

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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AJAY SHAH and BHARATI SHAH,

Plaintiffs-Appellants,

v

FLAGSTAR BANK, FSB,

Defendant-Appellee.

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UNPUBLISHED

November 29, 2007

No. 272689

Oakland Circuit Court

LC No. 2005-067613-CZ

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting defendant's motion for summary disposition. We affirm in part, reverse in part, and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs' complaint alleges defects in the foreclosure of their mortgage and essentially seeks to invalidate a sheriff's deed.

On approximately March 5, 1999, plaintiffs borrowed \$385,000 from defendant to construct a single-family residence upon a site condominium. The loan was secured by a promissory note and mortgage. The loan was to be paid in full by January 2000, but the parties agreed to several extensions of the loan. According to plaintiffs, they made the necessary payments, and defendant accepted payments until November 2003, when, without explanation, defendant began returning payments that plaintiffs tendered.

In a letter dated January 9, 2004, defendant informed plaintiffs that their failure to make timely payments had caused a default in the mortgage and that to cure the default, "we must receive payments for the months of October, 2003 through January, 2004, totaling \$2529.13." The letter stated that the default must be cured "by payment in certified funds on or before thirty (30) days from the date this letter is mailed." It further advised that if payment was received after "January 30, 2003 [sic]," the February 1, 2004, payment must also be included.

Plaintiffs alleged that they tendered a personal check in the amount of \$2,529.13, which was returned to them. They then sent an "Official Check," dated February 4, 2004, drawn on National City to defendant in the same amount, which defendant also refused. Plaintiffs alleged that after they sent the official check, defendant claimed that the reinstatement amount was \$10,124.52. Ultimately, a sheriff's sale for the property was held on September 28, 2004.

Defendant acquired the property for \$417,716.53. Plaintiffs did not redeem the mortgage within the six-month redemption period.

MCL 600.3204 sets forth the prerequisites of a foreclosure by advertisement, which include “(a) A default in a condition of the mortgage has occurred, by which the power to sell became operative . . . .” In *Bowen v Brogan*, 119 Mich 218, 220; 77 NW 942 (1899), the Court recognized that because payment on a mortgage had been made, “there was nothing due upon the mortgage when it was foreclosed, and the right to foreclose it did not exist, and no legal title was obtained by the foreclosure.”

The trial court granted defendant summary disposition with respect to plaintiff’s claim that the foreclosure sale was defective because, although plaintiffs had presented several checks as documentary evidence, plaintiffs had not presented supporting evidence that the payments were timely sent to defendant.

Because the trial court relied on evidence outside the pleadings, we review its decision under MCR 2.116(C)(10). *Krass v Tri-County Security, Inc*, 233 Mich App 661, 664-665; 593 NW2d 578 (1999). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a claim. The motion should be granted if the evidence demonstrates that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

Defendant, as the moving party, was required to specifically identify the matters that it believed had no disputed factual issues, *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); MCR 2.116(G)(4), and had the initial burden of presenting affidavits, depositions, admissions, or other documentary evidence in support of its motion, *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); MCR 2.116(G)(5). “[T]he substance or content of the supporting proofs must be admissible in evidence.” *Maiden, supra*, at 119. MCR 2.116(G)(6). This Court reviews a trial court’s decision on a motion for summary disposition de novo. *Maiden, supra*.

Defendant did not produce any admissible evidence to meet its burden under MCR 2.116(G)(4). To establish that plaintiffs failed to make payments, defendant relied on its January 9, 2004, letter to plaintiffs referencing their failure to make certain payments. However, the assertions in the letter are inadmissible hearsay when offered to establish plaintiffs’ failure to make payments. MRE 801. Defendant also refers to an email sent by defendant’s senior vice-president to defense counsel. However, the email is not admissible to prove the truth of the matters asserted therein. *Id.* Although the signature of the vice-president on a copy of the email was notarized, it was not the equivalent of an affidavit because the author did not swear to the accuracy of his answers or indicate that his answers were based on personal knowledge. MCR 2.119(B).

Even if defendant had met its burden,<sup>1</sup> plaintiffs' affidavits were sufficient to show a genuine issue of material fact concerning whether the loan was in default. The trial court referenced only the copies of the checks that plaintiffs submitted. But plaintiffs also submitted affidavits that stated in part that plaintiffs "were not in default of such loan as all payment due were timely made in the proper amount or were tendered to Flagstar Bank in a timely manner." The trial court erred in determining that defendant was entitled to summary disposition with respect to this claim.

Plaintiffs also alleged that defendant did not provide appropriate notice of the alleged fault before the foreclosure in accordance with the requirements of paragraph 21 of the mortgage. That paragraph required the lender to give notice to the borrower before acceleration and stated that the notice must specify "(a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given the Borrower, by which the default must be cured; and (d) that failure to sure the default on or before the date specified in the notice may result in acceleration of the sums secured by [the instrument] and sale of the Property." Defendant argued that the January 9, 2004, letter met these requirements. Plaintiffs contended that the letter was defective because it required payment in certified funds (when there is no contractual or legal basis for requiring this) and it stated the cure was required within 30 days "from the date this letter is mailed," rather than from the date the notice is given.

The trial court did not specifically address whether defendant complied with the requirements of paragraph 21 of the mortgage. The court observed generally that "plaintiffs are not suing under a breach of contract count and this Court is not asked to make a legal ruling in interpreting that contract." Plaintiffs disagree and note that their complaint specifically alleges: "That Defendant did breach the terms of the Mortgage, specifically Paragraph 21 thereof, in that Defendant lender did fail to give the required appropriate and accurate notice prior to acceleration of the indebtedness . . . ."

Although plaintiffs' complaint was poorly drafted because it failed to set forth specific causes of action, defendant has not shown that it was entitled to summary disposition with respect to the assertion that defendant failed to comply with the requirements of paragraph 21 of the mortgage. Therefore, defendant was not entitled to summary disposition with respect to that claim.

Plaintiffs alleged that defendant did not provide proper notice of the adjournments of the sheriff's sale. In support of its motion, defendant produced several adjournment notices. Plaintiffs then contended that defendant failed to present a notice calling for the sale on September 28, 2004. Defendant attached "inadvertently overlooked notices" to its reply brief.

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<sup>1</sup> We note that defendant faulted plaintiffs for failing to provide proof of mailing. However, defendant does not present legal authority regarding the mailbox rule. Moreover, in addition to their affidavits, plaintiffs submitted copies of mailed envelopes from defendant indicating that the mailed checks were returned to them. Defendant failed to respond to this assertion in admissible documentary evidence form. See MCR 2.116(G)(4)-(6).

Absent a challenge by plaintiffs to the validity of the notice, summary disposition was properly granted with respect to a claim that the notice of the adjournment was not given.

Plaintiffs do not challenge the trial court's determination that they had not advanced any argument pertinent to their assertion that defendant failed to provide information to other lenders when plaintiffs were attempting to secure financing to purchase the home from defendant. They also do not challenge the trial court's ruling that they failed to set forth a cause of action under the Michigan Consumer Protection Act. The trial court's ruling with respect to these claims is affirmed.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Patrick M. Meter

/s/ Karen M. Fort Hood