

STATE OF MICHIGAN
COURT OF APPEALS

Estate of EDWIN R. KACOS.

SCOTT A. KACOS and JEFFREY R. KACOS,
Co-Personal Representatives of the Estate of
EDWIN R. KACOS,

Plaintiffs-Appellants,

v

THOMAS C. VANDERPLOEG,

Defendant/Third-Party Plaintiff-
Appellee,

and

GMAC MORTGAGE CORPORATION, and
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC.,

Defendants-Appellees,

and

EDWIN R. KACOS & ASSOCIATES, INC.,

Third-Party Defendant-Appellee.

Before: GLEICHER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

UNPUBLISHED
May 3, 2012

No. 302050
Mecosta Circuit Court
LC No. 10-019542-CZ

Plaintiffs appeal as of right from an order following a bench trial; the trial court held that plaintiffs' mortgage over defendant's¹ residence was unenforceable. We reverse and remand for additional proceedings consistent with this opinion.

I. BACKGROUND

Plaintiffs filed a complaint to foreclose on defendant's residence. They alleged that defendant granted a mortgage over his personal residence on December 16, 1997, in order to guarantee a \$60,000 loan by plaintiffs' decedent to defendant's company, Execucare Landscape Services, Inc. (Execucare).² Defendant later failed to make payments to plaintiffs after Execucare ceased making payments on the loan. Because defendant had not paid his outstanding balance and also obtained additional mortgages³ on the residence without plaintiff's consent, plaintiffs asked the trial court to foreclose on the residence and order its sale and the distribution of the proceeds.

Defendant responded by attacking the validity of the mortgage. He filed a counter-complaint, asking the trial court to quiet title to his property and nullify the mortgage. Defendant asserted that the mortgage was unenforceable because his alleged agreement to repay Execucare's loan was unenforceable.⁴ Although defendant initially admitted (as discussed *infra*) the existence of a promissory note pertaining to the agreement, defendant later abandoned this position during trial and denied ever signing a promissory note. Although plaintiffs presented defendant's signed mortgage, dated December 16, 1997, they failed to provide a signed promissory note wherein defendant agreed to guarantee Execucare's debt.

During the trial, plaintiffs presented the following evidence to prove that defendant actually signed a promissory note to guarantee Execucare's loan: (1) the signed mortgage that expressly referred to a promissory note; (2) the testimony of John Amante, the accountant for plaintiffs and defendant, that defendant must have signed the promissory note in order for Execucare to have been given the funds; (3) defendant's prior admissions that defendant granted the mortgage to plaintiffs to secure defendant's personal guaranty of the \$60,000 Execucare loan; and (4) the financial records showing that Execucare was given \$30,000 in August 1998.

¹ For ease of reference, we will refer to Thomas C. Vanderploeg as "defendant" in this opinion.

² Defendant was the president and minority owner of Execucare.

³ Defendant obtained a mortgage over his residence from Huntington Mortgage Company on September 10, 1998; this was later assigned to GMAC Mortgage Company on August 1, 2000. Defendant also obtained a mortgage over his residence from Mortgage Electronic Registration Systems, Inc. (MERS). Although GMAC and MERS recorded their mortgages before plaintiffs, they failed to present a defense in this action. The trial court entered an order of default against GMAC (and also noted that MERS was GMAC's nominee). Neither GMAC nor MERS has filed a brief on appeal.

⁴ For example, defendant asserted that his "personal guarantee was discharged by bankruptcy and is barred by the statute of limitations."

Amante also testified that plaintiff “signed a personal guarantee.” Joseph Grzeszak, a notary public, testified that he personally witnessed and notarized defendant’s signed mortgage on December 16, 1997.

Defendant denied ever signing a promissory note for the Execucare loan. He also claimed that an apparent mortgage that he signed during the summer of 1998 was a blank, incomplete mortgage document. Defendant claimed to have signed the one-page document at the behest of Amante, his trusted accountant and a longtime friend of his family. Defendant claimed that Amante told him that the mortgage would not be used or recorded, but that he needed it to convince plaintiffs to grant Execucare the loan. The date of signing the mortgage as identified by defendant coincided with the \$30,000 deposit in the Execucare bank statement in August 1998. Defendant’s testimony was also corroborated by Mark Dohner, who testified that he witnessed defendant sign the mortgage during the summer months of 1998.⁵ Further, defendant noted that plaintiffs failed to produce the signed promissory note.

After reviewing the evidence, the trial court found defendant’s testimony more credible and ruled in defendant’s favor, holding the mortgage void because defendant’s underlying promise to guarantee Execucare’s loan was unenforceable under the statute of frauds. The trial court made the following factual findings: (1) defendant signed an incomplete “blank” mortgage, based on Amante’s close relationship with defendant’s family and his promise to not use or record the mortgage; (2) the evidence weighed in favor of defendant regarding the timing of the mortgage signing because a summer 1998 date corresponded closer to the \$30,000 payment from plaintiffs in August 1998; (3) plaintiffs failed to present evidence proving that they provided a \$60,000 loan to Execucare based on the mortgage allegedly signed in December 1997; and (4) defendant never signed a promissory note for the mortgage. The trial court held that the alleged promise to answer for Execucare’s debt was unenforceable under the statute of frauds and that, accordingly, the accompanying mortgage was void.

Defendant had raised several additional defenses at trial, including: (1) the 17 percent interest rate in the mortgage violated Michigan’s usury laws; (2) plaintiffs’ mortgage could not interfere with defendant’s wife’s dower rights to the property; and (3) the doctrine of laches barred plaintiffs’ right to foreclose on the mortgage.⁶ However, the trial court expressly declined to rule on these matters, resting its decision solely on the fact that plaintiffs failed to prove that defendant actually signed the personal guaranty to repay Execucare’s debt.

We review a trial court’s factual findings from a bench trial for clear error and its legal conclusions de novo. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). A finding is clearly erroneous if this Court is “left with the definite and firm conviction that a mistake has been made.” *Jonkers v Summit Twp*, 278 Mich App 263, 265; 747 NW2d 901

⁵ Execucare performs lawn maintenance. Dohner testified that he saw defendant sign the mortgage during the “cutting” season, which would have been during the summer.

⁶ Defendant also initially asserted that plaintiffs’ claim was barred by the statute of limitations. However, defendant has conceded on appeal that plaintiffs’ claim against defendant was timely.

(2008) (internal citation and quotation marks omitted). We review de novo a trial court's decision concerning whether a contract claim is barred by the statute of frauds. *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995).

In Michigan, a mortgage is a lien that secures an underlying promise or obligation; it is not an "estate in land." *Prime Fin Servs, LLC v Vinton*, 279 Mich App 245, 256-257; 761 NW2d 694 (2008). If the underlying debt or obligation cannot be enforced (because of, for example, payment or release), the mortgage is extinguished. *Cummings v Continental Machine Tool Corp*, 371 Mich 177, 183; 123 NW2d 165 (1963); *Ginsberg v Capitol City Wrecking Co*, 300 Mich 712, 717; 2 NW2d 892 (1942). Indeed, without the underlying debt, the mortgage "[i]s but a shadow without a substance, an incident without a principal" *Id.*, quoting *Ladue v Detroit & Milwaukee R Co*, 13 Mich 380 (1865).

In the case at bar, plaintiffs assert that the mortgage was given to secure defendant's personal guaranty for the Execucare loan and claim that the monies provided to Execucare were sufficient consideration to bind defendant's promise to answer for Execucare's debt. A promise to answer for the debt of another is encompassed by the statute of frauds, MCL 566.132. *Livonia Bldg Materials Co v Harrison Constr Co*, 276 Mich App 514, 526; 742 NW2d 140 (2007). MCL 566.132 provides, in relevant part:

(1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:

* * *

(b) A special promise to answer for the debt, default, or misdoings of another person.

However, the entire agreement need not be in writing; if a signed document or memorandum offers substantial probative value in establishing the existence of the agreement, it may be sufficient to satisfy the statute of frauds. *Kelley-Stehner & Assocs, Inc v MacDonald's Ind Prod, Inc (On Remand)*, 265 Mich App 105, 111-113; 693 NW2d 394 (2005).⁷

Plaintiffs assert that they should prevail because defendant's counter-complaint contained an admission that defendant personally guaranteed Execucare's loan. Evidentiary admissions under MRE 801(d)(2) are different from judicial admissions under MCR 2.312. Although a party may explain, discredit, or disprove an evidentiary admission to the fact-finder, a judicial

⁷ Extrinsic evidence may, in some circumstances, be used to prove the terms and existence of a lost written agreement as long as the evidence does not contradict the terms of the signed written memorandum and the party attempting to overcome the statute of frauds offers "clear, strong, and unequivocal, i.e. clear and convincing" evidence of the terms of the document. *Zander*, 213 Mich App at 443-444 (internal citation and quotation marks omitted).

admission is conclusively binding on the party who made it; the trial court cannot disregard a judicial admission unless there has been a formal withdrawal or amendment allowed by the court after the filing of a motion. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 689-690; 630 NW2d 356 (2001); MCR 2.312(D)(1). Judicial admissions are “beyond challenge,” and they must be narrowly interpreted by courts. *Id.* at 690. A judicial admission can be established from a party’s response to a written request for admission. MCR 2.312(A) and (B); *Hilgendorf*, 245 Mich App at 688-689.

Defendant’s counter-complaint, signed by his attorney, provided:

4. That on December 16, 1997, Thomas C. VanderPloeg, then a single man, executed a mortgage upon said property in favor of Edwin R. Kacos & Assoc., Inc. A copy of said mortgage is attached as Exhibit B.

5. The mortgage was given to secure Thomas C. VanPloeg’s personal guarantee of a loan by Counter-Defendant to Execucare Landscape Services, Inc., a Michigan corporation, in the amount of \$60,000.00.

In addition, in defendant’s answer to plaintiffs’ discovery request, defendant admitted that “the consideration for the [Execucare] Loan was a promissory note to repay said sum and the mortgage was provided as security for that original note.” Defendant himself signed this admissions document. The record thus reveals that defendant has put forth a binding judicial admission that he signed the promissory note binding him to repay Execucare’s debt, see *Hilgendorf*, 245 Mich App at 689-690, and *Ortega v Lenderink*, 382 Mich 218, 222-223; 169 NW2d 470 (1969), and the admission was sufficient to satisfy the statute of frauds under the principles discussed in this opinion. To the extent that the trial court disregarded the admission in finding that defendant did not sign the promissory note, the trial court committed clear error. Because defendant’s admission included an acknowledgement that the amount of the loan to Execucare was \$60,000, defendant could not contest the amount of the loan. Thus, the trial court also erred in concluding that “if a \$60,000 loan was made to Exeucare in December 1997, there was no evidence entered to support said loan.”

The trial court erred in holding plaintiffs’ claim untenable because they did not produce a signed note and in holding that the mortgage was void.⁸

Although the trial court did not decide the issue, plaintiffs request that this Court determine whether defendant’s wife has dower rights in the property that cannot be affected by foreclosure. Plaintiffs rely on MCL 558.3, which provides, “[w]hen a person seized of an estate of inheritance in lands, shall have executed a mortgage of such estate before marriage, his widow shall be entitled to a dower out of the lands mortgaged, as against every person *except the mortgagee* and those claiming under him.” (Emphasis added.) There is no dispute that defendant signed the mortgage before his marriage. Nevertheless, defendant, relying on *Tuller v*

⁸ Given our conclusion, we need not address plaintiffs’ alternative argument that the *mortgage* was sufficient under the statute of frauds.

Detroit Trust Co, 259 Mich 670, 676; 244 NW 197 (1932), asserts that his wife’s inchoate dower rights were sufficient to give her a right to redeem following foreclosure. *Tuller*, however, is inapposite because in it, the Supreme Court explicitly stated that it was simply *assuming* that the wife had the right to redemption in order to “obviate[] passing upon the controverted issues of fact and law as to her right to redeem under the particular circumstances of this case.” *Id.* Thus, the portion of *Tuller* evidently relied on by defendant essentially stands for the proposition that, if defendant’s wife has the right to redeem, the failure to include her as a party in the foreclosure proceedings cannot impair those rights. See *id.* There has been no determination, factual or legal, that defendant’s wife has the right to redeem, and we find that it would be inappropriate for this Court to make such a determination in the first instance on appeal. Rather, on remand, if this issue should become relevant, the trial court shall decide it.

The trial court similarly did not rule on defendant’s usury defense. Again, there are factual and legal issues related to this defense that should be addressed, in the first instance, by the trial court. If the usury issue arises on remand, the trial court shall decide it.

Reversed and remanded for additional proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Patrick M. Meter
/s/ Pat M. Donofrio