

STATE OF MICHIGAN
COURT OF APPEALS

WELLS FARGO BANK,

Plaintiff-Appellee,

v

RONALD R. HARRIS,

Defendant-Appellant.

UNPUBLISHED

June 10, 2014

No. 314785

Oakland Circuit Court

LC No. 2012-125254-CK

Before: WILDER, P.J., and SAAD and K. F. KELLY, JJ.

PER CURIAM.

In this breach of contract action, defendant, Ronald R. Harris, appeals as of right from a final order in favor of plaintiff, Wells Fargo Bank. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS

Plaintiff brought a breach of contract action against defendant for defendant's default on a home equity access line of credit. Several months later, plaintiff filed a motion for summary disposition pursuant to MCR 2.116(C)(8) (failure to state a claim), (C)(9) (failure to state a valid defense) and (C)(10) (no genuine issue of material fact). Plaintiff argued that defendant set forth only general denials in his answer to plaintiff's complaint and subsequently failed to respond to requests for admissions. As a result, plaintiff argued that there were no material fact issues remaining and that it was entitled to judgment as a matter of law.¹

Defendant responded that plaintiff's action was the result of an improper foreclosure. Defendant claimed that plaintiff violated MCL 600.3205c by failing to comply with the loan modification process prior to the foreclosure. As a result, "Plaintiff must be ordered to rescind the Sheriff's Sale for the subject property and reinstate the note that is the subject of this lawsuit."

¹ Although plaintiff attached its Requests for Admissions as an exhibit to the motion for summary disposition, the requests are not part of the lower court record.

At the hearing on plaintiff's motion, the trial court found that plaintiff was entitled to judgment as a matter of law on the issue of liability. The trial court first noted that defendant no longer had standing to challenge the foreclosure. And, even if defendant had standing to raise the issue, he did not dispute his liability under the parties' home equity loan agreement. However, the trial court noted its concern as to the amount of damages requested, noting a discrepancy between the complaint and the affidavit in support of plaintiff's motion for summary disposition. Thus, the only issue remaining was the amount of damages.

Following the trial court's denial of defendant's motion for reconsideration, plaintiff filed a "motion to amend the scheduling order." Plaintiff pointed out that, in failing to answer plaintiff's requests to admit, defendant "admitted" that the computation of damages was accurate. And, while the scheduling order required dispositive motions to be filed by November 9, 2012, the trial court could save time by considering an additional motion for summary disposition regarding the amount of damages. Plaintiff further indicated that it was willing to accept less than the amount requested. Defendant opposed the motion, arguing that "Plaintiff has in effect requested a Motion for Reconsideration out of time."

The trial court treated plaintiff's motion to amend the scheduling order as a motion for reconsideration and granted judgment for plaintiff based on defendant's failure to contest the amount owed and the failure to answer the request to admit. The trial court subsequently denied defendant's motion for reconsideration, rejecting defendant's argument that the trial court was precluded from considering plaintiff's motion "out of time."

The trial court entered a final judgment for plaintiff against defendant in the amount of \$134,600.16, plus costs and \$75 statutory attorney fee. Defendant now appeals as of right.

II. SUMMARY DISPOSITION

Defendant first argues that the trial court erred when it concluded that defendant failed to establish a "viable cause of action under MCL 600.3205c," which required plaintiff to consider defendant for a loan modification prior to instituting foreclosure proceedings. However, defendant obviously was not bringing a cause of action; instead, he was defending against plaintiff's breach of contract claim by arguing that the foreclosure and subsequent sheriff's deed were invalid.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

Although trial court appears to have granted summary disposition pursuant to MCR 2.116(C)(8), (C)(9), and (C)(10), it would appear that (C)(8) has no application because it tests the legal sufficiency of the claim solely on the basis of the pleadings. *Dalley v Dykema Gossett*, 287 Mich App 296, 304–305; 788 NW2d 679 (2010). Again, defendant has not stated a claim against plaintiff. Instead, it appears that (C)(9) applies and provides that summary disposition is appropriate when the opposing party has failed to state a valid defense. "When deciding a motion under MCR 2.116(C)(9), which tests the sufficiency of a defendant's pleadings, the trial court must accept as true all well-pleaded allegations and properly grants summary disposition

where a defendant fails to plead a valid defense to a claim.” *Slater v Ann Arbor Pub Schools Bd of Ed*, 250 Mich App. 419, 425; 648 NW2d 205 (2002). Whereas,

Summary disposition is appropriate under MCR 2.116(C)(10) if, “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” “A genuine issue of material fact exists when, viewing the evidence in a light most favorable to the nonmoving party, the record which might be developed . . . would leave open an issue upon which reasonable minds might differ.” In deciding whether to grant a motion for summary disposition pursuant to MCR 2.116(C)(10), a court must consider “[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties,” in the light most favorable to the nonmoving party. [*Bonner v City of Brighton*, ___ Mich ___; ___ NW2d ___ (Docket No. 146520, decided April 24, 2014) slip op, pp 9-10.]

At the October 31, 2012, hearing on plaintiff’s motion for summary disposition, the trial court found that plaintiff was entitled to judgment as a matter of law on the issue of liability:

In response to the motion [for summary disposition], defendant does not dispute his liability under the terms of the note. Rather, defendant argues this action is based on a deficiency after an improper mortgage foreclosure on the Sandbar property. Defendant claims he’s entitled to a setoff based on the sales proceeds and is entitled to a setoff for improper foreclosure.

According to the sheriff’s deed attached to defendant’s response, the sheriff’s sale occurred on January 19, 2011. If true, the redemption period expired on July 19, 2011 and plaintiff no longer has any standing to challenge that foreclosure. This is because, although unpublished, several panels of the Michigan Court of Appeals upheld a party lacks standing to challenge a foreclosure sale after their property rights are extinguished when the redemption period expires. See *Awad v GMAC Corporation*, an unpublished per curiam opinion that the Court of Appeals issued April 24, 2012, Docket No. 302692; *Overton v Mortgage Electronic Registration System*, an unpublished per curiam opinion that the Court of Appeals issued May 29, 2009, Docket No. 284950; and *Mission of Love v Evangelist Hutchinson Ministries and George W. Hutchinson*, an unpublished per curiam opinion of the Court of Appeals issued April 27, 2007, Docket No. 266219.

This Court is persuaded by the reasoning in *Awad*, *Overton* and *Mission of Love*, which is supported by the Michigan Supreme Court’s decision in *Piotrowski v State Land Office Board*, 302 Michigan 179, holding a party loses all their right, title and interest in and to the property at the expiration of the right of redemption.

Further, even if defendant still had standing, he entirely fails to cite any authority (indiscernible) in his defense of a breach of contract action on a loan secured by a mortgage of the property.

The Court finds that defendant fails to proffer any evidence contradicting plaintiff's assertion that defendant defaulted under the terms of the note. As a result, defendant fails to establish a question of fact regarding plaintiff's entitlement to judgment as a matter of law regarding defendant's liability under the agreement.

Under MCL 600.3240, after a sheriff's sale is completed, a mortgagor may redeem the property by paying the requisite amount within the applicable prescribed time limit, which here was six months. MCL 600.3240(1) and (7). "Unless the premises described in such deed shall be redeemed within the time limited for such redemption as hereinafter provided, such deed shall thereupon become operative, and shall vest in the grantee therein named, his heirs or assigns, all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter . . ." MCL 600.3236; see *Piotrowski v State Land Office Bd*, 302 Mich 179, 187; 4 NW2d 514 (1942). If a mortgagor fails to avail himself of the right of redemption "all plaintiffs' rights in and to the property [are] extinguished." *Piotrowski*, 302 Mich at 187. By failing to redeem the property within the applicable time, a homeowner loses standing to bring a claim challenging the foreclosure. *Bryan v JP Morgan Chase Bank*, ___ Mich App ___; ___ NW2d ___ (Docket No. 313279, decided April 10, 2014), slip op, pp 3-4.² In failing to

² In *Bryan*, this Court specifically adopted the reasoning of the unpublished cases that the trial court referenced.

We have reached this conclusion in a number of unpublished cases and, while unpublished cases are not precedentially binding, we find the analysis and reasoning in each of the following cases to be compelling. MCR 7.215(C)(1). Accordingly, we adopt their reasoning as our own. See *Overton v MERS*, unpublished opinion of the Court of Appeals, issued May 28, 2009 (Docket No. 284950) ("The law in Michigan does not allow an equitable extension of the period to redeem from a statutory foreclosure sale in connection with a mortgage foreclosed by advertisement and posting of notice in the absence of a clear showing of fraud or irregularity ... Once the redemption period expired, all of plaintiff's rights in and title to the property were extinguished."); *Hardwick v HSBC Bank USA*, unpublished opinion per curiam of the Court of Appeals, issued July 23, 2013 (Docket No. 310191) ("Plaintiffs lost all interest in the subject property when the redemption period expired.... Moreover, it does not matter that plaintiffs actually filed this action one week before the redemption period ended. The filing of this action was insufficient to toll the redemption period....Once the redemption period expired, all plaintiffs' rights in the subject property were extinguished."); *BAC Home Loans Servicing, LP v Lundin*, unpublished opinion per curiam of the Court of Appeals, issued May 23, 2013 (Docket No. 309048) ("[O]nce the redemption period expired, [plaintiff's] rights in and to the property

redeem the property, defendant has lost standing to challenge the irregularities related to the foreclosure proceeding.

We further note that, even if defendant had “standing” to raise the issue as a defense, in the face of a violation of MCL 600.3205c, defendant’s remedy was to seek an immediate injunction and convert the action from a foreclosure by advertisement to a judicial foreclosure pursuant to MCL 600.3205c(8). There is no common law counterpart to the modification statute; the statutory provisions impose upon lenders and servicers new duties where no such duties previously existed, and grant borrowers new rights. Thus, the statute provided the exclusive remedy for its violation. “As a general rule, the remedies provided by statute for violation of a right having no common-law counterpart are exclusive, not cumulative.” *Dudewicz v Norris-Schmid, Inc.*, 443 Mich 68, 78; 503 NW2d 645 (1993) overruled in part on other grounds 478 Mich 589 (2007).

In conclusion, defendant did not state a valid defense to plaintiff’s breach of contract action because defendant’s allegation regarding foreclosure irregularities was tantamount to a collateral attack on the foreclosure and, by failing to redeem the property, defendant has lost the ability to challenge the process. Moreover, even if defendant had standing to raise the alleged irregularities as a defense, the modification statute provided the exclusive remedy for its violations. There being no issue of fact as to defendant’s liability, the trial court properly entered judgment for plaintiff as a matter of law.

III. MOTION FOR RECONSIDERATION

Defendant next argues that the trial court erred when it granted plaintiff’s motion to amend the scheduling order because the motion was actually an untimely motion for reconsideration.

The trial court, and not plaintiff, treated the motion as one for reconsideration. “[A] court is not bound by a party’s choice of labels.” *Attorney Gen v Merck Sharp & Dohme Corp.*, 292 Mich App 1, 9–10; 807 NW2d 343 (2011).

were extinguished....Because [plaintiff] had no interest in the subject matter of the controversy [by virtue of MCL 600.3236], he lacked standing to assert his claims challenging the foreclosure sale.”); *Awad v Gen Motors Acceptance Corp.*, unpublished opinion per curiam of the Court of Appeals, issued April 24, 2012 (Docket No. 302692) (“Although she filed suit before expiration of the redemption period, [plaintiff] made no attempt to stay or otherwise challenge the foreclosure and redemption sale. Upon the expiration of the redemption period, all of [plaintiff’s] rights in and title to the property were extinguished, and she no longer had a legal cause of action to establish standing.”). We hold that by failing to redeem the property within the applicable time, plaintiff lost standing to bring her claim. [*Bryan*, slip op, pp 3-4.]

“We review for an abuse of discretion a trial court's decision on a motion for reconsideration. An abuse of discretion occurs if the trial court's decision falls outside the principled range of outcomes.” *Macomb Co Dep't of Human Services v Anderson*, ___ Mich App ___; ___ NW2d ___ (Docket No. 313951, issued April 15, 2014), slip op, p 3 (internal citations omitted).

When the trial court initially granted plaintiff summary disposition on the issue of defendant's liability, it noted its concern as to the amount of damages requested: “The Court will note that it's unclear how plaintiff arrived at that figure [\$148,016.29]. The affidavit filed in support of this motion references a debt in the principal amount of \$134,600.16. The affidavit filed with the complaint claims a debt of \$148,016.29.” For that reason, the trial court found a question of fact as to the amount of defendant's liability.

Thereafter, plaintiff filed a “motion to amend the scheduling order.” Plaintiff pointed out that, in failing to answer plaintiff's requests to admit, defendant “admitted” that the computation of damages was accurate. And, while the scheduling order required dispositive motions to be filed by November 9, 2012, the trial court could save time by considering an additional motion for summary disposition regarding the amount of damages. Plaintiff further indicated that it was willing to accept less than the amount requested. Defendant opposed the motion, arguing that “Plaintiff has in effect requested a Motion for Reconsideration out of time.”

At a hearing on plaintiff's motion to amend the scheduling order, plaintiff's counsel indicated that “[w]hat had happened between the time the suit was filed and the time plaintiff filed its motion for summary disposition, plaintiff, through an internal decision, decided to waive the interest. So the interest that was requested in plaintiff's complaint is no longer being requested and that was the reason for the lower amount in plaintiff's affidavit.” The following exchange took place:

THE COURT: Did you respond to the request to admit?

MR. FAIR [defense counsel]: No, your Honor.

THE COURT: Why not?

MR. FAIR: Well, because we were defending the whole lawsuit as a whole. And if the Court knows, they filed their motion for summary disposition, the Court had the opportunity to review the file. They could have -- they brought this up before, or they should have brought it up before, and now they're asking the Court for a do-over, which is essentially a motion for reconsideration, and it's (indiscernible). The Court has already ruled on this issue.

THE COURT: Well, but at this point what I'm dealing with is you refused to answer the request to admit, therefore you've admitted the amount owed, therefore they're entitled to judgment.

I'll grant judgment in the amount of \$134,600.16.

MS. OLIVIER [plaintiff's counsel]: Thank you, your Honor.

MR. FAIR: Thanks, your Honor.

THE COURT: That's based on the failure to answer the request to admit and the fact that your affidavit indicates that's the amount owed.

In denying defendant's motion for reconsideration from entry of judgment, the trial court noted:

Michigan law is well-settled that Courts are not bound by the labels that parties attach to their claims. As a result, the Court was not in error to consider Plaintiff's Motion as one for reconsideration. As stated, even Defendant acknowledges that Plaintiff's motion was one for reconsideration.

Further, Michigan caselaw is clear that Courts have broad discretion when deciding a motion for reconsideration. Included in that broad discretion is the discretion to consider untimely motions.

For the foregoing reasons, the Court finds that Defendant has failed to demonstrate that the Court committed palpable error when it exercised its discretion to hear Plaintiff's Motion as a motion for reconsideration filed 40 days after the October 31, 2012 Opinion and Order re: Summary Disposition (and only 11 days after the Court denied Defendant's November 21, 2012 Motion for Reconsideration on the same decision).

The trial court was correct in finding that it had broad discretion to reconsider its previous ruling. MCR 2.119(F)(1) provides "[u]nless another rule provides a different procedure for reconsideration of a decision . . . , a motion for rehearing or reconsideration of the decision on a motion must be served and filed not later than 21 days after entry of an order deciding the motion." However, under MCR 2.604(A), a rule expressly referenced in MCR 2.119(F), an order that does not dispose of all issues in a case does not terminate the action and "is subject to revision before entry of final judgment adjudicating all the claims and the rights and liabilities of all the parties." "The court rules therefore give the trial court explicit procedural authority to revisit an order while the proceedings are still pending and, on that reconsideration, to determine that the original order was mistaken, as the trial court did here." *Hill v City of Warren*, 276 Mich App 299, 307; 740 NW2d 706 (2007). This Court has held:

The purpose of MCR 2.119(F) is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal, but at a much greater expense to the parties. 1 Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), p. 537. The time requirement for filing a motion for reconsideration or rehearing insures that the motion will be brought expeditiously. Concerning the application of this rule, this Court in *Smith v Sinai Hospital of Detroit*, 152 Mich App 716, 723, 394 NW2d 82 (1986), stated:

"If a trial court wants to give a 'second chance' to a motion it has previously denied, it has every right to do so, and this court rule does nothing to prevent this exercise of discretion. All this rule does is provide

the trial court with some guidance on when it may wish to deny motions for rehearing.”

There is no suggestion in the court rules that the filing requirements for rehearing motions should be considered jurisdictional. [*Bers v Bers*, 161 Mich App 457, 462; 411 NW2d 732 (1987).]

Thus, while a trial court does not abuse its discretion in denying a motion for reconsideration that is filed outside of the time allotted, a trial court is not necessarily divested of its discretion to consider untimely motions for reconsideration. Once the trial court was presented with the reason for plaintiff’s discrepancy in the amount of damages sought, there was no longer an issue remaining in the case and judgment was properly entered in plaintiff’s favor.

Affirmed. As the prevailing party, plaintiff may tax costs. MCR 7.219

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Kirsten Frank Kelly