

STATE OF MICHIGAN  
COURT OF APPEALS

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BANK OF NEW YORK MELLON, f/k/a BANK  
OF NEW YORK,

UNPUBLISHED  
March 17, 2015

Plaintiff-Appellee,

v

No. 319432  
Kalamazoo Circuit Court  
LC No. 2012-000397-CH

JULIE M. BECKER-ZABAVSKI,

Defendant-Appellant.

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Before: M. J. KELLY, P.J., and MURPHY and HOEKSTRA, JJ.

PER CURIAM.

Defendant, Julie M. Becker-Zabavski, appeals by right the trial court's order denying her motion to set aside the default under MCR 2.603(D)(1). Because we conclude there were no errors warranting relief, we affirm.

Plaintiff, Bank of New York Mellon, is the trustee of the CHL Mortgage Pass-Through Trust 2006-HYB4. The Bank, as trustee, held a promissory note for \$650,000 that Becker-Zabavski executed on October 3, 2005. Although a different bank originally lent the funds to Becker-Zabavski, the note she executed was negotiable and endorsed in blank; it was apparently transferred to the entity that established the trust. On that same day, Becker-Zabavski also granted a mortgage to secure repayment on the note to Mortgage Electronic Registration System, Inc. (MERS), which took the mortgage solely as the nominee of the lender and its successors or assigns. Becker-Zabavski defaulted on the note by failing to make monthly payments beginning in July 2008.

In July 2011, MERS assigned the mortgage to the Bank; the assignment was recorded on July 29, 2011. The Bank then sued to foreclose.

In October 2012, the Bank filed a request for entry of default after Becker-Zabavski failed to plead or otherwise defend the suit. The clerk entered the default on October 11, 2012. In November 2012, the Bank moved for entry of default judgment of foreclosure.

In August 2013, Becker-Zabavski moved to set aside the default. She alleged she had good cause for failing to defend; namely, she did not answer because, at the time she was served with the complaint, she was attempting to modify the terms of her note and mortgage. She also alleged that she had a meritorious defense; she alleged that the Bank had no right to enforce the

mortgage. She attached an affidavit supporting this defense. The trial court determined that Becker-Zabavski showed good cause, but failed to establish a meritorious defense. The trial court denied the motion to set aside the default and granted the Bank's motion for entry of a default judgment.

This Court reviews a trial court's decision on a motion to set aside a default for an abuse of discretion. *Shawl v Spence Brothers, Inc*, 280 Mich App 213, 220; 760 NW2d 674 (2008). "A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." MCR 2.603(D)(1). Thus, a trial court may not set aside a default without first finding that the defaulting party had good cause for the default and meritorious defense.

Becker-Zabavski argues that the trial court erred when it determined that she failed to present a meritorious defense. She claims that she had a meritorious defense: a defense grounded on the premise that MERS' assignment of the mortgage in July 2011 was void because the assignment violated the terms of the trust, which prohibited the trust from acquiring mortgages after May 30, 2006. Because the assignment violated the terms of the trust, she maintains, it also violated New York trust law.

A mortgage is not an estate in land; it is a lien on real property intended to secure performance or payment on an obligation. *Prime Financial Services LLC and Vinton*, 279 Mich App 245, 256; 761 NW2d 694 (2008). Because a mortgage is intended to secure repayment of the underlying note, when a note secured by a mortgage is transferred to a new owner, the transfer of the note necessarily includes the transfer of a beneficial interest in the mortgage. *Id.* at 257. This is true even when a third-party—such as MERS—holds legal title to the mortgage as a matter of convenience for the owner of the note. See *Residential Funding Co, LLC v Saurman*, 490 Mich 909, 909-910; 805 NW2d 183 (2011) (recognizing that a third-party might hold legal title to a mortgage as a matter of convenience to the beneficial owner—the note holder—and may foreclose in its own name on the note holder's behalf).

In this case, Becker-Zabavski argued that she had a viable defense to the foreclosure; namely, she contended that there was a question of fact as to whether the Bank had the right to foreclose the mortgage on behalf of the trust because there was evidence that the trust did not acquire the mortgage until after the cut-off date provided in the trust. Becker-Zabavski relied on an affidavit wherein the affiant averred that the loan number did not appear in a list of loans assigned to the trust at issue and on the transfer of the mortgage from MERS to the Bank. However, the cut-off date in the trust applied to notes and did not prohibit the trust from making or receiving transfers of the mortgages that secured the underlying notes after the cut-off date—that is, nothing in the trust prevented MERS from transferring legal title to the mortgage securing the note at issue back to its beneficial owner. As such, the assignment was not on its face invalid and was not evidence that the trust did not own the note.

The affidavit also did not permit an inference that the trust did not acquire the note until after the cut-off date. The affiant did not aver that he had a complete list of all the notes included in the trust prior to the cut-off date and did not aver that the number assigned to the note at issue corresponded to the numbering scheme used in the list submitted with the affidavit. Thus, the

affidavit is not evidence that the trust did not hold title to the note. By contrast, the Bank alleged and presented evidence that it held the actual note on the trust's behalf, which had been endorsed in blank. Becker-Zabavski similarly could not defend against her obligation under the note by arguing that its transfer was invalid. *Bowles v Oakman*, 246 Mich 674, 678; 225 NW 613 (1929). Accordingly, Becker-Zabavski did not establish that she had a meritorious defense as required under MCR 2.603(D)(1).

Becker-Zabavski relies on *Kim v JPMorgan Chase Bank, NA*, 493 Mich 98; 825 NW2d 329 (2012), to argue that she suffered prejudice because of the alleged invalid assignment, and thus could challenge the foreclosure. She claims she was prejudiced by the risk of owing double payments. *Kim* concerned a foreclosure by advertisement and the defendant's failure to record an assignment of mortgage before suing to foreclose. *Id.* at 104-105. This case concerns an action for judicial foreclosure. Unlike foreclosures by advertisement, there is no requirement to record assignments for judicial foreclosures. Moreover, the assignment in this case was recorded. Even if the prejudice standard in *Kim* were to apply, Becker-Zabavski cannot demonstrate prejudice by showing that she "would have been in a better position to preserve [her] interest in the property" absent MERS' alleged invalid assignment of the mortgage. *Id.* at 116.

Becker-Zabavski also argues that the trial court erred in failing to set aside the default under MCR 2.612(C)(1)(f). Though she cites *Altman v Nelson*, 197 Mich App 467, 478; 495 NW2d 826 (1992), the Court there merely listed three requirements necessary for relief under MCR 2.612(C)(1)(f). Becker-Zabavski does not explain how the trial court erred in failing to set aside the default under that rule; therefore, she has abandoned this issue. *Greater Bethesda Healing Springs Ministry v Evangel Builders & Constr Managers, LLC*, 282 Mich App 410, 413; 766 NW2d 874 (2009).

Finally, Becker-Zabavski argues that her showing of good cause was strong enough to lessen the need for a meritorious defense. In support of this argument, she cites *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 233-234; 600 NW2d 638 (1999). The Court in *Alken-Ziegler* explained that the strength of the defenses affects the "good cause" showing required under MCR 2.603(D)(1). *Id.* In this case the trial court found good cause and this case does not involve a situation like *Alken-Ziegler*, where a lesser showing of good cause was discussed in the context of a meritorious defense.

On this record, we cannot conclude that the trial court abused its discretion in denying Becker-Zabavski's motion to set aside the default. *Alken-Ziegler*, 461 Mich at 227.

Affirmed.

/s/ Michael J. Kelly  
/s/ William B. Murphy  
/s/ Joel P. Hoekstra