

STATE OF MICHIGAN
COURT OF APPEALS

JOHN G. WILSON, a/k/a JACK JOHN G.
WILSON,

UNPUBLISHED
March 20, 2014

Plaintiff-Appellant,

v

No. 313224
Berrien Circuit Court
LC No. 11-000194-CH

MUTUAL BANK,

Defendant-Appellee,

and

THOMAS S. WILSON,

Defendant.

Before: GLEICHER, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

In this action to set aside a foreclosure sale, plaintiff "Jack" John G. Wilson appeals as of right the trial court's order granting summary disposition to defendant Mutual Bank, and its order denying plaintiff's motion for reconsideration. Because we conclude that the waiver of the application of MCL 600.3224 in the mortgage contract was valid and enforceable, we affirm.

Plaintiff and defendant Thomas S. Wilson¹ owned two tracts of land jointly. In 2009, they mortgaged the two tracts of land to Mutual Bank. Relevant to this case, the mortgage contained a provision explicitly permitting the lender to sell all the property together in the event of a foreclosure.

When plaintiff and Thomas defaulted on the mortgage, Mutual Bank commenced foreclosure proceedings and sold the two tracts of land together at a foreclosure sale. Plaintiff thereafter filed the instant action claiming that the sale of the two lots together violated MCL

¹ Defendant Thomas Wilson is not a party to this appeal.

600.3224. In lieu of filing an answer, Mutual Bank moved for summary disposition, arguing that the waiver contained in the mortgage barred plaintiff's claims. Before plaintiff responded to the motion, the trial court granted summary disposition in favor of Mutual Bank, finding that the waiver in the mortgage barred plaintiff's suit.

Thereafter, plaintiff moved the trial court to reconsider its ruling on the motion for summary disposition, arguing that no hearing had been held on the issue and plaintiff had not been provided with a chance to respond. The trial court entered an order indicating that no hearing had taken place and that it would allow the parties to brief any relevant issues on plaintiff's motion for reconsideration.² Plaintiff argued in relevant part that the waiver in the mortgage was violative of Michigan law and void as being against public policy. The trial court denied plaintiff's motion for reconsideration, and this appeal followed.

On appeal, plaintiff argues that there was a genuine issue of material fact because Mutual Bank violated MCL 600.3224 during the foreclosure sale, and plaintiff's waiver of his rights under MCL 600.3224 was invalid "as a clog on the equity of redemption" and because the waiver was contrary to Michigan's policies regarding mortgages. Specifically, plaintiff maintains that he was not aware of the waiver provision in the mortgage and that equity should bar its application because the sale of both parcels together "blocked" him from redeeming his property.³

We review for an abuse of discretion a trial court's decision on a motion for reconsideration. *Sherry v East Suburban Football League*, 292 Mich App 23, 31; 807 NW2d 859 (2011). We review de novo a trial court's decision on a motion for summary disposition. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205; 815 NW2d 412 (2012). A motion for summary disposition pursuant to MCR 2.116(C)(10) "tests the factual sufficiency of the complaint." *Id.* at 206. Summary disposition is proper where there is no "genuine issue regarding any material fact." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Additionally, "[t]he proper interpretation of a contract is a question of law, which this Court reviews de novo." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 48; 664 NW2d 776 (2003).

MCL 600.3224 states:

² We note that plaintiff does not raise any challenge on appeal regarding the procedural irregularities in the trial court.

³ We note that Mutual Bank argues that plaintiff's appeal should be deemed abandoned because plaintiff has failed to provide this Court with transcripts from the trial court proceedings. However, we decline to find that plaintiff abandoned his appeal because all the facts necessary for resolution of the issues before us are part of the record, see *Watkins v Manchester*, 220 Mich App 337, 341; 559 NW2d 81 (1996). Further, based on our review of the record it is clear that no hearing regarding the motion for summary disposition or for reconsideration was conducted; thus, there are no relevant transcripts to provide.

If the mortgaged premises consist of distinct farms, tracts, or lots not occupied as 1 parcel, they shall be sold separately, and no more farms, tracts, or lots shall be sold than shall be necessary to satisfy the amount due on such mortgage at the date of the notice of sale, with interest and the cost and expenses allowed by law but if distinct lots be occupied as 1 parcel, they may in such case be sold together.

In this case, the mortgage contained a provision waiving the application of MCL 600.3224. The provision stated:

Sale of the Property. To the extent permitted by applicable law, Borrower and Grantor hereby waive any and all right to have the Property marshaled. In exercising its rights and remedies, Lender shall be free to sell all or any part of the Property together or separately, in one sale or by separate sales and Grantor waives Grantor's rights under MCLA Section 600.3224 to have separate parcels sold separately and to have no more parcels than necessary sold. Lender shall be entitled to bid at any public sale on all or any portion of the Property.

We will enforce unambiguous contracts as written. *Rory v Continental Ins Co*, 473 Mich 457, 491; 703 NW2d 23 (2005). Moreover, "parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy." *Wilkie*, 469 Mich at 51.

Further, the application of MCL 600.3224 may be waived by parties to a mortgage contract. *Clark v Stilson*, 36 Mich 482, 485-486 (1877). See also *Metropolitan Life Ins Co v Foote*, 95 Mich App 399, 404; 290 NW2d 158 (1980) (citing *Clark* and enforcing a provision in the parties' mortgage contract that specifically permitted the sale of the property "en masse").

We conclude, and plaintiff does not dispute, that the plain language of this unambiguous provision waives the application of MCL 600.3224 and permits the joint sale of the properties. Moreover, we reject plaintiff's claims that the waiver should not be enforced because he did not realize the waiver was included in the mortgage contract or because the waiver itself contravenes public policy as a "clog on the equity of redemption."

In *Watts v Polaczyk*, 242 Mich App 600, 604; 619 NW2d 714 (2000), this Court observed that "Michigan law presumes that one who signs a written agreement knows the nature of the instrument so executed and understands its contents." Further, this Court noted that "mere failure to read an agreement is not a defense in an action to enforce the terms of a written agreement." *Id.* See also *Wilkie*, 469 Mich at 59, quoting *Farm Bureau Mut Ins Co of Mich v Nikkel*, 460 Mich 558, 567-568; 596 NW2d 915 (1999) (noting that the Court "has many times held that one who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms."). Accordingly, plaintiff's claim of ignorance of the waiver provision has no bearing on the provision's enforceability.

Similarly, to the extent plaintiff relies on *Batty v Snook*, 5 Mich 231 (1858) and *Russo v Wolbers*, 116 Mich App 327, 338; 323 NW2d 385 (1982), to argue that the waiver is a "clog on the equity of redemption" and is void as against public policy, we note that those cases deal with

a waiver of the right of redemption, rather than the right to have separate parcels sold separately under MCL 600.3224. Accordingly, we find both cases inapplicable and unconvincing.

Finally, we note that the waiver provision in this case is not void as against public policy, as Michigan Courts have recognized the validity of such waivers and upheld their application. See *Clark*, 36 Mich at 485; *Footte*, 95 Mich App at 404; *Imperial Constr Co, Inc v Indep Bank*, unpublished opinion per curiam of the Court of Appeals, issued March 17, 2011 (Docket No. 295728) (holding that a provision in a mortgage contract waiving application of MCL 600.3224 was enforceable and did not contravene public policy).⁴ Moreover, plaintiff has failed to articulate any persuasive reason to support his contention that Mutual Bank should be deprived of the contractual provision for which it contracted, and we find none.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Elizabeth L. Gleicher

/s/ Joel P. Hoekstra

/s/ Peter D. O'Connell

⁴ While we recognize that we are not bound by *Footte*, because it was decided before November 1, 1990 or by *Imperial Constr Co, Inc*, because it is unpublished, we find the reasoning in both cases applicable and persuasive. *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2013); *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136 n 3; 783 NW2d 133 (2010).