Court of Appeals, State of Michigan

ORDER

Warren Bank v Michael Torres

Docket No. 311277

LC No. 09-004273-CK

Kurtis T. Wilder
Presiding Judge

Karen M. Fort Hood

Deborah A. Servitto
Judges

The Court orders that the January 28, 2014 opinion is hereby AMENDED. The opinion contained the following clerical error: Federal Deposit Insurance Company should read as Federal Deposit Insurance Corporation.

In all other respects, the January 28, 2014 opinion remains unchanged.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

FEB 04 2014

Date

Chief Clerk

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

FEDERAL DEPOSIT INSURANCE COMPANY, as Receiver for WARREN BANK, Plaintiff-Appellee,	UNPUBLISHED January 28, 2014
v	No. 311277 Macomb Circuit Court LC No. 09-004273-CK
MICHAEL TORRES, Defendant-Appellant.	

Before: WILDER, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

In this foreclosure action, defendant, Michael Torres,[1] appeals as of right from a judgment entered against him in the amount of $611,819.99. We affirm in part, reverse in part, and remand for further proceedings.

I. BASIC FACTS

On May 31, 2005, defendant borrowed $1,100,000 from Warren Bank. The loan was to purchase 66.6 acres of property in Bruce Township in Macomb County and was secured by a mortgage. At the time of the loan, the property was appraised at $1,730,000. On November 17, 2006, defendant opened a $200,000 line of credit with Warren Bank and that also was secured by a mortgage to the Bruce property.

Both mortgages contained the following "cross-collateralization" language:

> In addition to the Note, this Mortgage secures the following described additional indebtedness: All obligations, debts and liabilities, plus interest thereon, of Borrower and/or Grantor to Lender, or any one or more of them, as well as all claims by Lender against Borrower and/or Grantor, or any one or more of them, whether now existing or hereafter arising, whether related or unrelated to

[1] Michael's wife, Edita, originally was named as a defendant as well. But during the pendency of the action, she filed for bankruptcy, and her liability was extinguished.

> the purpose of the Note, whether voluntary or otherwise, whether due or not due, direct or indirect, absolute or contingent, liquidated or unliquidated and whether Borrower and/or Grantor may be liable individually or jointly with others, whether obligated as guarantor, surety, accommodation party or otherwise, and whether recovery upon such amounts may be or hereafter may become barred by any statute of limitations, and whether the obligation to repay such amounts may be or hereafter may become otherwise unenforceable.

Although defendant had planned on developing the property as a residential project, that never happened because of the economic conditions.

Both parties acknowledged at the circuit court that defendant had been using the line of credit to make interest payments on the 2005 promissory note. However, in February 2009, plaintiff notified defendant that "effective immediately, no further advances will be permitted under this Line." At this time, plaintiff possessed internal "watch reports" that expressed concerns regarding the two loans. and noted that defendant was late numerous times in making payments.

Reports dated May 29, 2009, noted that defendant was 73 days past due on the $200,000 loan to the amount of $748.68 and 89 days past due on the $900,000 loan to the amount of $8,775. Both reports also indicated that "Borrower notified the Bank that Cash Flow does not support the loan payment." A June 23, 2009, report further states that defendant contacted plaintiff and stated that "he has no ability to pay and is unable to sell the property."

Plaintiff, pursuant to the loan agreements, accelerated the loans, making the entire amount due. As of July 13, 2009, the balance owed was $913,775.91 for the 2005 loan and $94,602.71 for the 2006 loan, for a total of $1,008,378.62.

Plaintiff thereafter initiated foreclosure by advertisement. A current appraisal reflected that the property was now only worth $530,000. Notice of the default and foreclosure sale was published in the Macomb County Legal News for five consecutive weeks: it was published on July 16, July 23, July 30, August 6, and August 13, 2009. Additionally, Tim Judge posted a copy of the notice "in a conspicuous place upon the premises described in said notice by attaching the same in a secure manner to the tree on this vacant land." The notice referenced that the mortgage being foreclosed upon was the one dated November 17, 2006, and that the total amount of the indebtedness was $1,008,378.62. The notice also stated that the foreclosure sale would take place on August 21, 2009. However, the sale eventually was adjourned to take place a week later on August 28, 2009.

At the sale, plaintiff was the only bidder for the property and consequently won with a bid of $487,113.18.

On September 17, 2009, plaintiff filed a complaint against defendant, claiming that it was still owed $527,225.45, plus interest, costs, and expenses, as a result of the deficiency remaining after the foreclosure sale.

On October 2, 2009, Warren Bank was declared insolvent and was closed by the Michigan Office of Financial and Insurance Regulation. The Federal Deposit Insurance Corporation ("FDIC") was then appointed as receiver of the bank.[2]

On May 17, 2011, defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). In his motion, defendant made several assertions, including that he never received any notice of any default, the property taxes were current, and tax assessments show that the value of the property was $898,000. But none of defendant's submitted documents supported these assertions.[3] Defendant's main argument in his brief, however, solely focused on his position that he was entitled to judgment as a matter of law because he owed no further money to plaintiff as a result of plaintiff foreclosing only upon the *second/junior* mortgage. Defendant argued that pursuant to *Bd of Trustees of Gen Ret Sys of Detroit v Ren-Cen Indoor Tennis & Racquet Club*, 145 Mich App 318, 322-323; 377 NW2d 432 (1985), when a mortgagee holds both a senior and junior mortgage and forecloses only on the junior mortgage, then the obligation from the senior mortgage is extinguished.

In response, plaintiff argued that the evidence was undisputed that defendant "defaulted" and that, as a result, it was entitled to accelerate the indebtedness and foreclose on the property. Plaintiff also took exception to defendant's claim that its bid at the foreclosure sale was well under the property's market value. Plaintiff asserted that defendant's reliance on property tax assessments (equating to a value of $898,000) was misplaced, considering the thorough appraisal that took place in June 2009 (showing a value of $530,000). Finally, plaintiff argued that it could foreclose on the second mortgage for the full amount of the indebtedness because that mortgage specifically stated that it secured *all* obligations of the borrower.

On July 21, 2011, the trial court issued a written opinion and order denying defendant's motion for summary disposition and, instead, granting summary disposition in favor of plaintiff only on the issue of liability pursuant to MCR 2.116(I)(2). The trial court noted that the submitted documents established that defendant defaulted: by May 29, 2009, plaintiff was 89 days past due on the original 2005 promissory note and 73 days past due on the original 2006 promissory note. The trial court further noted that defendant failed to support his claim that he did not have notice of the foreclosure sale because the sheriff's deed clearly stated that the notice for August 28, 2009, sale had been posted in a conspicuous place in the courthouse. The trial court also noted that, in light of the $530,000 appraisal, the evidence showed that the property

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[2] We will use the term "plaintiff" to refer to both the FDIC and Warren Bank interchangeably."

[3] The attached documents were the various loan and mortgage documents, the Evidence of Sale, and the Affidavit of Publication. In short, none of these documents was evidence that defendant had no notice of any default or that he failed to pay any property taxes. However, we note that defendant's brief also referred to an "Exhibit E," which supposedly was proof of the $898,000 SEV of the property in 2009, but there is no document in the lower court file corresponding with this exhibit. Instead, that document was missing with the last page in the lower court record for defendant's motion/brief being a divider page that merely states, "Exhibit E."

was not sold well below its true value. Therefore, the trial court determined that plaintiff was entitled to summary disposition related solely on the issue of liability.

Although not pertinent to the issues on appeal, plaintiff later moved for summary disposition on the issue of damages on September 8, 2011, which was denied. Plaintiff, after attempting to correct some deficiencies in the earlier motion, filed a renewed motion for summary disposition March 21, 2012. This motion was denied as well, and the case proceeded to trial on the issue of damages.

At trial, plaintiff produced two witnesses, Joe Campbell and Lejuan Robinson. Campbell was an employee of FDIC and was an asset manager who was in charge of the original 2005 loan. Campbell also had been appointed FDIC's attorney-in-fact a week before trial started. Campbell testified that he relied on the materials that were handed over to him that came from Warren Bank. Using a default date of March 17, 2009, Campbell determined that the principal balance on that 2005 loan was $900,000, the pre-default interest owed was $3,656.37, and the post-default interest owed was $66,003.01. Applying the amount of the foreclosure sale, Campbell testified that the principal amount was then reduced to $414,461.57. Further, he stated that the total amount owed as of March 13, 2012, under the 2005 loan, was $484,120.95. Interest after that day was calculated to be $60.44 per day.

Robinson is an employee of Midland Loan Services, who was retained by the FDIC to be an asset manager over the 2006 loan. Like Campbell, Robinson admitted that he had no personal knowledge regarding the loan documents he used in his calculations (Tr I, p 103). Robinson testified that, according to the records, the 2006 loan had a principal balance of $93,271.57. Using the same default date of March 17, 2009, Robinson determined that the pre-default interest owed was $9,430.03 and the post-default interest owed, through March 13, 2012, was $5,658.35. The post-default interest for this loan was $13.60 per day.

Defendant was the only witness to testify on his behalf at trial. Defendant admitted that he never personally made any payments on the first loan. Instead, he maintained that the interest payments for that loan were made automatically by Warren Bank through the second loan. There was no evidence of any written agreement for this arrangement, however. He testified that the default occurred when Warren Bank stopped handling the loans in this manner and never notified him that the automatic payments had stopped. He also claimed that he was never notified of the pending foreclosure.

On June 26, 2012, the trial court issued its opinion and order. In pertinent part, the court made the following findings of fact: defendant was in default as of March 17, 2009; the loan agreements did not require defendant to be notified that he was in default; plaintiff purchased the property at foreclosure sale for $487,113.18; plaintiff applied the "net credit bid" of $485,538.43 to the outstanding principal balance of the 2005 loan; a principal balance of $93,271.57 remained on the 2006 loan; $3,656.37 in interest accrued pre-default on the 2005 loan; the post-default interest owed on the 2005 loan through March 13, 2012, was $66,003.01 with a per diem amount thereafter of $60.44; $9,430.03 in pre-default interest accrued on the 2006 loan; the post-default interest owed on the 2006 loan through March 13, 2012, was $5,658.33 with a per diem amount thereafter of $13.60; the loan documents entitle plaintiff to recover reasonable attorney fees and other costs; plaintiff incurred reasonable attorney fees of $18,260 through July 31, 2011; and plaintiff had incurred reasonable expenses in the amount of $1,079.11 through July 31, 2011.

In its conclusions of law, the trial court determined that, pursuant to federal caselaw, Campbell and Robinson properly were allowed to testify even though they lacked personal knowledge related to the underlying loan transactions. They, as agents for FDIC, were entitled to reply upon the books and records of the bank as they existed at the time the FDIC was appointed receiver. Further, while relying in part on 12 USC 1823(e),[4] defendant was barred from asserting the existence of any "secret agreement," where such secret agreement would alter the terms of the notes.

The trial court therefore entered judgment against defendant in the total amount of $611,819.99, which was broken down as follows:

$484,120.95	2005 Loan
$108,359.93	2006 Loan
$18,260.00	Attorney fees as of July 31, 2011
$1,079.11	Costs as of July 31, 2011
$611,819.99	TOTAL

The judgment further provided that interest would accrue every day after March 14, 2012, at an amount of $74.04 ($60.44 + $13.60) per day.

II. ANALYSIS

A. SUMMARY DISPOSITION

Defendant argues that the trial court erred when it granted summary disposition on the issue of liability in favor of plaintiff. We disagree.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When deciding a motion for summary disposition brought under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001). But MCR 2.116(I)(2) also provides, "If it appears to the court

[4] 12 USC 1823(e): "No agreement which tends to diminish or defeat the right, title or interest of the Corporation [the FDIC] in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing . . . ."

that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

Further, the proper interpretation of a contract, such as a mortgage, is a question of law that is reviewed de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

Defendant first claims that he could not have been found liable because there was no evidence that he defaulted on any loan obligation and he was not provided any notice of default. However, looking at the submitted documents in conjunction with defendant's motion for summary disposition, there is no question of fact that defendant defaulted. According to 2006 mortgage, "default" was defined as occurring when "payment in full is not made immediately when due."[5] And other documents that plaintiff submitted show that defendant missed many deadlines, thereby defaulting under the terms of the 2006 mortgage. In particular, a watch report dated May 29, 2009, indicated that the 2006 loan was "73 days past due in the amount of $748.68." The report further noted that, over the history of the loan, defendant was late with payments 15 times. None of defendant's submitted documents contradicted these proofs.

In his brief in support of his motion for summary disposition, defendant did not deny that there was any default. Instead, defendant merely argued that there could be no default because any default was the result of plaintiff breaching an agreement it and defendant had, where plaintiff would pay the mortgage payments on the first loan by using the line of credit from the second loan. However, defendant attached no documentary evidence to support this allegation, let alone the existence of such an "agreement." Consequently, there was no genuine question of fact that defendant defaulted on the 2006 loan.

Regarding defendant's claim that the foreclosure should have been set aside because he never received notice of any default, we find that position untenable. The 2006 mortgage provides in bold text the following:

> **Warning. This Mortgage contains a power of sale, and upon default, may be foreclosed by advertisement. In foreclosure by advertisement, no hearing is involved and the only notice required is to publish notice in a local newspaper and to post a copy of the notice on the Property.**

Defendant relies on another portion of the mortgage, which provides that "[a]ny notice required to be given under this Mortgage, including without limitation any notice of default and any notice of sale shall be given in writing, and shall be effective when actually delivered . . . ." However, defendant ignores the very first part of that entry that conditionally requires written

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[5] Plaintiff on appeal cites to the 2005 mortgage's definition of default, which also includes "[a] material adverse change . . . in Grantor's financial condition" and "Lender believ[ing] the prospect of payment or performance of the Indebtedness is impaired." However, plaintiff's own foreclosure documents show that it was foreclosing on the 2006 mortgage only, so this more-encompassing definition is not pertinent.

notice only for "[a]ny notice required to be given under this Mortgage." Defendant does not identify where in the mortgage it requires notice of default, and we did not find any instance. Although this phrase does indicate that the notices considered include "any notice of default," that phrase itself does not actually establish a requirement. Instead, it simply states that *if* those notices were required in the mortgage, then they would have to be given in writing and only effective upon actual delivery. However, as noted earlier, there is no requirement in the mortgage to provide notice of default.

Defendant also relies on MCL 600.3205a(1) for the proposition that plaintiff was required to provide notice of default. MCL 600.3205a(1), which was later modified effective December 22, 2011, and repealed effective June 30, 2013, provided the following at the time of the foreclosure:

> (1) Subject to subsection (6), before proceeding with a sale under this chapter of *property claimed as a principal residence* exempt from tax under section 7cc of the general property tax act, 1893 PA 206, MCL 211.7cc, the foreclosing party shall serve a written notice on the borrower that contains all of the following information:
>
> (a) The reasons that the mortgage loan is in default and the amount that is due and owing under the mortgage loan. [Emphasis added.]

While this statute requires written notice of default, it only does so for "property claimed as a principal residence exempt from tax under . . . MCL 211.7cc." Here, it was undisputed that the property was "vacant" land defendant planned on developing and was not his "principal residence." Thus, defendant's reliance on this statutory requirement is misplaced, and no written notice of default was required.

Defendant also claims that there was insufficient proof that the notice of adjournment took place. MCL 600.3220 governs the notice of adjournment and provides, in pertinent part, the following:

> Such sale may be adjourned from time to time, by the sheriff . . . by posting a notice of such adjournment before or at the time of and at the place where said sale is to be made.

Defendant notes that the purported notice of adjournment, adjourning the sale from August 21 to August 28, 2009, that plaintiff submitted at the circuit court was unsigned. However, the circuit court noted that plaintiff attached a copy of the sheriff's deed to its complaint. That sheriff's deed provided the following:

> WHEREAS, by virtue of said power of sale, and pursuant to the statue of the State of Michigan in such case made and provided, a notice was duly published and a copy thereof was duly posted in a conspicuous place upon the premises described in said mortgage that the said premises, or some part of them, would be sold on the 28th day of August, A.D. 2009 at **the North Main St. entrance to the Macomb County Court Building in the City of Mount**

> **Clemens**, that being the place of holding the Circuit Court for Macomb County where the premises are situated . . . . [Emphasis in original.]

The circuit court concluded that there was no genuine question that the adjournment notice was properly posted because, even though the submitted notice of adjournment was not signed, the sheriff's deed detailed that "the August 28, 2009 sale had been posted in a conspicuous place in the court building." Our reading of the sheriff's deed reaches a different conclusion, however. The sheriff's deed did not state that the adjournment notice was posted in the court building; instead, it stated that the notice was "posted in a conspicuous place *upon the premises described in said mortgage*." (Emphasis added.) Thus, the sheriff's deed only asserted that it was posted on the land being sold and that the notice *referred* to the place of sale, the Macomb Circuit Court. Thus, a genuine issue of material fact may exist regarding whether the adjournment notice was actually posted by a sheriff's deputy "at the place where the sale is to be made," as required by MCL 600.3220.

However, even if a defect in the adjournment notice existed, such a defect only "renders a foreclosure sale voidable, not void." *Sweet Air Inv, Inc v Kenney,* 275 Mich App 492, 502; 739 NW2d 656 (2007) (quotation marks omitted). In *Sweet Air*, the borrowers could not establish any prejudice from any alleged defect in the notice of adjournment because they did not timely challenge the validity of the foreclosure sale and they made no effort to redeem or take any action until well after the redemption period had run. *Id.* at 503. In this case, defendant did not establish any prejudice either. He did not timely challenge the foreclosure sale; instead, in his brief in support of his motion for summary disposition, defendant focused his discussion exclusively on his position that the foreclosure of the second mortgage extinguished his liability on the first mortgage because plaintiff was the mortgage holder for both. Further, there was no evidence that defendant ever attempted to redeem the property. At best, after summary disposition was granted to plaintiff on the issue of liability, defendant submitted some e-mails that he wrote after the foreclosure sale, indicating that he had "a possible buyer for the property." But having a possible buyer is not the same as attempting to redeem the property. Thus, defendant cannot show prejudice, and the foreclosure sale should not be voided.

Likewise, defendant's claim that the notice of foreclosure was defective because it referenced the entire indebtedness and a six-month redemption period is not availing. Defendant asserts that the proper indebtedness was only for the second loan and that the redemption period was 12 months. The 2006 mortgage contained, however, the "cross-collateralization" clause, which provided that the 2006 mortgage not only secured the 2006 loan, but also secured "[a]ll obligations, debts and liabilities, plus interest thereon, of Borrower and/or Grantor to Lender . . . ." Thus, the unambiguous language of the mortgage shows that it also secured all other obligations defendant had to plaintiff, including the 2005 note. As a result, the circuit court did not err when it determined that the 2006 mortgage also secured the 2005 note.

Further, with respect to defendant's claim that the incorrect timeframe was listed on the foreclosure notice for the redemption period, defendant agreed in his motion for summary disposition that the redemption period was six months. "A party may not take one position in the trial court and then seek redress in an appeal on a contrary ground." *Mich AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 148; 809 NW2d 444 (2011). Moreover, assuming any notice defect existed, as discussed above, defendant failed to establish any prejudice and is not entitled to any relief.

Defendant next contends that plaintiff should not have been awarded summary disposition on the issue of liability because any liability he owed on the first mortgage was extinguished when the second mortgage was foreclosed. We disagree.

Defendant relies on *Bd of Trustees*, 145 Mich App 318. In *Bd of Trustees*, the plaintiff loaned the defendant $1.1 million and received a promissory note for that amount secured by a first mortgage. *Id.* at 319. Two years later, plaintiff loaned defendant an additional $500,000 and received a promissory note for that amount secured by a second mortgage on the same property. *Id.* at 320. After the defendant defaulted on both loans, the plaintiff foreclosed on the second mortgage only. At the ensuing sale, the plaintiff bought the property for the amount owed on the second note, even though the property was valued at more than $3 million. *Id.*

The *Bd of Trustees* Court noted that MCL 600.3280 generally would protect mortgagors from such underbidding. The statute is as follows:

> When in the foreclosure of a mortgage by advertisement, any sale of real property has been made after February 11, 1933, or shall be hereafter made by a mortgagee, trustee, or other person authorized to make the same pursuant to the power of sale contained therein, at which the mortgagee, payee or other holder of the obligation thereby secured has become or becomes the purchaser, or takes or has taken title thereto at such sale either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as foresaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation, or any other person liable thereon, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and set-off to the extent only of the amount of the plaintiff's claim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and such showing shall constitute a defense to such action and shall defeat the deficiency judgment against him, either in whole or in part to such extent.

The Court, however, concluded that, while this statute would have protected the defendant if there had been only one note and one mortgage, the fact that there were two mortgages and two notes, the plaintiff was able to avoid the provided defense. *Id.* at 321. The Court then adopted the rule that

> "if the holder of both a junior and senior mortgage forecloses the junior and buys it in on foreclosure sale it is generally held that, in the absence of an agreement to the contrary, the mortgagor's personal liability for the debt secured by the first mortgage is extinguished." [*Id.* at 322, quoting Osborne, Mortgages (2d ed), § 274, p 553.]

The rationale for such a rule was described as follows:

> "In theory, as between the purchaser and the original mortgagor, the mortgagor has already advanced to the purchaser the amount of the mortgage debt by receiving that much less than the market value of his land at the time of the sale. In other words, it is presumed that the purchaser of land subject to a mortgage deducted the amount of the incumbrance from the market value of the land when he bought. The mortgagor therefore has an equitable right to have the land pay the mortgage before his personal liability is called upon and the purchaser will not be permitted to retain the land, go out and acquire the mortgage, and enforce the same against the mortgagor personally." [*Bd of Trustees*, 145 Mich App at 324, quoting *Wright v Anderson*, 62 SD 444, 449-450; 253 NW 484 (1935).]
>
> The *Bd of Trustees* Court held that
>
> whenever a greater and lesser estate or a legal and equitable estate coincide in the same person, the lesser or equitable estate is destroyed by merger. Equity, however, will generally prevent a merger if the parties did not intend a merger, and an intent to avoid a merger will ordinarily be inferred where it is in the interest of the person holding the various estates to keep them separate. [*Bd of Trustees,* 145 Mich App at 325.]

Therefore, a plaintiff in such a position must look to equity to prevent the merger which otherwise would be automatic at law. *Id.* In *Bd of Trustees,* the plaintiff, while seeking to avoid merger, was seeking, "in effect a double recovery." *Id.* The plaintiff wanted to obtain the price advantage of purchasing at a second mortgage sale without the disadvantage of having to satisfy the debt secured by the first mortgage, and equity will not aid such a plaintiff. *Id.* at 326.

In the instant case, the rule enunciated in *Bd of Trustees* simply does not apply. First, unlike the second mortgage in *Bd of Trustees,* the second mortgage here secured *all* of defendant's debts with plaintiff, including the amount owed on the first note. Thus, assuming arguendo that the first mortgage was extinguished when the second mortgage was foreclosed, the entire debt was still secured on the second mortgage. Second, there was evidence produced at the summary disposition phase that showed that the value of the property was $530,000, and plaintiff owed defendant in excess of $1 million. Thus, the equitable concern of a plaintiff seeking a "double recovery" by holding onto property that was worth well in excess of the amount owed is not present in the instant case.

Alternatively, defendant argues that any debt he owed was extinguished because plaintiff submitted a "full credit bid" for the property. In support of this claim, defendant relies on a "foreclosure bid sheet" that plaintiff used at the foreclosure sale. Defendant claims that the entry of $485,538.43 under "principal" means that plaintiff was admitting that the total principal defendant owed was that amount. That view is not supported by the document itself. Nowhere on that document did it state that that amount represented the total principal owed by defendant. Instead, a fair reading of the document shows that it simply is a breakdown of how its bid got apportioned, and $485,538.43 got apportioned to the principal balance that defendant owed, which according to the other documents submitted was over $1 million.

Further, related to the defense allowed by MCL 600.3280, defendant claims that plaintiff "never submitted any evidence whatsoever which established, in any way," that plaintiff's $487,113.18 bid "was reasonable or represented the true value of the property as of the date and time on which the sale took place." This position is without merit. Plaintiff submitted to the circuit court an appraisal that was done in contemplation of the foreclosure sale. It was dated June 8, 2009, and provided that the property had a current value of $530,000. Of note, no conflicting appraisals were submitted to the circuit court. Accordingly, defendant's assertion that there was no support to show that the value of the property was reasonable in relation to plaintiff's bid is unfounded.

In sum, the circuit court did not err in granting summary disposition in favor of plaintiff on the limited issue of liability. From the evidence submitted, there was no genuine issue of fact that defendant defaulted under the terms of the second mortgage. Thus, the only question remaining was the amount of damages.

B. DUE PROCESS

Defendant argues that he was denied procedural due process because he was denied notice and an opportunity to be heard when the trial court sua sponte granted partial summary disposition in favor of plaintiff under MCR 2.116(I)(2). An issue must be properly raised in and decided by the trial court in order to preserve it for review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). While the defendant did raise the issue at the circuit court, he did so in his motion for reconsideration. Therefore, the issue is not preserved. See *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009) ("Where an issue is first presented in a motion for reconsideration, it is not properly preserved."). Unpreserved constitutional issues are reviewed for plain error affecting substantial rights. *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 193; 740 NW2d 678 (2007).

"Due process is a flexible concept, the essence of which requires fundamental fairness. The basic requirements of due process in a civil case include notice of the proceedings and a meaningful opportunity to be heard." *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009) (citations omitted).

MCR 2.116(I)(2) allows a trial court to sua sponte grant summary disposition:

> If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party.

After defendant moved for summary disposition on the basis of his theory that the first mortgage was extinguished upon the foreclosure of the second mortgage, the circuit court granted summary disposition in favor plaintiff on the lone issue of liability after it determined that there was no genuine issue of fact that defendant had defaulted under the terms of the loan and mortgages. Defendant claims that he "was deprived of any opportunity to ability to assert any factual or legal defenses to the claim that a deficiency judgment should enter." Defendant overstates the circuit court's order. The order merely provided that plaintiff was granted summary disposition "pursuant to MCR 2.116(I)(2) as to the issue of liability only." The order did not declare that plaintiff would ultimately be entitled to a deficiency judgment. Instead, the order made it clear that any deficiency judgment would be contingent upon the outcome of a hearing/trial on damages. Therefore, defendant's base position that the circuit court's award of summary disposition to plaintiff was an order for a deficiency judgment is without merit. All the order stood for is that the issue of liability was not to be litigated further because there was no genuine issue that defendant had defaulted on the loans.

Defendant claims that if he had notice that the circuit court would rule on the issue of liability, he would have presented all of his defenses to plaintiff's claim. In his brief in support of summary disposition, defendant does not dispute that payments stopped being made on the loans. Instead, he asserts that it was plaintiff's "fault" because it breached a purported agreement he and plaintiff had, where plaintiff would make interest payments on the first loan from the line of credit on the second loan. Thus, there was no genuine issue that payments on the loans were missed; defendant merely claimed that any default was excused because it was the result of plaintiff's breach of an established "course of dealing."

Therefore, there is no question that defendant had defaulted on the loans. At best, plaintiff's assertions would constitute a separate cause of action for breach of that subsequent contract. In other words, the relevant mortgage document simply allowed for default if payments were not made in a timely manner. There is no question that the facts in this case meet that definition. Until the terms of the mortgage were modified, they remained in effect. Consequently, plaintiff cannot establish how he was prejudiced, and he cannot establish any plain error.

C. WITNESS TESTIMONY

Defendant argues that the trial court erred in allowing two witnesses, Joe Campbell and Lejuan Robinson to testify. We disagree. Preserved evidentiary issues are reviewed for an abuse of discretion. *Lenawee Co v Wagley*, 301 Mich App 134, 164; 836 NW2d 193 (2013). A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2009).

Defendant first claims that the witnesses should not have been allowed to testify because they were not listed on any witness list. Plaintiff's witness list included, among others, the unidentified "Keeper of the Loan Records, Warren Bank/FDIC." Defendant's witness list included, in part, the "Personnel and Custodian of the records" for both Warren Bank and the FDIC.

MCR 2.401(I)(1) requires the parties in a civil action to file and serve witness lists no later than the time directed by the court. The purpose of the rule is to avoid trial by surprise. *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993). Pursuant to MCR 2.401(I)(2), a "court *may* order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown." (Emphasis added.) "The word 'may' denotes permissive and not mandatory action." *DC Barnes Assocs, Inc v Star Heaven, LLC*, 300 Mich App 389, 425; 834 NW2d 878 (2013). "Because the decision [to disallow witnesses from testifying] is within the trial court's discretion, caselaw mandates that the trial court consider the circumstances of each case to determine if such a drastic sanction is appropriate." *Duray Development, LLC v Perrin*, 288 Mich App 143, 164-165; 792 NW2d 749 (2010) (quotation marks omitted). Two important factors a court may consider include whether there was any prejudice to the defendant and whether there was any actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice. *Id.* at 165. Here, there was little prejudice to defendant. Plaintiff's witness list actually mentioned the "Keeper of the Loan Records" for both Warren Bank and the FDIC. Although, the individuals were unidentified at the time, defendant was at least put on notice that these people would be called. Coincidentally, defendant himself listed the unidentified "Personnel and Custodian of the records" for both Warren Bank and the FDIC. Moreover, defendant had actual notice of Campbell's predecessor and Robinson. In a filing dated September 8, 2011, plaintiff it attached an affidavit from Robinson, where Robinson stated that, as an employee of Midland Loan Services, which was contracted by the FDIC to manage particular assets, he was "in possession of the business records of Warren Bank with regard to the commercial loans made by Warren Bank to [defendant] at issue in this litigation." Robinson further stated that he calculated the amount of unpaid principal and interest that defendant owed. In a subsequent filing dated March 21, 2012, plaintiff attached another affidavit of Robinson, who clarified that he was in possession of only "the 2006 loan" documents. Attached to that same filing was an affidavit of John Pace, who was an employee of the FDIC and was appointed as its attorney in fact. Pace indicated that he had in his possession "the 2005 loan" documents.

On May 30, 2012, the FDIC, through Pace as its attorney-in-fact, executed a limited power of attorney to appoint "Campbell as its true and lawful Attorney-in-Fact to act in its name, place, and stead" for the limited purpose of, among other things, "keeping and maintaining Bank records of the 2005 Loan" and "calculating outstanding principal and interest on the 2005 loan." The first day of trial took place just six days later on June 5, 2012.

When defendant objected to allowing Campbell and Robinson to testify, based on them not being specifically named on any witness list, the trial court cited a lack of prejudice to defendant and denied the motion. The trial court did not abuse its discretion.

The record shows that as early as September 2011, or nine months before trial, defendant knew that Robinson possessed the loan records at issue in the litigation. Defense counsel even admitted to speaking at one point to Robinson on the phone. Yet, there was no evidence that defendant ever sought discovery from Robinson. As the trial court noted, "[T]here's been no effort," and because of that, the trial court noted that there was no prejudice to defendant. While the trial court did not specifically address the late announcement of Campbell as a witness, because defendant did not take any discovery of Pace, whom defendant knew of three months before trial, a similar finding of no prejudice is warranted.

Therefore, because defendant had actual knowledge that Midland Loan Services and the FDIC had the 2006 and 2005 loan documents, respectively, the trial court did not abuse its discretion by allowing the witnesses from those institutions to testify.

Defendant also argues that Campbell's and Robinson's testimony was inadmissible because they lacked personal knowledge.

MRE 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." The essence of defendant's objection to Campbell's and Robinson's testimony is that they lacked personal knowledge regarding the accuracy or authenticity of the loan documents that originally were created and maintained by Warren Bank. Both Campbell and Robinson acknowledged at trial that they lacked personal knowledge regarding the accuracy of those Warren Bank loan documents. But they knew that these records were kept by Warren Bank and they relied on those records themselves. Thus, they did have personal knowledge of how they arrived at their calculations.

Defendant's issue boils down to whether the witnesses' testimony was nonetheless inadmissible because they lacked personal knowledge regarding the underlying facts that they relied upon. However, "there is no requirement that the party offering a business record produce the author of the item." *FDIC v Staudinger*, 797 F2d 908, 910 (CA 10, 1986), citing Weinstein's Evidence, pp 803-179 to 803-181 (1985); see also *People v Kirtdoll*, 391 Mich 370, 387; 217 NW2d 37 (1974); *People v Safiedine*, 152 Mich App 208, 217; 394 NW2d 22 (1986), citing MRE 803(6). "Furthermore, '[a] foundation for admissibility may at times be predicated on judicial notice of the nature of the business and the nature of the records as observed by the court, particular in the case of bank and similar statement.'" *Staudinger*, 797 F2d at 910, quoting Weinstein's Evidence at 803-178. The types of records at issue here are the type typically maintained by banks in the ordinary course of business. And there was no dispute that, by virtue of him being appointed attorney-in-fact, Campbell was the current keeper of the records for the 2005 loan. Likewise, Robinson testified that FDIC contracted his company, Midland Loan Services, to manage the 2006 loan, and the FDIC provided him with the original 2006 loan documents. Given the circumstances of this case, where the FDIC assumed control over all of the records when it was appointed receiver over Warren Bank, the trial court did not abuse its discretion in allowing the admission of those records when the two latest custodians of those records testified regarding those records. The fact that they did not author or have other personal knowledge related to those documents did not affect their admissibility. *Safiedine*, 152 Mich App at 217; *Staudinger*, 797 F2d at 910; see also *Kirtdoll*, 391 Mich at 387; *Dalton v FDIC*, 987 F2d 1216, 1223 (CA 5, 1993) ("[A]n affidavit of an FDIC account officer is not defective solely because the officer did not have personal knowledge of the loan transaction when it occurred, and only learned about the loan after the bank went into receivership.").

D. POST-FORECLOSURE INTEREST

Defendant argues that the award to plaintiff of post-foreclosure interest is contrary to law. We agree. A trial court's determination of damages after a bench trial is reviewed for clear error. *Hannay v Dep't of Transp*, 299 Mich App 261, 271; 829 NW2d 883 (2013). A finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake was made. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 296; 769 NW2d 234 (2009).

After foreclosure, the rights and obligations of the parties are fixed by statute rather than controlled by the mortgage. *Senters v Ottawa Savings Bank, FSB*, 443 Mich 45, 52; 503 NW2d 639 (1993). That is because upon foreclosure, the mortgage itself becomes extinguished. *Bank of Three Oaks v Lakefront Props*, 178 Mich App 551, 555; 444 NW2d 217 (1989). In *Bank of*

Three Oaks, this Court stated that in a deficiency action, a mortgagor is liable for interest and taxes accruing before a foreclosure sale, but not liable for any interest or taxes accruing *after* the sale. *Id.* at 557, citing *New York Life Ins Co v Erb*, 276 Mich 610, 614-615; 268 NW 754 (1936); see also *Citizens Bank v Boggs*, 299 Mich App 517, 521; 831 NW2d 876 (2013). Instead, according to statute,[6] a mortgagor would be liable to pay post-foreclosure interest *only if the mortgagor chose to redeem the property*. *Citizens Bank*, 299 Mich App at 521, citing MCL 600.3240(1) and (2); *Bank of Three Oaks*, 178 Mich App at 555. Defendant in the instant case did not exercise the right to redemption, so the exception to the rule does not apply.

Here, the trial court awarded plaintiff interest of $74.04 per day "going forward, until paid in full." This was erroneous. The foreclosure sale occurred on August 28, 2009, which means that August 28, 2009, was the last date that interest could accrue.

The judgment also included an award of $484,120.95 for the 2005 loan and $108,359.93 for the 2006 loan. But these figures also included post-default interest up to March 14, 2012. Again, because the foreclosure occurred on August 28, 2009, that means that these awards erroneously included post-foreclosure interest.

Plaintiff's position that the rule in *Bank of Three Oaks* only applies to situations where the property was purchased for an amount equal to the amount owed by the mortgage is not accurate. The sentence that plaintiff relies on simply provides that "[w]hen property is purchased at a foreclosure sale for an amount equal to the amount due on the mortgage, the debt is satisfied." *Bank of Three Oaks*, 178 Mich App at 555. While this statement certainly is true, the Court did not rely on this rule in making its determination that Michigan statutes, which exclusively govern after a foreclosure sale, do not allow for the imposition of post-foreclosure interest. Instead, the salient rule is the one that provides that mortgages are extinguished upon foreclosure. *Id.* Furthermore, this Court recently in *Citizens Bank* reiterated the holdings of *Bank of Three Oaks*. *Citizens Bank*, 299 Mich App at 521, citing *Bank of Three Oaks*, 178 Mich App at 557.

E. ATTORNEY FEES AND COSTS

Defendant argues that plaintiff failed to offer any authority such that the trial court could award attorney fees and costs. We disagree.

"Under the American rule, attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or *contract*." *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005) (quotation marks omitted; emphasis added). Defendant is correct in that plaintiff did not supply any statute or court rule for in support of its position that it should be awarded attorney fees. However, plaintiff based its position on the contractual language of the various loan documents. In particular, the 2006 mortgage contains the following provision:

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[6] MCL 600.3240(1) and (2).

> If Lender institutes any suit or action to enforce any of the terms of this Mortgage, Lender shall be entitled to recover its reasonable attorneys' fees. Whether or not any court action is involved, and to the extent not prohibited by law, all reasonable expenses Lender incurs that in lender's opinion are necessary at any time for the protection of its interest or the enforcement of its rights shall become a part of the Indebtedness payable on demand . . . . Expenses covered by this paragraph include, without limitation, however subject to any limits under applicable law, Lender's reasonable attorneys' fees and Lender's legal expenses whether or not there is a lawsuit . . . . Grantor also will pay any court costs, in addition to all other sums provided by law.

Therefore, because the parties agreed that defendant would be liable for any incurred attorney fees and expenses, the trial court did not abuse its discretion in awarding those fees and costs.

Defendant next argues that the trial court's award of attorney fees should be modified because those attorney fees were not reasonable. However, defendant has abandoned this issue on appeal. Not only did defendant fail to mention this particular issue in his statement of the questions presented as required by MCR 7.212(C)(5), he failed to fully argue the merits of this issue. In particular, defendant cursorily states in his brief that

> [t]he amounts charged by attorneys Van Wyke and Powe are not reasonable pursuant to the factors stated in *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008). Furthermore, the amounts claimed by various legal assistants/paralegals should be denied because the FDIC failed to demonstrate that they meet the criteria set forth in Article 1, § 6 of the Bylaws of the State of Michigan. MCR 2.626."[7]

Defendant does not articulate *how* the amount of the awarded fees does not satisfy any *Smith* factor, and defendant does not identify what legal assistant/paralegal fees he is objecting to. "It is not sufficient for a party simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments . . . ." *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Accordingly, defendant has abandoned this particular issue on appeal. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Furthermore, with respect to defendant's claim that plaintiff failed to establish that it was entitled to any legal assistant/paralegal fees, defendant cites MCR 2.626, which simply provides that an award of *attorney fees* may include such assistant/paralegal fees if certain criteria is met under the bylaws of the State Bar of Michigan. However, this argument fails to account for the loan agreements, which permit plaintiff to recover "all reasonable expenses." Thus, even if the legal assistant/paralegal fees would not qualify as "attorney fees," per se, they nonetheless were recoverable as "expenses."

III. CONCLUSION

[7] Presumably, defendant was referring to the Bylaws of the State *Bar* of Michigan.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. On remand, the trial court is to revise the judgment by limiting the amount of post-default interest/fees to only those accruing before the foreclosure sale. We do not retain jurisdiction. No costs are taxable pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto