STATE OF MICHIGAN

COURT OF APPEALS

AJAY SHAH and BHARATI SHAH,

Plaintiffs-Appellants,

v

FLAGSTAR BANK, FSB,

Defendant-Appellee.

UNPUBLISHED
November 29, 2007

No. 272689
Oakland Circuit Court
LC No. 2005-067613-CZ

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

KELLY, J. *(concurring in part and dissenting in part*.)

I respectfully dissent from the majority's conclusion that defendant was not entitled to summary disposition plaintiffs' wrongful foreclosure and breach of contract claims. In all other respects, I concur with the majority.

A trial court's decision on a motion for summary disposition is reviewed de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). Contract interpretation likewise presents a question of law, calling for review de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). The primary goal in contract interpretation is to ascertain and effectuate the intent of the parties. *Old Kent Bank v Sobczak*, 242 Mich App 57, 63; 620 NW2d 663 (2003). To determine the parties' intent, we read the document as a whole and attempt to apply its plain language. *Id.* Where the contractual language is not ambiguous, its construction is a question of law for the court. See *id at 63-64*.

In my opinion, defendant was entitled to summary disposition on plaintiffs' claim that defendant failed to comply with the requirements of paragraph 21 of the mortgage. Paragraph 21 provides in relevant part:

> Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument . . . The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less that 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and the sale of the

> Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender, at its option, may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by applicable law. …

Defendant's notice was in compliance with paragraph 21. On January 9, 2004, defendant wrote to plaintiffs regarding their mortgage:

> Your failure to make timely payments on the mortgage note has caused a default in your mortgage with Flagstar Bank. In order to cure the default, we must receive payments for the months of October, 2003 through January, 2004, totaling $2529.13. This amount includes late charges.
>
> This default must be cured by paying this amount in certified funds on or before thirty (30) days from the date this letter is mailed. If you fail to cure this default on or before this date, Flagstar Bank may accelerate your indebtedness by declaring the entire amount due and payable immediately. Flagstar Bank would also be able to proceed with the sale of the property.
>
> If you are able to meet certain conditions set forth in the Mortgage regarding the borrowers right to reinstate a mortgage, you may be able to reinstate this mortgage after acceleration. You also have the right to bring a court action to assert the non-existence of a default or any other defendant you might have to acceleration of the debt and sale.

The notice also stated in bold capital letters that if payment was received after January 30, plaintiffs must include the February payment as well.

Although plaintiffs contend that the requirement of certified funds was an extra condition not mandated by the mortgage document, defendant retained the right to specify "the action required to cure the default." Requesting certified funds is not prohibited by the mortgage document and, in light of the circumstances presented in this case, certainly a reasonable condition. Although the trial court did not specifically make any findings on plaintiffs' paragraph 21 claim, we will not reverse if the right result is reached. *FACE Trading, Inc v Dep't of Consumer & Industry Services,* 270 Mich App 653, 678; 717 NW2d 377 (2006).

Moreover, the trial court properly granted summary disposition to defendant on plaintiffs' claim that the foreclosure sale was defective. 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 . . . ." Here, plaintiffs failed to provide any documentary evidence that the October 2003 or January 2004 payments were made. And, at

no time until after the sheriff's sale had been concluded, did plaintiffs ever contest that the mortgage was in default.[1] Even if their affidavits could be considered as something more than simply the reiteration of allegations made in their complaint, they do not contest the failure to timely pay either October 2003 or January 2004. Under the plain terms of the mortgage, defendant was entitled to accelerate the debt and exercise its power of sale. Although they eventually did send in a payment with certified funds, it did not include the February 2004 amount due. Accordingly, the default was never cured. The trial court did not err in granting summary disposition.

I would affirm.

/s/ Kirsten Frank Kelly

[1] In fact, after title had passed to defendant, plaintiffs entered into a purchase agreement, negotiated with the assistance of their attorney, to buy back the property. No claim was made that the foreclosure was improper. It was only after plaintiffs financing fell through that any claim was made that the foreclosure was improper. Plaintiffs have simply waited too long to contest the default and sale. See, *Jackson Investment Corp v Pittsfield Products, Inc*, 162 Mich App 750; 413 NW2d 99 (1987).