

STATE OF MICHIGAN
COURT OF APPEALS

NANCY HARBOTTLE SMITH and JOHN C.
HARBOTTLE, JR.,

UNPUBLISHED
October 17, 2013

Plaintiff-Appellants,

v

JOHN C. HARBOTTLE, SR.,

No. 309596
Leelanau Circuit Court
LC No. 2011-008534-CH

Defendant-Appellee.

NANCY HARBOTTLE SMITH and JOHN C.
HARBOTTLE, JR.,

Petitioners-Appellants,

v

JOHN C. HARBOTTLE, SR.,

No. 311362
Leelanau Circuit Court
LC No. 2012-008817-CH

Respondent-Appellee.

Before: RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

In docket no. 309596, plaintiffs Nancy Harbottle Smith (Nancy) and John C. Harbottle Jr. (John Jr.), appeal as of right the trial court order granting summary disposition to plaintiff, John C. Harbottle, Sr. (John Sr.), relating to John Sr.'s failure to pay the mortgage on vacation property in which the parties each had an interest. In docket no. 311362, Nancy and John Jr. appeal as of right the trial court order granting John Sr. the surplus from the foreclosure sale on the property. We affirm in part and reverse in part in docket no. 309596, and affirm in docket no. 311362.

I. FACTUAL BACKGROUND

A. Docket No. 309596

Upon the dissolution of their marriage, defendant John Sr. and plaintiff Nancy entered into a marital settlement agreement in Illinois in 1994. Pursuant to this agreement, they agreed to own, as joint tenants, their residence at 12 Juniper Trail in Leland, Michigan, which was encumbered with a \$100,000 mortgage. Nancy agreed to pay the mortgage payments and defendant agreed to pay Nancy a monthly maintenance fee. The parties agreed that the agreement could be modified at any time in a written document signed by the parties noting that they intended to modify or amend the marital settlement agreement.

In December 1999, defendant and Nancy entered into a supplemental property settlement agreement. Pursuant to this agreement, Nancy agreed to quitclaim the property to defendant, and defendant agreed to pay Nancy \$150,000 and transfer title of the property to a Qualified Personal Residence Trust (QPRT). John Sr. reserved the right to use the residence for 15 years and the remainder passed to John Jr. subject to a life estate for Nancy. This supplemental property settlement agreement did not specify who was required to pay the mortgage, and contained no restrictions on making subsequent modifications.

Nancy transferred her interest in the property via quitclaim deed to defendant; however, instead of transferring the property to the QPRT, John Sr. purportedly quitclaimed the property to John Jr., reserving a life estate for himself and a subsequent life estate for Nancy. Defendant also reserved the right to mortgage the property as long as the mortgage did not exceed 60 percent of the fair market value.¹

In 2010, John Sr. contacted John Jr. and offered him the following options: (1) John Sr. would terminate his life estate and vest his interest in the property in John Jr.; or (2) plaintiffs would convey their respective interests to defendant so he could control the property fully. After a series of communications during which the negotiations broke down, defendant revoked his offer to convey his life estate to John Jr. In a subsequent email, John Sr. informed plaintiffs that that he had ceased making the mortgage payments and expected foreclosure proceedings to commence.

Thus, plaintiffs initiated this instant litigation. In their first amended complaint, plaintiffs asserted claims for quiet title, waste, an injunction, and breach of contract. Defendant subsequently filed a motion for summary disposition under MCR 2.116(C)(1), (7), (8) and/or (10). Defendant argued that the trial court lacked jurisdiction to enforce the Illinois marital settlement, the statute of limitations had passed on plaintiffs' breach of contract claim, and defendant could not be liable for waste because he did not physically damage the property.

¹ Defendant apparently failed to record this deed in 1999, so he executed a deed in 2003 with the same terms, quitclaiming the property to John Jr.

The court granted summary disposition to defendant based on MCR 2.116(C)(10). The trial court found, *inter alia*, that it typically lacked jurisdiction to enforce foreign agreements, and plaintiffs' had a commensurate obligation to pay the mortgage and because neither party had clean hands, injunctive relief was not warranted. The trial court also found that there was no waste because there was no physical damage to the property.

B. Docket No. 311362

After the property was foreclosed upon and sold at a sheriff's sale, plaintiffs petitioned the court to disburse to them the \$45,821.81 surplus from the foreclosure sale. Defendant counter-petitioned for the same relief, albeit in his favor, arguing that he was entitled to the surplus because he was the mortgagor and plaintiffs did not have a subsequent mortgage or lien on the property. The trial court granted defendant's petition to disburse the surplus and denied plaintiffs' request for the same. The trial court ordered the money to be held in escrow pending the outcome of the appeal.

In both docket nos. 309596 and 311362, plaintiffs now appeal on several grounds.

II. SUMMARY DISPOSITION

A. Standard of Review

We review "de novo a trial court's grant or denial of a motion for summary disposition." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A motion for summary disposition under MCR 2.116(C)(10) "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court considers only "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

Also, "[i]ssues of statutory construction and contract interpretation are also reviewed de novo." *Klida v Braman*, 278 Mich App 60, 62; 748 NW2d 244 (2008). When interpreting a statute, we ascribe the plain and ordinary meaning to words and if the language is unambiguous, we presume that the Legislature intended the meaning expressed in the statute. *Superior Hotels, LLC v Mackinaw Twp*, 282 Mich App 621, 629; 765 NW2d 31 (2009). "[E]very word of a statute should be given meaning" and "no word should be treated as surplusage or made nugatory." *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007).

B. Breach of Contract

Plaintiffs first argue that the parties agreed that John Sr. would be responsible for any mortgage payments and that this agreement superseded any common-law duty imposed on plaintiffs to pay the mortgage.² Viewed in the light most favorable to plaintiff, we agree that there is a genuine issue of material fact regarding whether John Sr. agreed to pay the mortgage.

The supplemental property settlement agreement required Nancy to quitclaim the property to John Sr., and for John Sr. to transfer the property to a QPRT. While plaintiff Nancy quitclaimed the property to John Sr., there is no dispute that John Sr. did not transfer the property to a QPRT, but instead quitclaimed the property to plaintiff John Jr. Thus, the parties' conduct is indicative of some type agreement outside of the supplemental property settlement agreement. In fact, John Sr. acknowledges on appeal that shortly after Nancy quitclaimed the property to him, "the terms of the parties' agreement changed." Moreover, reasonable minds could differ regarding whether this agreement included John Sr. consenting to continue mortgage payments, as John Sr. acknowledged at the deposition that he believed it was his obligation to do so.³

Therefore, "giving the benefit of reasonable doubt to the opposing party," we find that there is "an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. On appeal, defendant now asserts that any oral modification of the supplemental property settlement agreement is barred by the statute of frauds. Yet, defendant has waived any argument on appeal under the statute of frauds because he did not raise it in his motion for summary disposition or as an affirmative defense. MCR 2.111(F).⁴

C. Waste

Plaintiffs next argue that the court erred in granting defendant summary disposition regarding the waste claim. MCL 600.2919 is a statutory codification of the law of waste in Michigan, and comprehensively addresses actionable waste. "Where legislation is

² On appeal, neither party argues that the trial court lacked jurisdiction to enforce an alleged contract or that the supplemental property settlement agreement improperly modified the marital settlement agreement. Further, the trial court only stated that it "typically" lacked jurisdiction to enforce these judgments, and granted summary disposition pursuant to MCR 2.116(C)(10), not MCR 2.116(C)(1).

³ Neither the 1999 nor the 2003 deed evidenced an agreement between defendant and Nancy or contained any terms of an agreement. We note, however, that consideration of Nancy's affidavit is improper as it was attached to the motion for reconsideration, and "[r]eview is limited to the evidence presented to the trial court at the time the motion was decided." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006).

⁴ Because we agree with plaintiffs' argument that there is a genuine issue of material fact regarding breach of contract, we decline to address their "alternat[e]" argument regarding modifying the general rule that a remainderman is obligated to make the principle mortgage payments.

comprehensive, providing in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, then there is a legislative intention that a statute preempt common law.” *Kyser v Twp*, 486 Mich 514, 539; 786 NW2d 543 (2010) (quotation marks and citation omitted).

MCL 600.2919(2)(a), in relevant part, narrows the scope of “waste” as follows:

Any guardian, tenant in dower, life tenant, or tenant for years who commits or suffers any waste, during his term or estate, *to the* lands, tenements or hereditaments, without having a lawful license to do so, is liable for double the amount of actual damages. [Emphasis added.]

Therefore, the type of waste actionable under MCL 600.2919(2)(a) is limited to “waste . . . to the lands, tenements or hereditaments.” In other words, the plain reading of the statute indicates that waste is found when there has been damage to the land itself, not harm to a property interest.⁵ Because defendant’s actions in this case did not cause any harm to the actual property, the trial court properly dismissed plaintiffs’ claim for waste.

Thus, regardless of the trial court’s ruling that the unclean hands doctrine precluded plaintiffs’ claims, we affirm the grant of summary disposition on the waste claim for the reasons discussed *infra*. See *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000) (“we will not reverse the court’s order when the right result was reached for the wrong reason.”).⁶

III. FORECLOSURE SURPLUS

A. Standard of Review

In docket no. 311362, plaintiffs assert that the trial court erred in holding that John Jr. was not an eligible claimant of the surplus under MCL 600.3252. “An issue involving statutory interpretation presents a question of law reviewed de novo.” *Pontiac Sch Dist v Pontiac Ed Ass’n*, 295 Mich App 147, 152; 811 NW2d 64 (2012).

B. Analysis

MCL 600.3252 establishes the following method of distributing a surplus following a foreclosure:

If after any sale of real estate, made as herein prescribed, there shall remain in the hands of the officer or other person making the sale, any surplus money after satisfying the mortgage on which the real estate was sold, and

⁵ See e.g. *Stevens v Mobil Oil Corp*, 412 F Supp 809, 815 (ED Mich 1976) (finding that the statute provides “for liability for waste only in the event of physical damage[.]”).

⁶ Moreover, plaintiffs’ claims for injunctive relief and quiet title are now moot, as the property has been sold at a foreclosure sale.

payment of the costs and expenses of the foreclosure and sale, the surplus shall be paid over by the officer or other person on demand, to the mortgagor, his legal representatives or assigns, unless at the time of the sale, or before the surplus shall be so paid over, some claimant or claimants, shall file with the person so making the sale, a claim or claims, in writing, duly verified by the oath of the claimant, his agent, or attorney, that the claimant has a subsequent mortgage or lien encumbering the real estate, or some part thereof, and stating the amount thereof unpaid, setting forth the facts and nature of the same, in which case the person so making the sale, shall forthwith upon receiving the claim, pay the surplus to, and file the written claim with the clerk of the circuit court of the county in which the sale is so made; and thereupon any person or persons interested in the surplus, may apply to the court for an order to take proofs of the facts and circumstances contained in the claim or claims so filed. Thereafter, the court shall summon the claimant or claimants, party, or parties interested in the surplus, to appear before him at a time and place to be by him named, and attend the taking of the proof, and the claimant or claimants or party interested who shall appear may examine witnesses and produce such proof as they or either of them may see fit, and the court shall thereupon make an order in the premises directing the disposition of the surplus moneys or payment thereof in accordance with the rights of the claimant or claimants or persons interested.

According to the statute, after the mortgage on which the property was sold has been satisfied, the surplus must be paid over to “the mortgagor, his legal representatives or assigns.” MCL 600.3252. Plaintiffs first assert that because John Jr. held fee title to the property, subject to John Sr.’s and Nancy’s life estate, he was an assignee of defendant’s interest in the mortgage and was entitled to the surplus. This argument is meritless. John Sr., not John Jr., was the mortgagor. There is no evidence that defendant assigned his rights and liabilities in the mortgage to John Jr., which would render John Jr. an assignee. Moreover, it has long been held that the purpose of this statute is to protect subsequent mortgagors and lien holders, not owners. See *Schwartz v Irons*, 4 Mich App 628, 632; 145 NW2d 357 (1966). Therefore, the fact that John Jr. may have held title to the property is not a basis to claim entitlement to the surplus. According to the plain language of the statute, John Sr. was the mortgagor and therefore entitled to the surplus.

Plaintiffs further contend that because they were eligible claimants of defendant, the court erred in failing to hold an evidentiary hearing and take proofs on the matter. Yet, plaintiffs’ construction of the statute is contrary to its plain language. MCL 600.3252 does not permit all claimants of a mortgagor to obtain a surplus, but only those claimants who have a “subsequent mortgage or lien encumbering the real estate[.]” Without meeting those requirements, a party is not a claimant entitled to a hearing or eligible to receive the surplus. Plaintiffs offered no support to establish that their future interests in the property qualified them as holders of a subsequent mortgage or lien on the property. Therefore, the trial court’s ruling was consistent with the plain reading of the statute.

Although plaintiffs now argue on appeal that the trial court should have granted them an equitable lien over the property, plaintiffs failed to raise this specific issue before the trial court, and the trial court neither addressed nor decided whether an equitable lien was warranted.⁷ Accordingly, we decline to address this unpreserved argument. *LME v ARS*, 261 Mich App 273, 284; 680 NW2d 902 (2004).

IV. CONCLUSION

Because there is a genuine issue of material fact regarding whether the parties agreed that defendant would pay the mortgage, summary disposition was improperly granted on the breach of contract claim. The trial court correctly granted summary disposition on plaintiffs' waste claim and on their petition to obtain the foreclosure surplus. We have reviewed any remaining arguments in the parties' briefs and find them to be without merit. We reverse in part and affirm in part in docket no. 309596, and affirm in docket no. 311362. We do not retain jurisdiction.

/s/ Michael J. Riordan

/s/ Jane E. Markey

/s/ Kirsten Frank Kelly

⁷ While plaintiffs claim they preserved the argument through their general request for equity during oral argument, they failed to raise any specific argument that they were entitled to the surplus under an equitable lien theory.