

STATE OF MICHIGAN
COURT OF APPEALS

CHERYL HASKELL,

Plaintiff-Appellant,

UNPUBLISHED
August 16, 2012

v

FIFTH THIRD BANK,

Defendant-Appellee.

No. 304943
Ingham Circuit Court
LC No. 10-000658-CK

Before: TALBOT, P.J., and WILDER and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition. This case arose from a dispute involving an installment loan, which was secured by a mortgage. We affirm in part, reverse in part, and remand.

I. BASIC FACTS

As of June 2000, plaintiff had a mortgage with Old Kent Bank¹ on her residential property located in Holt, Michigan. In June 2000, plaintiff, needing money to purchase a new vehicle, received an installment loan in the amount of \$25,000 from Old Kent Bank. This loan was secured by a second mortgage on the Holt property.

Between 2000 and 2002, it appears that numerous mistakes occurred with relation to the proper applying of payments for these two loans. Plaintiff had set up automatic payments (by way of automatic withdrawals from her bank account) to occur for both loans. Plaintiff alleges that there were instances of the automatic withdrawals being applied to the incorrect account² and instances of the automatic withdrawals not occurring at all. In November 2002, the original mortgage loan was paid off, and the installment loan remained as debt secured by the property.

¹ Old Kent Bank would later be acquired by defendant, Fifth Third Bank.

² Specifically, plaintiff claims that there were instances that her automatic payment for the installment loan was applied to the original mortgage loan, thereby making the installment loan delinquent.

The loan history submitted at the trial court shows that plaintiff missed several payments on the installment loan in 2004. In October 2004, defendant exercised the acceleration clause contained in the mortgage and demanded that the remaining outstanding balance be paid. In November 2004, defendant sent a letter to plaintiff indicating that it was initiating foreclosure proceedings. Afterwards, in an attempt to rectify the deficiency in the installment loan, plaintiff entered into an agreement with another company, Advance Realty Services (“Advanced Realty”), to obtain funds. The specifics of the agreement with Advanced Realty are not clear from the record. Evidently as part of the agreement, plaintiff provided a deed of her property to Advanced Realty. In her brief on appeal, she claims that the deed she signed was “blank,” and it was not to be completed and recorded unless she defaulted on her loan with Advanced Realty. Regardless of what the specific terms of the agreement with Advanced Realty were, it is clear that (1) the funds received from Advanced Realty were applied to the installment loan, which resulted in defendant ceasing its pursuit of foreclosure, and (2) Advanced Realty recorded the deed to plaintiff’s property.³ Thereafter, the loan history shows that plaintiff continued to make monthly payments until early 2006.

In February 2006, plaintiff noticed that she had not yet received a property tax statement from the township. Upon inquiring into the matter, she discovered that she did not receive a tax notice because it was sent to Advanced Realty as the owner of record of the property. Plaintiff claims that she contacted defendant in order to inquire about the status of the installment loan, and that on March 21, 2006, she was informed by defendant’s employee that the loan was “charged off.” Plaintiff also claims that defendant, for the next several months, refused to provide any information related to the installment loan account.

After learning that Advanced Realty was considered the owner of the property and that her account with defendant was “charged off,” plaintiff decided to stop making payments on the installment loan. However, in November 2006, plaintiff received a letter from defendant indicating that the installment loan was still active and that payment was overdue.

On January 22, 2007, defendant again informed plaintiff that it was exercising the acceleration clause and initiating foreclosure proceedings. The property was sold in February 2007 at a sheriff’s sale. But within the redemption period, Advanced Realty paid off the installment loan.⁴

³ Plaintiff claims that this recorded deed was “fraudulent” and later filed a separate action against Advanced Realty related to this matter.

⁴ Plaintiff claims in her brief on appeal that during her litigation with Advanced Realty related to its recording of the deed to her property, she entered into a settlement with it. The record indicates that this settlement involved her getting title to the property back in conjunction with her entering into a new loan agreement with Advanced Realty, which also had a mortgage associated with it. The proceeds from this latest loan agreement were applied to satisfy the installment loan with defendant during the redemption period.

In early 2009, Advanced Realty sold its rights under the loan to Macatawa Bank. But after that loan became delinquent, Macatawa Bank exercised that acceleration clause. Because plaintiff was unable to obtain other financing or funds, she was unable to make the necessary payments, and the property was sold at a foreclosure sale.

On June 1, 2010, plaintiff filed a complaint against defendant, asserting claims of breach of contract, breach of fiduciary duty, and action for an accounting.⁵ On March 3, 2011, defendant moved for summary disposition against plaintiff, premised upon MCR 2.116(C)(8) and 2.116(C)(10).

On April 13, 2011, the trial court granted defendant's motion for summary disposition. The trial court determined that the statute of limitations had expired no later than 2008 because any breaches occurred no later than 2002 and that, therefore, plaintiff's complaint was not timely filed in 2010.

On May 17, 2011, plaintiff filed a motion for reconsideration and a motion for leave to amend her complaint. Plaintiff's amended complaint contained the original breach of contract claim plus four⁶ additional claims. The trial court issued an opinion that explained its rationale for granting summary disposition but gave no explanation as to why it was denying plaintiff's motion to amend the complaint.

II. ANALYSIS

Plaintiff argues that the trial court erred when it granted summary disposition in favor of defendant. We disagree.

A.

Defendant sought summary disposition under MCR 2.116(C)(8) and/or MCR 2.116(C)(10) and argued, in part, that the statute of limitations barred plaintiff's claims. While the trial court did not cite to any rule when it granted summary disposition in favor of defendant, it stated at the hearing that it was basing its decision on the fact that "the statute of limitations has expired." MCR 2.116(C)(7) governs motions for summary disposition on the basis that a claim is time-barred. The fact that no one relied on or cited to MCR 2.116(C)(7) at the trial court does not preclude our review of the matter under the correct rule "as long as the record permits review under the correct subpart." *Detroit News, Inc v Policemen & Firemen Ret Sys of City of Detroit*, 252 Mich App 59, 66; 651 NW2d 127 (2002). But the ultimate issue also involves considering whether there is any genuine issue as to any material fact related to conduct that occurred within the statute of limitations period. Thus, the analysis of whether summary

⁵ The claims of fiduciary duty and action for an accounting were later dismissed via stipulation between the parties.

⁶ The four additional claims were silent misrepresentation, fraudulent misrepresentation, another breach of contract, and a violation of the Fair Credit Reporting Act, 15 USC 1681s-2(b), 1680o.

disposition was appropriate will also involve the application of MCR 2.116(C)(10). See *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

On appeal, this Court reviews a trial court's decision on a motion for summary disposition made under MCR 2.116(C)(7) de novo. *Lockwood v Mobile Med Response, Inc*, 293 Mich App 17, 22; 809 NW2d 403 (2011). When deciding a motion for summary disposition under this rule, a court must consider all affidavits, pleadings, and other documentary evidence filed or submitted by the parties and must consider all well-pleaded allegations as true unless they are contradicted by documentary evidence. *Id.*

A trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10) is also reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under this rule, 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).

The statute of limitations period for a claim of breach of contract is six years. MCL 600.5807(8). Plaintiff filed her complaint on June 1, 2010. Thus, in order to survive defendant's challenge under MCR 2.116(C)(7), that the claims were barred by the statute of limitations, plaintiff must have established that her claims accrued on or after June 1, 2004.

Regarding defendant's conduct that occurred after June 1, 2004, plaintiff contends that defendant breached the contract when it exercised the mortgage's acceleration clause in both 2004 and in 2007. We disagree. Plaintiff admits that her account was in a "delinquent" status when defendant exercised the acceleration clause in both instances. In fact, she admits that the reason she obtained funds from Advanced Realty in 2004 was to satisfy the delinquent status of the account. And she admits that, in 2007, she voluntarily stopped making payments on the account. The acceleration clause in the mortgage states that "[u]pon the occurrence of any Event of Default and at any time thereafter, Lender, at its option, may exercise any one or more of the following rights and remedies, [which includes] the right at [Lender's] option without notice to Grantor to declare the entire Indebtedness immediately due and payable . . ." An "Event of Default" is defined in the mortgage as including the "Failure of Grantor to make any payment when due on the Indebtedness." Thus, the acts of exercising the acceleration clauses in October 2004 and January 2007 when the accounts were in an admitted delinquent status, although they occurred within the statute of limitations period, were not breaches themselves.

Additionally, in her complaint, plaintiff alleges that defendant breached the installment contract during this time period by failing to allow "access to" the installment loan account. But this claim is insufficient to survive defendant's motion for summary disposition. Plaintiff has identified no such duty or obligation in the mortgage, which is the purported contract at issue, and we likewise have found none. Accordingly, summary disposition was warranted in defendant's favor pursuant to MCR 2.116(C)(10) for the allegations related to defendant's conduct that occurred after June 1, 2004.

Next, plaintiff asserts that her claims for breach of contract accrued in October 2004, even though defendant's alleged conduct of mismanaging and misapplying payments from 2000 to 2002 actually *occurred* before 2004. We disagree.

A breach of contract claim accrues and the statute of limitations begins to run at the time the breach occurs. *Blazer Foods, Inc v Rest Props, Inc*, 259 Mich App 241, 245-246; 673 NW2d 805 (2004). Here, these alleged acts by defendant, or defendant's predecessor, occurred before June 1, 2004. As a result, any claims that plaintiff had for those breaches accrued at that time. Thus, plaintiff's filing of her complaint on June 1, 2010, was after the six-year limitations period lapsed, and the claims were properly dismissed under MCR 2.116(C)(7).

Plaintiff's reliance on this Court's holding in *Sparta State Bank v Covell*, 197 Mich App 584, 588; 495 NW2d 817 (1992), that breaches in an installment loan context accrue when an acceleration clause is exercised, is misplaced. In *Sparta*, the Court noted how *missed payments* are treated differently between installment contracts with acceleration clauses and those without acceleration clauses. For contracts that do not contain acceleration clauses, "claims based upon a breach of the installment contract accrue, and the statute of limitations begins to run, as each separate installment falls due." *Id.* at 587. Thus, such claims for breach of contract based on missed payments "do not accrue until [each] installment becomes due." *Id.* "However, a different result is reached when an installment contract contains an acceleration clause and the acceleration clause is exercised." *Id.* at 587-588. When the loaning party exercises an acceleration clause, the entire unpaid balance under the agreement becomes due and payable, and the loaning party's claim "with respect to the remainder of the unpaid balance" accrues at that time. *Id.* at 588. Thus, *Sparta* addressed how a loaner's claims for the unpaid balance accrue once the acceleration clause is exercised (instead of having to wait for each future payment to fall due) – it has nothing to do with calculating when a borrower's claims would accrue as a result of the loaner breaching the contract. Therefore, plaintiff's attempt to describe her claims for breach of contract for conduct that occurred before 2004 as accruing in 2004 is without merit, and summary disposition was proper for these claims under MCR 2.116(C)(7).

We further note that, in addition to the above reasons, summary disposition was also warranted under MCR 2.116(C)(8) (failure to state a claim upon which relief can be granted) because plaintiff never attached a copy of the contract to her complaint. "When an action is based on a written contract, it is generally necessary⁷ to attach a copy of the contract to the complaint." *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007), citing MCR 2.113(F). The record is clear that plaintiff's breach of contract claims revolve around one, if not two, written instruments: the note for the installment loan and the mortgage as security for the loan. While the mortgage was provided in plaintiff's response to defendant's motion for summary disposition, neither document was attached to plaintiff's complaint, thereby making her claims based on those written instruments defective.

⁷ MCR 2.113(F)(1) provides that if a claim is based on a written instrument, a copy of that instrument "must" be attached to the pleading unless one of four exceptions listed under MCR 2.113(F)(1)(a)-(d) is present. None of the exceptions is present in the instant case, however.

B.

Plaintiff next argues that the lower court erred when it denied her motion to file an amended complaint pursuant to MCR 2.118(A)(2). We agree.

On appeal, this Court reviews the trial court's decision to grant or deny a request for leave to file an amended complaint for an abuse of discretion. *Wormsbacher v Seaver Title Co*, 284 Mich App 1, 8; 772 NW2d 827 (2009). A court abuses its discretion when its decision results in an outcome that falls outside the range of principled outcomes. *Id.*

Under MCR 2.118(A)(2), "a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." A motion to amend the pleadings should ordinarily be denied only for particularized reasons, such as undue delay, bad faith, or dilatory motive. *Decker v Rochowiak*, 287 Mich App 666, 682; 791 NW2d 507 (2010). "The trial court *must* specify its reasons for denying leave to amend" *PT Today, Inc v Comm'r of Office of Fin & Ins Services*, 270 Mich App 110, 143; 715 NW2d 398 (2006) (emphasis added); see also *Dowerk v Charter Twp of Oxford*, 233 Mich App 62, 75; 592 NW2d 724 (1998).

"In regard to undue delay, delay, alone, does not warrant denial of a motion to amend. However, a court may deny a motion to amend if the delay was in bad faith or if the opposing party suffered actual prejudice as a result." *Decker*, 287 Mich App at 682 (quotations and brackets omitted). Prejudice exists if the amendment would prevent the opposing party from receiving a fair trial. *Id.* One such instance where the opposing party can be denied a fair trial is

when the moving party seeks to add a new claim or a new theory of recovery on the basis on the same set of facts, after discovery is closed, just before trial, and the opposing party shows that he did not have reasonable notice, from any source, that the moving party would rely on the new claim or theory at trial. [*Weymers v Khera*, 454 Mich 639, 659-660; 563 NW2d 647 (1997); see also *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 488; 652 NW2d 503 (2002) (noting that proposed amendment made after the close of discovery, after case evaluation, and after summary disposition had been granted to defendants was prejudicial because defendant had no notice that he would be defending against the new claim), overruled on other grounds *Elezovic v Ford Motor Co*, 472 Mich 408; 697 NW2d 851 (2005).]

Here, plaintiff sought to amend her complaint by adding new claims of fraud, silent fraud, and violation of the Fair Credit Reporting Act, 15 USC 1681 et seq. These new claims were based on the same set of facts, discovery had closed, summary disposition had been granted in defendant's favor, and trial was scheduled to proceed in the next several weeks following the filing of plaintiff's motion to amend her complaint. Nevertheless, because the trial court made no findings whatsoever on the merits or lack thereof of plaintiff's motion, let alone any findings related to prejudice, its failure to specify its reasons for denying leave to amend "requires reversal unless the amendment would be futile." *PT Today*, 270 Mich App at 143; *Dowerk*, 233 Mich App at 75. "An amendment would be futile if (1) ignoring the substantive merits of the claim, it is legally insufficient on its face; (2) it merely restates allegations already made; or (3) it

adds a claim over which the court lacks jurisdiction.” *PT Today*, 270 Mich App at 143 (citations omitted). The amended complaint, like the original complaint, did not have a copy of the contract attached to it in contravention of MCR 2.113(F)(1). Thus, the amendments related to the breach of contract claims were futile. But we are unable to conclude on the basis of the record before us that the remainder of plaintiff’s amended complaint would be futile. Thus, the trial court’s failure to provide any rationale for its denial of plaintiff’s motion to amend requires reversal.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Neither party having prevailed in full, no costs are taxable pursuant to MCR 7.219.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Riordan