 550; 619 NW2d 66 (2000). In particular, MCL 566.132(2) provides:

An action shall not be brought against a financial institution to enforce any of the following promises or commitments of the financial institution unless the promise

or commitment is in writing and signed with an authorized signature by the financial institution:

(a) A promise or commitment to lend money, grant or extend credit, or make any other financial accommodation.

(b) A promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation.

(c) A promise or commitment to waive a provision of a loan, extension of credit, or other financial accommodation.

In *Crown Technology Park*, 242 Mich App at 550, this Court held that MCL 566.132(2) was “an unqualified and broad ban” that “preclude[s] *all* actions for the enumerated promises and commitments, including actions for promissory estoppel.” This “unqualified and broad ban” includes actions where a plaintiff seeks to enforce an oral promise for a loan modification. *Id.* at 552. Accordingly, the statute of frauds precludes plaintiffs from seeking enforcement of an oral promise against defendant. *Id.* at 550, 552.

We reject plaintiffs’ argument that the statute of frauds should not bar their promissory estoppel claim on the ground that it was defendant’s improper denial of their request for a meeting which caused the promise not to be “in writing.” There is nothing in the record properly before us supporting plaintiffs’ claim that defendant failed to follow proper procedures. And plaintiffs’ contention that the mortgage document satisfied the writing requirement is unavailing. Plaintiffs are not seeking to enforce promises contained within the mortgage; rather, they are seeking to enforce a purported oral promise concerning loan modification. MCL 566.132(2) clearly and unambiguously prevents them from doing so. See *Crown Technology Park*, 242 Mich App at 550, 552. Thus, we affirm the trial court’s summary dismissal of plaintiffs’ promissory estoppel claim, albeit under alternative reasoning. See *Lavey v Mills*, 248 Mich App 244, 250; 639 NW2d 261 (2001).

Affirmed.

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Mark J. Cavanagh