

STATE OF MICHIGAN
COURT OF APPEALS

JEFFREY M. DAVIS,

Plaintiff-Appellant,

v

GMAC and affiliated entities, and MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS,
INC.

Defendant-Appellees.

UNPUBLISHED

June 17, 2014

No. 307721

Oakland Circuit Court

LC No. 2011-116494-CH

JEFFREY M. DAVIS,

Plaintiff-Appellant,

v

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

Defendant-Appellees.

No. 313846

Oakland Circuit Court

LC No. 2012-127086-CH

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

PER CURIAM.

The trial court rejected plaintiff's claims under MCL 600.3201 *et seq.* and granted summary disposition to defendants under MCR 2.116(C)(8) and 2.116(C)(10). For the reasons stated below, we affirm.

I. FACTS AND PROCEDURAL HISTORY

In March 2008, plaintiff refinanced his home mortgage through a loan provided by defendant GMAC Mortgage, LLC (“GMACM”).¹ At closing, plaintiff signed a note and granted defendant Mortgage Electronic Registration Systems, Inc (“MERS”) a mortgage interest in the property, as nominee for GMACM. The mortgage agreement specified that if plaintiff failed to make monthly payments pursuant to the note, his property could be foreclosed.

Though plaintiff initially made the monthly payments required by the note, he stopped doing so after he was laid off from work in 2010. GMACM considered plaintiff for loan modification multiple times, but plaintiff did not qualify because he did not possess sufficient income. Accordingly, MERS commenced foreclosure by advertisement proceedings, which resulted in a sheriff’s sale of plaintiff’s home in August 2010. Prior to the sale, MERS informed plaintiff of his right to request mediation pursuant to MCL 600.3205a,² and plaintiff attended mediation.

After the sale, plaintiff made no attempt to redeem his property pursuant to MCL 600.3240. Instead, he filed suit against defendants in January 2011 in Oakland Circuit Court, and asked the court to: (1) set aside the foreclosure and sheriff’s sale; (2) compel defendants to modify his loan; (3) revoke all costs, expenses, and interest claimed by defendants; and (4) grant him damages for emotional distress because of the foreclosure sale.

To comply with a since overruled opinion of this Court,³ defendants effectively granted plaintiff’s requests from April to June 2011, when they rescinded the foreclosure, expunged the sheriff’s deed, and reinstated plaintiff’s mortgage. GMACM also contacted credit-rating agencies and asked them to remove reference to the foreclosure sale from plaintiff’s credit reports.

Though defendants thus voluntarily granted much of what plaintiff demanded in his suit, plaintiff refused to dismiss the action, and defendants filed a motion for summary disposition under MCR 2.116(C)(8) and/or 2.116(C)(10). Specifically, defendants stated that plaintiff’s foreclosure-related claims had been rendered moot, because he had received the relief he requested, and that his emotional distress claim lacked evidentiary support and failed as a matter of law.

The trial court granted defendants’ motion from the bench in November 2011.⁴ It held that: (1) plaintiff’s foreclosure-related claims became moot when defendants set aside the

¹ Plaintiff’s complaint improperly identified defendant GMACM as “GMAC.”

² MCL 600.3205a to 600.3205d were subsequently repealed by the Legislature in 2012 PA 521, which became effective on June 30, 2013, after the events relevant to these appeals.

³ *Residential Funding Co, LLC v Saurman*, 292 Mich App 321; 807 NW2d 412 (2011), rev’d 490 Mich 909 (2011).

⁴ The trial court stated that it granted summary disposition under both MCR 2.116(C)(8) and 2.116(C)(10).

foreclosure and restored plaintiff's right to the property; and (2) plaintiff failed to provide any evidence to sustain his claim of emotional distress, and that such claims are usually not recognized in a contractual relationship.

Plaintiff appealed the case to our Court in December 2011. However, our Court closed the appeal, subject to reopening, because of issues related to defendant's bankruptcy.⁵ In the interim, plaintiff continued to live in the house rent-free, and did not make payments under a loan modification proposal. Accordingly, defendants once again foreclosed on the property, and the sheriff conducted a sale in May 2012. Plaintiff launched another lawsuit against defendants in that same month, and alleged defendants violated MCL 600.3205a and 600.3205c during the second foreclosure proceeding. Defendants again moved for summary disposition under MCR 2.116(C)(8) and argued that they had complied with both MCL 600.3205a and 600.3205c. The trial court granted defendants' motion, and held that plaintiff failed to show fraud or irregularity in the May 2012 foreclosure proceeding.

Plaintiff appealed this decision to our Court, and, after defendant GMACM's bankruptcy proceedings were resolved, asked that his earlier suit be consolidated with his second action, because they involved the same underlying facts and claims. We granted his motion and consolidated the cases in February 2014.⁶ In the consolidated appeals, plaintiff argues that the trial court erred when it: (1) dismissed his foreclosure-related claims as moot; (2) held that he failed to show defendants violated MCL 600.3205a and 600.3205c; and (3) rejected his claim of emotional distress. Defendants ask us to affirm the awards of summary disposition.

II. STANDARD OF REVIEW

Our Court reviews de novo a trial court's decision to grant a motion for summary disposition. *Braverman v Granger*, 303 Mich App 587, 595; 844 NW2d 485 (2014). MCR 2.116(C)(8) permits summary disposition when a plaintiff's complaint fails "to state a claim on which relief can be granted." The rule therefore "tests the legal sufficiency of the complaint on the basis of the pleadings alone." *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). A motion under MCR 2.116(C)(8) "may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

MCR 2.116(C)(10) states that a court may grant summary disposition when "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." Accordingly, the court must test "the factual sufficiency of the complaint" through consideration of "affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the

⁵ *Jeffrey M Davis v GMAC*, unpublished order of the Court of Appeals, entered June 13, 2012 (Docket No. 307721).

⁶ *Jeffrey M Davis v GMAC*, unpublished order of the Court of Appeals entered February 19, 2014 (Docket No. 307721).

motion.” *Maiden*, 461 Mich at 120. The non-moving party “may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.” *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

III. ANALYSIS

A. FORECLOSURE BY ADVERTISEMENT

Foreclosure by advertisement is a method by which a party owed money under a mortgage agreement can recoup its losses through sale of the mortgaged property. In Michigan, the practice is regulated by MCL 600.3201 *et seq.*, which requires, among other things, that the party foreclosing the mortgage provide notice to the delinquent mortgagor under MCL 600.3205a(1). In addition, mortgagees initiating foreclosure by advertisement must attempt to modify the loan agreement if the mortgagor requests modification and meets certain conditions. See MCL 600.3205c. Though they are governed by statute, foreclosures by advertisement

are a matter of contract, authorized by the mortgagor, and ought not to be hampered by an unreasonably strict construction of the law. Harsh results may and often do occur because of mortgage foreclosure sales, but we have never held that because thereof, such sale should be enjoined, when no showing of fraud or irregularity is made. [*Church & Church, Inc v A-1 Carpentry*, 281 Mich App 330, 339–340; 766 NW2d 30 (2008); vacated in part and aff’d in part on other grounds, 483 Mich 885; 759 NW2d 877 (2009).]

If the mortgagor believes that the foreclosing party began “foreclosure proceedings under this chapter in violation of [MCL 600.3201, *et seq.*],” he may make a motion in circuit court to convert the foreclosure by advertisement into judicial foreclosure. MCL 600.3205c(8). Because Michigan’s foreclosure-by-advertisement statute is intended to give finality to purchasers of foreclosed properties,⁷ a court’s ability to set aside a foreclosure sale is limited. See *Schulthies v Barron*, 16 Mich App 246, 248; 167 NW2d 784 (1969). The party seeking to do so must show “a strong case of fraud or irregularity, or some peculiar exigency.” *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 497; 739 NW2d 656 (2007).⁸

Here, plaintiff makes a number of disjointed and unsupported claims that defendants violated MCL 600.3205a and 600.3205c without providing any evidence that defendants actually violated the statutes. “An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority.” *Peterson Novelties, Inc v City of*

⁷ See *Mills v Jirasek*, 267 Mich 609, 614; 255 NW 402 (1934).

⁸ Though it is a federal case and thus not binding on Michigan courts, see *Conlin v Mortgage Electronic Registration Systems, Inc*, 714 F3d 355, 359–360 (CA 6, 2013) for a detailed explanation of the limits on judicial action in foreclosure-by-advertisement cases.

Berkley, 259 Mich App 1, 14; 672 NW2d 351 (2003). The record also belies plaintiff's assertions, as defendants conducted the foreclosure by advertisement pursuant to MCL 600.3205a(1) and provided plaintiff with the detailed notice required by the statute. And despite plaintiff's unsubstantiated protestations to the contrary, defendants considered him for loan modification pursuant to MCL 600.3205c on multiple occasions, and found that he did not qualify. Further, if plaintiff actually believed that defendants violated MCL 600.3205a and 600.3205c, the proper remedy was to seek conversion to judicial foreclosure under MCL 600.3205c(8), which he did not do.

In any event, as the trial court noted, the foreclosure-related relief plaintiff sought in his 2011 action was granted—by defendants. They rescinded the foreclosure, expunged the sheriff's deed, and reinstated plaintiff's mortgage. “An issue is moot when an event occurs which renders it impossible for the reviewing court to grant any relief.” *Plumbers and Pipefitters Local Union No 190 v Wolff*, 141 Mich App 815, 818; 369 NW2d 237 (1985).

As defendants essentially granted the relief plaintiff requested in his 2011 lawsuit (when they rescinded the first foreclosure) and followed the mandates of MCL 600.3205a and 600.3205c at all times relevant to these proceedings (during both the rescinded 2011 foreclosure, and the 2012 foreclosure at issue in plaintiff's 2012 action), the trial court correctly rejected plaintiff's foreclosure-related claims.

B. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

“Damages for mental (emotional) distress are not normally recoverable in breach of contract actions.” *Hajciar v Crawford and Co*, 142 Mich App 632, 637; 369 NW2d 860 (1985), citing *Kewin v Massachusetts Mutual Life Ins Co*, 409 Mich 401; 295 NW2d 50 (1980). This is because any breach of contract is likely to cause “vexation and annoyance” to both parties. *Stewart v Rudner*, 349 Mich 459, 470; 84 NW2d 816 (1957). Accordingly, emotional distress from a contract breach cannot be a basis for damages, “unless . . . the contract was made specially to procure exemption” from emotional distress. *Id.* at 471.⁹ In most instances, the party seeking damages for emotional distress from a contract breach will need to demonstrate that tortious conduct exists independently of the breach of contract. *Wendt v Auto Owners Ins Co*, 156 Mich App 19, 25; 401 NW2d 375 (1986).

“In order to state a claim of intentional infliction of emotional distress, a plaintiff must show (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress.” *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 582; 603 NW2d 816 (1999). “Liability for such a claim has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all

⁹ See also *Valentine v General American Credit, Inc*, 420 Mich 256, 261–262; 362 NW2d 628 (1984) (“the courts of this state have qualified the general rule, pursuant to which mental distress damages for breach of contract are not recoverable, with a narrow exception,” namely, extreme circumstances, such as when a party breached a promise to marry, or a doctor breached a promise to deliver a child by caesarean section).

possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community.” *Id.* at 582–583.

Here, plaintiff unconvincingly asserts that defendants’ conduct after *he* breached a contract entitles him to damages for emotional distress. As noted, Michigan courts do not usually permit parties to recover damages for emotional distress in contract suits, absent extreme circumstances or the existence of an independent basis for tort liability. Plaintiff fails to demonstrate that his circumstance is extreme or unusual, nor does he provide any evidence that defendants’ conduct was so “outrageous” that it warrants the imposition of damages for emotional distress. Instead, plaintiff merely makes repeated and unsupported assertions that defendants caused him emotional distress, without even reciting the specific elements and relevant Michigan case law on that tort. Again: “an appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority.” *Peterson Novelties*, 259 Mich App at 14.

In any event, plaintiff’s claim fails as a matter of law. Defendants’ conduct was hardly “outrageous”—in fact, it adhered to its statutory responsibilities under MCL 600.3201 *et seq.* when it sought to foreclose the property by advertisement. Further, Michigan courts and federal courts applying Michigan law have repeatedly held that plaintiffs may not claim emotional distress in foreclosure actions.¹⁰

The trial court therefore properly rejected plaintiff’s claim of emotional distress, and granted summary disposition to defendants.

IV. CONCLUSION

Accordingly, the trial court correctly rejected plaintiff’s claims and granted defendants summary disposition.

¹⁰ See, for example, *Ursery v Option One Mortgage Corp*, unpublished opinion per curiam of the Court of Appeals, issued July 31, 2007 (Docket No. 271560), p 9 (holding that breach of mortgage agreement “does not rise to the level of conduct necessary to satisfy the [intentional infliction of emotional distress] standard in Michigan case law”); *Chungag v Wells Fargo Bank, NA*, 2011 WL 672229 at *6 (ED Mich, Feb 17, 2011) (ruling that “[b]ecause Plaintiffs allege no facts that would impose a duty on Defendant . . . that is distinct from its contractual obligations under their mortgage loan, they cannot state a claim of intentional infliction of emotional distress”); and *Houston v US Bank Home Mortgage Wisconsin Servicing*, 2011 WL 1641898 at *8 (ED Mich, May 2, 2011) (noting the demanding nature of the standard for intentional infliction of emotional distress claims under Michigan law, and stating that “it is not sufficient to show [the existence of IIED] that the defendant acted tortuously, intentionally, or even criminally”).

Affirmed.

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