STATE OF MICHIGAN

COURT OF APPEALS

NEWTEK SMALL BUSINESS FINANCE, INC.,

Plaintiff-Appellant,

v

GOLF BAN, INC., JIDASC, INC., d/b/a PEACOCK RIDGE, JAMES RAU, TIMOTHY BARKER, and DANE TERRILL,

Defendants/Cross-Defendants-Appellees,

ROBERT PAGE,

Defendant/Cross-Plaintiff/Cross-Defendant-Appellee,

and

THOMAS SONDAY,

Defendant/Cross-Defendant/Cross-Plaintiff-Appellee.

UNPUBLISHED
September 25, 2008

No. 277747
LC No. 05-054003-CH

Before: Meter, P.J., and Hoekstra and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order denying its motion to confirm sale after the sale of foreclosed property. Specifically, plaintiff challenges the trial court's ruling that because the liability of the individual guarantors was not included in the judgment of foreclosure, the guarantors could not be held liable for the deficiency that existed after the foreclosure sale. Because the individual guarantors were brought into the foreclosure action under MCL 600.3160 and because this provision allows a court to order the payment of a deficiency by any person besides the mortgagor who secures by obligation the mortgage debt after the foreclosure sale, we reverse.

Plaintiff loaned approximately $1.3 million to defendants Golf Ban and JIDASC, who granted a promissory note in the same amount to plaintiff. As security for the note, Golf Ban

granted a mortgage and a security interest to plaintiff on real and personal property. In addition, defendants James Rau, Timothy Barker, Dane Terrill, Robert Page, and Thomas Sonday (individual guarantors) signed personal guarantees. After Golf Ban and JIDASC defaulted on the promissory note, plaintiff obtained a judgment of foreclosure against Golf Ban. A sale of the foreclosed property left a deficiency. Plaintiff moved to confirm the sale, asking, in part, the trial court to confirm that the individual guarantors were liable for the deficiency. The guarantors argued that, pursuant to MCL 600.3150, they could not be held liable for the deficiency because their liability had not been described in the judgment of foreclosure. The trial court agreed.

On appeal, plaintiff argues that because MCL 600.3160 provides for the entry of judgment against a third-party guarantor after a foreclosure sale, the trial court erred in holding that MCL 600.3150 precluded the individual guarantors from being held liable for the deficiency. We review questions of statutory interpretation de novo. *Haynes v Neshewat,* 477 Mich 29, 34; 729 NW2d 488 (2007). The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *Id.* at 35. If the language of the statute is unambiguous, we must apply the statute as written. *Id.*

Foreclosure by judicial action is governed by the provisions in MCL 600. 3101 *et seq.* Two provisions, MCL 600.3150 and MCL 600.3160, are at issue in the present case. MCL 600.3150 provides:

> In the original judgment in foreclosure cases the court shall determine and adjudge which defendants, if any, are personally liable on the land contract or for the mortgage debt. The judgment shall provide that upon the confirmation of the report of sale that if either the principal, interest, or costs ordered to be paid, is left unpaid after applying the amount received upon the sale of the premises, the clerk of the court shall issue execution for the amount of the deficiency, upon the application of the attorney for the plaintiff, without notice to the defendant or his attorney. The court may order and compel the delivery of the possession of the premises to the purchaser at the sale.

MCL 600.3160 provides:

> If the land contract or mortgage debt is secured by the obligation or other evidence of debt of any other person besides the vendee or mortgagor, the plaintiff may make that person a party to the action, and the court may order payment of the balance of the debt remaining unsatisfied, after a sale of the mortgaged premises, against this other person as well as against the vendee or mortgagor, and may enforce this judgment as in other cases.

The term "may" designates discretion. *Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 532; 660 NW2d 384 (2003). Thus, pursuant to MCL 600.3160, a plaintiff has discretion whether to make persons besides the mortgagor who have secured by obligation the mortgage debt parties to the foreclosure action. Here, the individual guarantors were not the mortgagors. Accordingly, plaintiff had discretion whether to make the individual guarantors parties to the foreclosure action, and plaintiff chose to exercise this discretion. The corollary to the previous statement is that the individual guarantors, unlike Golf Ban, the mortgagor, were not

necessary parties to the action. The original judgment in the foreclosure action could have been issued without the individual guarantors being included as parties to the action.

Because the individual guarantors were brought into the foreclosure action under MCL 600.3160, we conclude that this provision, rather than MCL 600.3150, governs the answer to whether the liability of the individual guarantors was required to be included in the judgment of foreclosure in order for the guarantors to be held liable for the deficiency. MCL 600.3160 provides that "after a sale of the mortgaged premises" the court may order payment of the deficiency against any other person besides the mortgagor who secured by obligation the mortgage debt. Thus, pursuant to MCL 600.3160, discretionary authority rested with the trial court to issue an order after the foreclosure sale requiring the individual guarantors to pay the deficiency. Accordingly, it was not required that the liability of the individual guarantors be included in the judgment of foreclosure in order for the guarantors to be held liable for the deficiency. We therefore reverse the trial court's order holding that the individual guarantors cannot be held liable for the deficiency.

Reversed.

/s/ Patrick M. Meter
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto