

STATE OF MICHIGAN
COURT OF APPEALS

BARRY MOON and LORI MOON,
Plaintiffs-Appellants,

UNPUBLISHED
April 18, 2013

v

OCWEN LOAN SERVICING, LLC,
Defendant-Appellee.

No. 308529
Ingham Circuit Court
LC No. 11-000215-CH

BARRY MOON and LORI MOON,
Plaintiffs-Appellants,

v

FEDERAL HOME LOAN MORTGAGE CORP,
Defendant-Appellee.

No. 311330
Ingham Circuit Court
LC No. 12-000009-CH

Before: BOONSTRA, P.J., and SAAD and HOEKSTRA, JJ.

PER CURIAM.

In these consolidated actions, plaintiffs, Barry and Lori Moon, appeal the trial court's grant of summary disposition to defendants, Ocwen Loan Servicing, LLC, and Federal Home Loan Mortgage Corporation (Freddie Mac). For the reasons set forth below, we affirm.

I. FACTS

On December 17, 2007, plaintiffs executed a mortgage on a home in Haslett. The mortgage identified the lender as Taylor, Bean & Whitaker Mortgage Corporation. The mortgage was delivered to Mortgage Electronic Registration Systems, Incorporated (MERS), a nominee of the lender and its successors and/or assigns. The mortgage was recorded by the Ingham County Register of Deeds on March 25, 2008. On January 20, 2010, MERS assigned the mortgage to Ocwen. The assignment was recorded by the Ingham County Register of Deeds on May 4, 2010. The parties agree that plaintiffs defaulted on the mortgage by failing to make the required payments.

Notice of the foreclosure sale was provided by publication on July 22, July 29, August 5, and August 12, 2010. On August 19, 2010, Freddie Mac bought the property at a sheriff's sale for \$123,200. On February 7, 2011, plaintiffs sued Ocwen and asked the trial court to void the foreclosure and sheriff sale. In response, Ocwen moved the trial court for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). After ordering the parties to mediation, the trial court denied Ocwen's motion, ruling that the sale was voidable because it had occurred before the expiration of publication. Thereafter, the trial court denied plaintiffs' motion to join Freddie Mac as a defendant:

Well, based on this I'm going to deny your request. You can either file a new suit and then consolidate or you can bring me something more and reopen the issue, but at this point I'm going to deny. It seems not to be timely or founded on anything at this point except something speculative, and I just have to say, it looks to me like it's going to cost defendants a whole lot of money for, I don't know what reason. So bring me something else and I will reconsider, but right now the answer is, no, it's denied.

On January 20, 2012, the trial court granted Ocwen's renewed motion for summary disposition.

On January 4, 2012, plaintiffs sued Freddie Mac in circuit court, again requesting the court void the foreclosure and sheriff sale. Freddie Mac moved the trial court for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). The court granted the motion pursuant to MCR 2.116(C)(8) and (C)(10) "for the reasons stated on the record." At oral argument, the trial court stated as follows:

Pursuant to statute, notice of the foreclosure sale was provided by publication and posting on July 22nd, 2010. The sale occurred four weeks later, I believe on August 19, 2010, with Federal Home Loan Mortgage Corporation as the successful purchaser and current owner of the subject property.

The Moons had a statutory six months redemption period during which they could redeem the property and they failed to do so. The Moons filed the prior action, which was file number 11-215-CH in the Circuit Court, and that was fully adjudicated, and that, I believe, is in the Court of Appeals.

Here we are again, and when I look at this case, I could have it go on and we could do some discovery, but when I slice it and dice it and look at it, when I put it in the kaleidoscope and turn it, I see a lot of pretty pictures, but ultimately when I slide it around I come back to this same place, and I'm not willing to waste my time, counsel's time, clients' time, and resources when it always comes back to this same picture.

I am granting the motion for summary disposition as requested by defendant pursuant to 2.116(C)(8). I think it is very appropriate and as a matter of law he is entitled. I also believe it is supported based on (C)(10). Justice would not be served were I not to grant this. I think it would simply be one of delay. A little bit of discovery is going to get us to the same place.

II. STANDARDS OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). We review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint by the pleadings alone. [*Maiden v Rozwood*, 461 Mich 119, 118; 597 NW2d 817 (1999).] All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the plaintiff. *Id.* "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* (quotations omitted). [*Wilson v King*, 298 Mich App 378, 381; 827 NW2d 203 (2012).]

"When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party." *Ernsting v Ave Maria College*, 274 Mich App 506, 509-510; 736 NW2d 574 (2007). All reasonable inferences are to be drawn in favor of the nonmoving party. *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010). "Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Ernsting*, 274 Mich App at 509. "A genuine issue of material fact exists when the record, giving the benefit of any reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ." *Id.* at 510. "This Court is liberal in finding genuine issues of material fact." *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008).

We review for an abuse of discretion a trial court's ruling on a joinder motion. *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 135; 715 NW2d 398 (2006). The trial court does not abuse its discretion when it chooses an outcome within the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

III. DISCUSSION

"Every mortgage of real estate, which contains a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement, in the cases and in the manner specified in this chapter. . . ." MCL 600.3201; see *Cheff v Edwards*, 203 Mich App 557, 560; 513 NW2d 439 (1994).

There is no dispute that plaintiffs defaulted on the mortgage by failing to make the required payments. However, plaintiffs assert that defendant failed to comply with two statutory

requirements, MCL 600.3204(3) and MCL 600.3208. Plaintiffs argue that the foreclosure on the subject property is void because Freddie Mac may have been required to record its interest in the property pursuant to MCL 600.3204(3),¹ which provides as follows:

If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale under section 3216 evidencing the assignment of the mortgage to the party foreclosing the mortgage.

The statutory language is clear. It refers to a singular, specified party (“*the party*”) engaged in a particular action (“foreclosing”), in compliance with the statutorily authorized method of providing proper notice (“by advertisement”). Freddie Mac may have had an interest in the property, but it was not “the party foreclosing [the] mortgage by advertisement.” Thus, § 3204(3)’s mandate regarding the chain of title does not apply.

In any event, the trial court correctly ruled that plaintiffs did not, and could not, show prejudice. In *Kim v JP Morgan Chase Bank, NA*, 493 Mich 98, 115-116; 825 NW 329 (2012), our Supreme Court explained:

[W]e hold that defects or irregularities in a foreclosure proceeding result in a foreclosure that is voidable, not void *ab initio*. Because the Court of Appeals erred by holding to the contrary, we reverse that portion of its decision. We leave to the trial court the determination of whether, under the facts presented, the foreclosure sale of plaintiffs’ property is voidable. In this regard, to set aside the foreclosure sale, plaintiffs must show that they were prejudiced by defendant’s failure to comply with MCL 600.3204. To demonstrate such prejudice, they must show that they would have been in a better position to preserve their interest in the property absent defendant’s noncompliance with the statute.

Plaintiffs assert that the alleged failure to comply with MCL 600.3204(3) resulted in de facto prejudice. In other words, plaintiffs claim that they were prejudiced by defendants’ alleged failure to comply with statute by the alleged failure itself. This argument is circular and without merit. Further, plaintiffs do not argue that knowledge of Freddie Mac’s interest in their mortgage would have enabled them to submit a successful bid at the sheriff’s sale or successfully exercise their right of redemption.

MCL 600.3208 provides as follows:

Notice that the mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, shall be given by publishing the same for 4 successive weeks at least once in each week, in a newspaper published in the county where the premises included in the mortgage and intended to be sold, or

¹ It is undisputed the assignment of plaintiffs’ mortgage to Ocwen was recorded by the register of deeds prior to the date of sale.

some part of them, are situated. If no newspaper is published in the county, the notice shall be published in a newspaper published in an adjacent county. In every case within 15 days after the first publication of the notice, a true copy shall be posted in a conspicuous place upon any part of the premises described in the notice.

The trial court found, and it is undisputed on appeal, that Ocwen sold the property at the sheriff sale one day before the expiration of the four-week publication period. This error constitutes a “defect[] or irregularit[y] in a foreclosure proceeding.” *Kim*, 493 Mich at 115. Such a defect or irregularity renders a foreclosure voidable. *Id.* However, “to set aside a foreclosure sale, plaintiffs must show that they were prejudiced by defendant’s failure to comply with” the applicable statutory provision. *Id.* That is, “they must show that they would have been in a better position to preserve their interest in the property absent defendant’s noncompliance with the statute.” *Id.* Plaintiffs cannot show that they were prejudiced by the sale of the property one day before the publication period ended. In fact, plaintiffs admitted that if the sheriff’s occurred on August 20, 2010, rather than August 19, 2010, they could not have submitted a bid of \$123,200 or higher.

Plaintiffs also maintain that the trial court erred in denying their motion to join Freddie Mac as an additional defendant in their suit against Ocwen. Plaintiffs moved for joinder pursuant to MCR 2.205(A) and 2.206(A)(2)(a). MCR 2.205(A) provides as follows:

Subject to the provisions of subrule (B) and MCR 3.501,^[2] persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests.

“The purpose of the rule is to prevent the splitting of causes of action and to ensure that all parties having a real interest in the litigation are present.” *Mason Co v Dep’t of Community Health*, 293 Mich App 462, 489; 820 NW2d 192 (2011).

Freddie Mac was not a necessary party to plaintiffs’ suit against Ocwen. Plaintiffs’ complaint alleged failure to comply with statutory foreclosure requirements. Ocwen, not Freddie Mac, was the foreclosing entity. Freddie Mac, as the successful purchaser of the property, has an interest in any eviction action brought by plaintiffs, but plaintiffs do not allege any fraud or wrongdoing on the part of Freddie Mac in purchasing the property at the sheriff sale. Thus, Freddie Mac’s “presence in the action [was not] essential to permit the court to render complete relief.” MCR 2.205(A).

MCR 2.206(A)(2) provides as follows:

All persons may be joined in one action as defendant

² MCR 3.501 applies to class actions and is therefore irrelevant to the instant appeal.

(a) if there is asserted against them jointly, severally, or in the alternative, a right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if a question of law or fact common to all of the defendants will arise in the action; or

(b) if their presence in the action will promote the convenient administration of justice.

It is a well-established rule of statutory interpretation that “[w]hile the word ‘shall’ is generally used to designate a mandatory provision, ‘may’ designates discretion.” *Port Huron v Amoco Oil, Inc*, 229 Mich App 616, 631; 583 NW2d 215 (1998).

Plaintiffs argued that the trial court should join Freddie Mac as a defendant in “an attempt for overall judicial economy.” However, this Court has stated that, “where a party’s presence in the action is not essential to the court rendering complete relief, factors such as judicial economy or avoidance of multiple litigation are not enough to compel joinder.” *Hofmann v Auto Club Ins Ass’n*, 211 Mich App 55, 96; 535 NW2d 529 (1995). We hold that given Freddie Mac’s position relative to the parties and the foreclosure sale, the trial court did not abuse its discretion in denying plaintiffs’ motion for joinder.

We decline to address plaintiffs’ argument that its claims against Freddie Mac were not barred by res judicata and collateral estoppel because the trial court’s grant of summary disposition was pursuant to MCR 2.116(C)(8) and (C)(10). “Summary disposition on the basis of collateral estoppel . . . is pursuant to MCR 2.116(C)(7),” *Alcona Co v Wolverine Environmental Prod, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998), as is summary disposition on the basis of res judicata, see *RDM Holdings, LTD v Continental Plastics Co*, 281 Mich App 678, 686-687; 762 NW2d 529 (2008).³

Finally, for the same reasons set forth above, we hold that plaintiffs’ argument predicated on the admitted violation of MCL 600.3208 is without merit. As discussed, Ocwen, not Freddie Mac, was the foreclosing entity on the subject property. MCL 600.3204(1)(d). Thus, the requirements of MCL 600.3208 do not apply to Freddie Mac. Further, plaintiffs cannot establish the requisite prejudice.

³ In any event, because the action against Freddie Mac is predicated on the same arguments raised in lower court no. 11-000215, it is collaterally estopped. See *Monat v State Farm Ins Co*, 469 Mich 679, 680-681; 677 NW2d 843 (2004) (“[W]here collateral estoppel is being asserted defensively against a party who has already had a full and fair opportunity to litigate the issue, mutuality is not required.”).

Affirmed.

/s/ Mark T. Boonstra
/s/ Henry William Saad
/s/ Joel P. Hoekstra