STATE OF MICHIGAN

COURT OF APPEALS

GLENN PRENTICE,

Plaintiff-Appellant,

v

BANK OF NEW YORK TRUST COMPANY, NA, and ORLANS ASSOCIATES, P.C.,

Defendant-Appellee.

UNPUBLISHED
April 28, 2009

No. 283789
Macomb Circuit Court
LC No. 2007-003476-CH

Before: Markey, P.J., and Fitzgerald and Gleicher, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants. We affirm.

FACTS AND PROCEDURAL HISTORY

On March 7, 2002, plaintiff and his then-wife executed a note to Republic Bank, d/b/a Home Banc Mortgage Corporation, in the amount of $214,200.00, secured by a mortgage on certain real property in Clinton Township. Republic Bank assigned its interest defendant Bank of New York Trust Company, NA, (BNY). Plaintiff thereafter defaulted on the mortgage. BNY, through its agent, defendant Orlans Associates, P.C., began foreclosure by advertisement proceedings on December 8, 2006. The property was sold to BNY as the highest bidder at a sheriff's sale on January 12, 2007. Plaintiff made no attempt to redeem the property. On August 9, 2007, plaintiff filed the present complaint seeking declaratory relief in the form of a judgment declaring the foreclosure by advertisement void. (Complaint attached as Appendix C to appellees' brief). Plaintiff alleged that defendants failed to comply with the foreclosure procedure mandated by MCL 600.3201, *et seq.* Defendants moved for summary disposition, asserting that the foreclosure proceedings were proper in all respects. Following a hearing, the trial court granted defendant's motion. (Trial court's opinion and order attached as Appendix 1 to appellee's brief).

STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant summary disposition. *Hamade v Sunoco, Inc (R & M)*, 271 Mich App 145, 153; 721 NW2d 233 (2006). This Court also reviews de novo the proper interpretation of statutes, such as the statute providing for

foreclosure by advertisement. *State Farm Fire & Casualty Co v Corby Energy Services, Inc*, 271 Mich App 480, 483; 722 NW2d 906 (2006).

I

Plaintiff first argues a defect in the chain of title prevented BNY from foreclosing the mortgage by advertisement. Plaintiff did not raise this issue in his complaint, in his response to defendant's motion for summary disposition, or at the hearing on the motion for summary disposition. Because this issue was not raised before the trial court, it is not preserved for appellate review. Under our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). We therefore decline to consider it here.

II

Plaintiff argues that the foreclosure sale was invalid because the affidavit of posting did not comply with MCL 600.3256(1)(c) because someone other than the person who actually posted the property executed the affidavit. The trial court found with regard to this argument:

> The Court is further not convinced that Crane [the person posting the notice of sale] was required to give plaintiff an affidavit setting forth the time, manner and place of the posting. MCL 600.3256 provides in pertinent part that:
>
> (1) Any party desiring to perpetuate the evidence of any sale made in pursuant of the provisions of this chapter, **may** procure:
>
> * * *
>
> (c) An affidavit setting forth the time, manner and place of posting a copy of such notice of sale to be made by the person posting the same. [emphasis added]
>
> Pursuant to the above clear and unambiguous statutory language, such an affidavit was not mandatory.

The primary goal of construing a statute is to determine and give effect to the intent of the Legislature. *Mt. Pleasant v State Tax Comm*, 477 Mich 50, 53; 729 NW2d 833 (2007). The first step in doing this is to review the language of the statute. *United Parcel Service, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2007). "If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute and judicial construction is not permissible." *Mt Pleasant, supra* at 53.

Here, the language of the statute is clearly permissive; it provides that a party *may* perpetuate evidence of the sale by recording an affidavit of the posting. The foreclosure by advertisement statute does not require the proof of sale to be perpetuated in the records. See,

e.g., *Lee v Clary*, 38 Mich 223 (1878) (There is nothing in any statute requiring the proof of sale to be perpetuated in the records). Plaintiff's argument that an alleged irregularity in perpetuating evidence of the sale voids the sale is misplaced.[1]

III

Plaintiff contends that defendants did not file the sheriff's deed within twenty days of the foreclosure sale as required by MCL 600.3232. He claims that the failure to file the deed within twenty days negated the sale. Under MCL 600.3232, a sheriff's deed shall, "as soon as practicable, and within 20 days after such sale, be deposited with the register of deeds of the county in which the land therein described is situated . . ."

Here, the sale occurred on January 12, 2007. The sheriff's deed was recorded on March 22, 2007, plainly more than 20 days after the sale. The "Affidavit of Auctioneer and Certificate of Redemption Period" attached to the sheriff's deed indicated a "last day to redeem" of July 12, 2007, but also stated:

> [S]hould the Sheriff's Deed not be recorded within 20 days from the date of the foreclosure sale, in which case the redemption period will be 6 months from the date of recording."

Thus, plaintiff had 6 months from the date of March 22, 2007, or September 22, 2007, to redeem the property.

In *Mills v Jirasek*, 267 Mich 609, 610; 255 NW2d 402 (1934), the Court considered the effect of a late filing that occurred in September after a May foreclosure sale. The Court noted that earlier decisions may have motivated an 1875 amendment to the statute setting twenty days as the reasonable time after the sale that a deed may be filed. *Id.* at 613-614. It further noted that statutes regulating foreclosure sales and subsequent recordings "were intended to prevent surprise or unfairness, and they should be enforced in everything substantial." *Id.* at 614 (quotation, citation omitted). According to the Court:

> But on the other hand those provisions cannot be enlarged or unreasonably construed so as to render mortgage sales unsafe, or to make bidding hazardous. The law was designed to encourage and not to destroy recourse to these simple and cheap remedies; and while no substantial right should be disregarded, substantial regularity is all that should be held imperative. [*Id.* (quotation, citation omitted).]

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[1] Further, although a person other than the person who actually posted the property executed the affidavit of posting, an affidavit was presented to the trial court from Michael Crane, the person who did post the property. Crane stated in the affidavit that he no longer remembered the specifics on the posting, but that he reviewed a form that he had completed at the time of the posting. Based on his review of that form, he represented that the posting did occur.

The Court held that the appellant was entitled to no relief because he showed no damage as a result of the failure to timely record. *Id.* at 615. According to the Court:

> We see no reason to allow appellant the benefit of a new foreclosure merely because he insists upon a technical and strict construction of the statute. The equities are not with his position. It may be true that appellee, or some one acting for her, has acted inadvertently in the matter, but no harm has been done the parties or any one claiming through them. The situation appeals to the conscience of the court. We hold that the provisions of the statute as to time of recording are directory, and, under the circumstances of the instant case, defendant is estopped to question the validity of plaintiff's deed. [*Id*.]

In accord with *Mills*, plaintiff's claim must fail because plaintiff has not demonstrated that any harm resulted from defendants' untimely filing of the deed. Plaintiff did not allege in his complaint that he suffered any harm as the result of the delay. Plaintiff did not attempt to redeem the property, and in fact filed the present action before the redemption period expired.[2]

IV

Plaintiff asserts that defendants failed to post notice of the sale on the property as required by MCL 600.3208, which states, "a true copy shall be posted in a conspicuous place upon any part of the premises described in the notice." In support of their motion for summary disposition, defendants attached the affidavit of Michael Crane. Crane averred that although he did not have independent recollection of December 18, 2006, or the work he performed on that day:

> it was my custom, practice and habit at that time to complete a Metropolitan [Process Service] form when I posted a property that noted the location of the property where I posted the notice.
>
> I have reviewed the form I completed for property commonly known as 37655 Palmar in Clinton Township, Michigan, and can state to a reasonable degree of certainty that I posted notice of the foreclosure sale in a conspicuous location on the front door of the house on December 18, 2006.

Where evidence of a posting is shown, the burden of proving that it did not occur shifts to the party attacking the notice. *Cox v Townsend*, 90 Mich App 12, 15; 282 NW2d 233 (1979). Plaintiff attached an affidavit to his reply to defendants' motion for summary disposition in

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[2] Plaintiff alleged in his affidavit attached to his response to defendants' motion for summary disposition that he was not afforded the 6-month redemption period and that if he would have known of the foreclosure sale he would have made efforts to redeem or lower the price to sell the property. But as previously stated, plaintiff filed the present action before the redemption period expired. Further, he presented no evidence that these additional efforts would have resulted in a sale.

which he averred that he did not see any notice posted on the property. However, "any facially proper service requires a considerable showing of proof before it may be set aside, and courts generally consider a bare denial of service insufficient." *Delph v Smith*, 354 Mich 12, 16-18; 91 NW2d 854 (1958). A bare denial of service is all plaintiff alleges here, which is particularly unavailing given that the notice required by statute need only be constructive, not actual.

Affirmed. Defendants, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Elizabeth L. Gleicher