

STATE OF MICHIGAN
COURT OF APPEALS

DARWYN FAIR and VOLANTE COUNCIL-
FAIR,

UNPUBLISHED
June 26, 2012

Plaintiffs-Appellants,

v

US BANK NATIONAL ASSOCIATION AS
TRUSTEE FOR RESIDENTIAL LOAN TRUST
2008-2, MORTGAGE PASS THROUGH
CERTIFICATES, SERIES 2008-2,

No. 303547
Oakland Circuit Court
LC No. 2010-108705-CH

Defendant-Appellee.

Before: SERVITTO, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(7). Because the trial court did not err in granting defendant's motion to set aside the default, or in denying plaintiffs' motion to amend their complaint and because res judicata barred plaintiffs' claims, we affirm.

Plaintiffs purchased a condominium in 1998. In 2005, plaintiffs initiated a lawsuit against various parties, in connection with a real estate transaction concerning the property. Plaintiff sought to quiet title to the property and asserted fraud and other claims against the parties. Ultimately, the assignee of a mortgage on the property, LaSalle Bank, intervened in the action and was awarded an equitable mortgage on the property. This Court affirmed the imposition of the equitable mortgage. *Fair v Moody*, unpublished opinion per curiam of the Court of Appeals, issued December 23, 2008 (Docket No. 278906). Plaintiffs did not buy out the mortgage as was allowed under the court order and, as a result, the property was judicially foreclosed upon. In 2009, defendants purchased the property at a sheriff's sale. The foreclosure and sale were challenged in the trial court at every step. According to plaintiffs, the purchase was illegal and improper in that it failed to satisfy notice requirements, was based on a void order, was based on an invalid foreclosure, and was based on an improper sheriff's sale, among other things. Plaintiffs thus filed the instant complaint against defendant asserting actions for quiet title, unjust enrichment, fraud, breach of public policy, and seeking a constructive trust and an injunction.

On April 23, 2010, plaintiffs filed a default, alleging that defendant had been timely served with the complaint but had failed to answer or otherwise defend within the required 28-day period. On May 4, 2010, defendant filed an answer to the complaint and affirmative defenses. On June 29, 2010, plaintiffs moved for entry of a default judgment against defendant, to which defendant responded and additionally moved to set aside the default based upon improper service. The trial court conducted an evidentiary hearing on the issue of service, after which the trial court entered an order setting aside the default and denying plaintiffs' motion for entry of a default judgment.

After discovery had closed, plaintiffs moved to amend their complaint and conduct additional discovery. The trial court denied the request. Defendant thereafter moved for summary disposition, asserting that MCR 2.116(C)(6), (7), (8), and (10) all applied. The trial court granted summary disposition in defendant's favor; however, pursuant only to MCR 2.116(C)(7)(res judicata). This appeal followed.

On appeal, plaintiffs first contend that the trial court erred in granting defendant's motion to set aside the default entered against it. We disagree.

We review a trial court's decision on a motion to set aside a default for an abuse of discretion. *Shawl v Spence Bros, Inc*, 280 Mich App 213, 218; 760 NW2d 674 (2008). An abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of reasonable outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). A trial court's factual findings at an evidentiary hearing are reviewed for clear error. *People v Marsack*, 231 Mich App 364, 372; 586 NW2d 234 (1998).

MCR 2.603(D), which governs motions to set aside a default, provides:

A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.

“‘Good cause’ can be shown by: (1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements which created the default, or (3) some other reason showing that manifest injustice would result from permitting the default to stand.” *Shawl*, 280 Mich App at 221(internal quotations omitted).

Here, there is no dispute that defendant is a corporation. Pursuant to MCR 2.105(D) service of process on an active domestic or foreign corporation may be made by:

(1) serving a summons and a copy of the complaint on an officer or the resident agent;

(2) serving a summons and a copy of the complaint on a director, trustee, or person in charge of an office or business establishment of the corporation and sending a summons and copy of the complaint by registered mail, addressed to the principal office of the corporation . . .

At an evidentiary hearing on defendant's motion to set aside the default, a paralegal employed by defendant testified that plaintiffs mailed a copy of the summons and complaint, by registered mail, to the legal address of the company in Cincinnati, Ohio. According to the paralegal, an employee of an outside courier service signed for and picked up the summons and complaint. It then went to the mail distributing center, and eventually made its way to defendant's legal department. There has been no assertion and, more importantly, no evidence that plaintiffs ever served a copy of the summons and complaint on an officer or the resident agent of the corporation, if service were being made under MCR 2.105(D)(1), or mailed a copy of the complaint to the principal office of defendant and served a copy of the same upon a director, trustee, or person in charge of an office or business establishment of defendant as required, if plaintiffs were attempting service pursuant to MCR 2.105(D)(2). Plaintiffs thus failed to comply with the applicable court rules and, having not perfected service upon defendant, defendant's answer to the complaint was not due at the time the default was entered. The trial court thus did not clearly err in finding that service was improper.

Plaintiffs assert that irrespective of the above, defendant obviously had actual notice and knowledge of the lawsuit because it filed an answer, albeit untimely, to plaintiffs' complaint. Plaintiffs' flawed argument, however, is that it should profit by way of a default for defendant's alleged failure to comply with the relevant court rules (i.e., file a timely answer) while their own failure to comply with court rules (service requirements) should be excused. Plaintiffs cannot have it both ways. Given that plaintiffs, admittedly, did not properly serve defendant and, as a result, according to unrefuted testimony, the summons and complaint took a lengthy, circuitous route before reaching a responsive party, a finding that good cause was shown to set aside the default would not be clearly erroneous.¹ In light of the testimony presented at the evidentiary hearing, the trial court's decision to set aside the default does not constitute an abuse of discretion. *Shawl*, 280 Mich App at 218.

Plaintiffs next assert that the trial court erred in denying their motion to amend their complaint and conduct additional discovery. We disagree.

"[D]ecisions granting or denying motions to amend pleadings are within the sound discretion of the trial court and reversal is only appropriate when the trial court abuses that discretion." *Doyle v Hutzel Hosp*, 241 Mich App 206, 212; 615 NW2d 759 (2000). The rules pertaining to the amendment of pleadings are designed to favor amendment except when prejudice to the opposing party would result:

[A]mendment is generally a matter of right rather than grace. Thus, a motion to amend should ordinarily be denied only for particularized reasons,

¹ In a one sentence argument, plaintiffs contend that defendant has no meritorious defense for purposes of setting aside the default. Having cited neither to the record nor to any case law, and having provided no relevant argument on this point, however, we need not consider this argument. See, e.g., *Blackburne & Brown Mortg Co v Ziomek*, 264 Mich App 615, 619; 692 NW2d 388 (2004).

including undue delay, bad faith or a dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility. The trial court must specify its reasons for denying leave to amend, and the failure to do so requires reversal unless the amendment would be futile. [*PT Today, Inc v Commr of Office of Fin & Ins Services*, 270 Mich App 110, 143; 715 NW2d 398 (2006)(internal citations omitted)].

Here, plaintiffs moved to amend their complaint to add a count for “wrongful eviction deceptive act and/or unfair practice.” The gist of plaintiffs’ claim is that defendant may have submitted affidavits or signed other documents in support of the judicial foreclosure. The trial court did not abuse its discretion in denying plaintiffs’ motion to amend to add this count for several reasons. First, the only basis plaintiffs offered in support of the added count was an assertion that Michigan is one of the fifty states whose attorney generals joined a multi-state effort to investigate whether mortgage loan servicers submitted affidavits or signed other documents in support of foreclosures without confirming their accuracy; a procedure termed “robo-signing.”² Plaintiffs did not, however, submit any affidavit or provide any evidence whatsoever that defendant was engaged in the process of robo-signing. Instead, plaintiffs simply make a blanket assertion regarding the industry practice of robo-signing based upon the attorney general’s inquiries into the industry in general.

Second, LaSalle Bank was granted a judicial foreclosure on plaintiffs’ property, not defendant. Defendant purchased the property at a sheriff’s sale, so any claim of “robo-signing” with respect to the foreclosure would be inapplicable to defendant in this matter.

Third, any “robo-signing” would be inapplicable to the judicial foreclosure, as it pertained to an *equitable* mortgage granted by the trial court in LaSalle’s favor in 2006. The mortgage foreclosed upon was an equitable order entered by the court, not a typical mortgage accompanied by the myriad documents signed by a lender and a homeowner. And, after the sheriff’s sale was made on the subject property, the trial court issued an order confirming the sale.

Finally, discovery had already closed. While plaintiffs sought additional discovery as well, indicating that the investigation was a recent development, they attached an article dated October 13, 2010 to their motion to amend. The article was thus released nearly a month prior to the close of discovery, and plaintiffs’ counsel indicated that he files “a lot” of these types of lawsuits. As indicated by the trial court, while plaintiffs’ theory is interesting, without any factual basis to support their allegation against defendant, their proposed amendment would be futile. The trial court did not abuse its discretion in denying plaintiffs’ motion to amend their complaint.

² In their brief, plaintiffs assert that in requesting leave to amend their complaint they alleged that defendant “did not have the capacity to accept the subject property into the trust because the Trust had closed one year before the subject property was purportedly transferred to the defendant.” This specific assertion did not appear in plaintiffs’ motion, nor did it appear in their proposed amended complaint.

Plaintiffs lastly contend that the trial court erred in granting summary disposition in defendant's favor when the subject property was never properly transferred to defendant. We disagree.

We review de novo a trial court's determination regarding a motion for summary disposition. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). Summary disposition is proper under MCR 2.116(C)(7) if "[t]he claim is barred because of . . . prior judgment . . ." MCR 2.116(C)(7). A motion brought pursuant to MCR 2.116(C)(7), similar to a motion brought under MCR 2.116(C)(10), requires consideration of all documentary evidence presented by the parties. *Herman v City of Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). The applicability of res judicata is a question of law that is reviewed de novo on appeal. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 10; 672 NW2d 351 (2003).

As our Supreme Court explained in *Adair v State*, 470 Mich 105, 121; 680 NW2d 386 (2004):

The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not (internal citations omitted).

On appeal, plaintiffs challenge only the second element of res judicata, contending that defendant was not in privity with LaSalle Bank because defendant lacked the capacity to purchase the subject property and it was never properly transferred to defendant. However, the trial court, in its opinion and order granting summary disposition in defendant's favor, noted that plaintiffs did not dispute that both actions involved the same parties or their privies. Generally, an issue is not properly preserved if it is not raised before, addressed, or decided by the circuit court. *Polkton Charter Tp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Because plaintiffs did not raise the issue of privity before the trial court, it is not preserved for appeal and we need not consider issues raised for the first time on appeal. *Id.* Moreover, if there were no privity between LaSalle and defendant, it would be incumbent upon plaintiffs to establish the same. Plaintiffs have offered nothing to the trial court or this Court but bare assertions.

Affirmed.

/s/ Deborah A. Servitto
/s/ Patrick M. Meter
/s/ Michael J. Riordan