

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

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FAIZ G. KAKOS,

Plaintiff-Appellant,

and

GEORGE A. KAKOS and WADIA KAKOS,

Plaintiffs,

v

SPECIALIZED LOAN SERVICING, L.L.C., and  
U.S. BANK NATIONAL ASSOCIATION,

Defendants-Appellees.

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UNPUBLISHED

April 16, 2013

No. 308729

Oakland Circuit Court

LC No. 2011-119215-CZ

Before: JANSEN, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

Plaintiff Faiz G. Kakos (“plaintiff”)<sup>1</sup> appeals as of right from a circuit court order granting defendants’ motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiff challenges the trial court’s denial of plaintiffs’ motion for leave to file an amended complaint. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiffs granted two mortgages on property in West Bloomfield. Foreclosure proceedings relating to the first mortgage resulted in a disagreement regarding the amount necessary for plaintiffs to cure a default on the second mortgage. First, a sheriff’s sale related to foreclosure of the first mortgage resulted in surplus proceeds that were paid to defendants, but whether and how those proceeds were applied to reduce the balance owed on the second mortgage was unclear. Second, funds that defense counsel placed in escrow with the Oakland County Clerk/Register of Deeds were treated by defendants as an advance necessary to protect

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<sup>1</sup> Plaintiffs George Kakos and Wadia Kakos did not file a claim of appeal. The singular term “plaintiff” is used to refer only to plaintiff-appellant Faiz Kakos.

the lender's interests, such that the amount of the funds and interest that accrued were part of the reinstatement amount that defendants claimed was owing.

Plaintiffs' original complaint included counts for breach of contract and intentional infliction of emotional distress. After defendants moved for summary disposition, plaintiffs sought leave to file an amended complaint to clarify the basis of the breach of contract claim, to eliminate the claim for intentional infliction of emotional distress, and to add a count for declaratory relief to determine the amount plaintiffs needed to reinstate the second mortgage and the balance owed. The trial court granted defendants' motion for summary disposition and denied plaintiffs' motion for leave to file an amended complaint. The court denied leave to amend because amendment would be futile and the request was untimely.

This Court reviews for an abuse of discretion a trial court's decision denying leave to amend pleadings. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Although plaintiffs filed their motion to amend before the trial court ruled on defendants' motion for summary disposition, the court ruled on both motions at the same hearing.

When a trial court grants summary disposition pursuant to MCR 2.116(C)(8), or (C)(10), the opportunity for the nonprevailing party to amend its pleadings pursuant to MCR 2.118 should be freely granted, unless the amendment would not be justified. MCR 2.116(I)(5). [*Ormsby v Capital Welding, Inc*, 471 Mich 45, 52-53; 684 NW2d 320 (2004).]

A motion to amend ordinarily should be granted, and should be denied only for particularized reasons such as futility, undue delay, bad faith or dilatory motive, undue prejudice to the opposing party, and repeated failure to cure deficiencies by previous amendments. *Weymers*, 454 Mich at 658. "An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face." *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998). An amendment is also futile if it "adds allegations that still fail to state a claim." *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

On appeal, plaintiff asserts that the breach of contract claim was intended to be based on ¶ 17 of the second mortgage, which states:

**17. Borrower's Right to Reinstate.** Notwithstanding Lender's acceleration of the sums secured by this Mortgage due to Borrower's breach, Borrower shall have the right to have any proceedings begun by Lender to enforce this Mortgage discontinued at any time prior to the earlier to occur of (i) the fifth day before sale of the Property pursuant to the power of sale contained in this Mortgage or (ii) entry of judgment enforcing this Mortgage if: (a) Borrower pays Lender all sums which would be then due under this Mortgage and the Note had no acceleration occurred; (b) Borrower cures all breaches of any other covenants or agreements of Borrower contained in this Mortgage; (c) Borrower pays all reasonable expenses incurred by Lender in enforcing the covenants and agreements of Borrower contained in this Mortgage; and (d) Borrower takes such action as Lender may reasonably require to assure that the lien of this Mortgage, Lender's interest in the Property and Borrower's obligation to pay the sums

secured by this Mortgage shall continue unimpaired. Upon such payment and care by Borrower, this Mortgage and the obligation secured thereunder shall remain in full force and effect as if no acceleration had occurred.

We disagree with plaintiff's argument that the proposed amended complaint alleged a viable claim for breach of contract based on ¶ 17. The proposed amendment did not allege that defendants had refused to honor plaintiffs' rights under this provision or even that plaintiffs had taken the steps outlined in it. The amended complaint alleged that defendants refused to respond to plaintiffs' inquiries. However, ¶ 17 does not impose any obligation on the lender or the servicer to respond to the borrower's request for information about the amount necessary to exercise this right. The trial court did not abuse its discretion in denying plaintiffs' motion to amend with respect to the breach of contract claim. Accordingly, we affirm the trial court's denial of leave to amend to allege a breach of contract claim premised on ¶ 17 of the mortgage.

However, we conclude that the court abused its discretion in denying leave to amend to add a count for declaratory relief. The purpose of a declaratory action is to "enable the parties to obtain adjudication of rights before an actual injury occurs, to settle a matter before it ripens into a violation of the law or a breach of contract, or to avoid multiplicity of actions by affording a remedy for declaring in expedient action the rights and obligations of all litigants." *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Central Mich Univ Trustees*, 295 Mich App 486, 496; 815 NW2d 132 (2012), quoting *Rose v State Farm Mut Auto Ins Co*, 274 Mich App 291, 294; 732 NW2d 160 (2006) (emphasis omitted). Plaintiffs' request for declaratory relief to settle the parties' disagreement concerning the surplus proceeds and the escrowed redemption funds would enable the parties to determine the principal balance owed and the proper amount that defendants could demand to reinstate the mortgage before the controversy came to a head in the context of a foreclosure proceeding or a breach of contract action.

Defendants contend that the addition of a count for declaratory relief was "meritless" because plaintiffs "had recently received an itemized statement from SLS" showing the amount in arrears. The itemized statement merely shows the amount that defendants believed was owed by plaintiffs. It does not show that the amount was not in dispute, or that defendants' listed amount was indisputably accurate.

In support of the mortgagee's right to advance the funds and add them to the debt of the borrower, defendants referred to "Paragraph No. 9, Page 7 of the Mortgage, Exhibit A." However, that mortgage does not have seven pages, and ¶ 9 of that mortgage is inapposite. The mortgage agreement includes a provision that allows the lender to "disburse sums . . . necessary to protect Lender's interest," with the amounts becoming "additional indebtedness . . . payable upon notice from Lender to Borrower requesting payment thereof." However, whether this provision authorized defendants' treatment of the escrowed redemption funds as an advance is questionable. The funds were placed in escrow with the register of deeds after plaintiffs had already redeemed the property. Whether the placement of funds in escrow in these circumstances was a "disburse[ment] . . . necessary to protect Lender's interest" is not clear. Moreover, the provision states that the amounts shall be "payable," which does not necessarily mean that immediate payment could be demanded. See *Kevelighan v Trott & Trott, PC*, 771 F Supp 2d 763, 776-777 (ED Mich, 2010).

The trial court's decision in conjunction with the grant of summary disposition to order the return of the redemption funds from the register of deeds to defendants did not necessarily eliminate the controversy. First, the court's order does not address how defendants must apply the returned escrowed funds to plaintiffs' debt and whether the interest that accrued would be credited. The application of the surplus proceeds from the sheriff's sale is also unresolved.

In denying plaintiffs' motion to amend, the trial court also referred to the request as being "untimely." "Delay, alone, does not warrant denial of a motion to amend." *Weymers*, 454 Mich at 659. If the delay was in bad faith or the other party suffered prejudice, the court properly may deny the motion. *Id.* In this context, "prejudice" exists if the amendment would prevent the opposing party from receiving a fair trial, if for example, the opposing party would not be able to properly contest the matter raised in the amendment because important witnesses have died or necessary evidence has been destroyed or lost." *Id.* "A trial court may find prejudice when the moving party seeks to add a new claim or a new theory of recovery on the basis of the same set of facts, after discovery is closed, just before trial, and the opposing party shows that he did not have reasonable notice, from any source, that the moving party would rely on the new claim or theory at trial." *Id.* at 659-660. In this case, the parties' disagreement with respect to defendants' handling of the surplus proceeds and the escrowed redemption amount was evident in the original complaint. Plaintiffs did not specifically seek declaratory relief to resolve the dispute until defendants moved for summary disposition. However, the delay alone was not grounds for denying the amendment, and there is no basis for concluding that plaintiffs acted in bad faith or that defendants would be prejudiced.

For these reasons, we reverse in part the trial court's decision insofar that the court denied leave to amend the complaint to add a claim for declaratory relief.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen  
/s/ David H. Sawyer  
/s/ Deborah A. Servitto