STATE OF MICHIGAN

COURT OF APPEALS

JOHNSON ACHO,

Plaintiff/Counter-Defendant/Appellant/Cross-Appellee,

UNPUBLISHED
August 6, 2009

v

No. 284997
Oakland Circuit Court
LC No. 2007-082783-CK

BOK YEON KIM and SUN KEON KIM,

Defendants/Cross-Defendants,

and

WELLS FARGO BANK, NA,

Defendant/Counter-Plaintiff/Appellee/Cross-Plaintiff/Cross-Appellant,

and

HONG SUK KIM,

Third-Party-Defendant.

Before: Servitto, P.J., and O'Connell, and Zahra, JJ

PER CURIAM.

Plaintiff Johnson Acho ("plaintiff") appeals as of right an order granting defendant Wells Fargo Bank NA, ("Wells Fargo") summary disposition. The order held that defendants Bok Yeon Kim and Bok Keon Kim (the "Kims") fully paid a promissory note, and that plaintiff failed to discharge the mortgage securing the note. Wells Fargo cross-appeals an order denying an award of attorneys' fees claimed as "actual damages" under MCL 565.44. We affirm.

I. Basic Facts and Proceedings

The Kims have a son named Hong Suk Kim ("the Kims' son"). The Kims' son brokered loans through Countryside Financial, which plaintiff was vice president and shareholder. The other shareholders were Gabe Gabriel and Sam Challangoe. Countryside Financial operated out of the same office as several of shareholders' other businesses, including plaintiff-owned Acho & Associates, an insurance business.

In January 2003, the Kims' son began borrowing money from plaintiff. In February 2004, the Kims' son owed plaintiff $55,467, at four percent interest. The Kims' son sought to borrow another $5,000 from plaintiff. Plaintiff agreed to loan the Kims' son $5,000 only if the Kims' son provided collateral to secure the $60,467 that would then be due.

On February 26, 2004, plaintiff provided the Kims' son $5,000, but only after the Kims' agreed by promissory note to pay plaintiff $60,000, at four percent interest, which was secured by a mortgage on the Kims' West Bloomfield home. The mortgage was recorded on April 14, 2004. Plaintiff alleges that he subsequently loaned the Kims' son an additional $112,925.

According to Wells Fargo, plaintiff provided the Kims with a payoff quote letter that indicated the amount needed to satisfy the promissory note. In support, Wells Fargo relies on a letter that contains plaintiff's address and provides itemized loan payoff information in regard to the Kims' property. In an affidavit, plaintiff denies knowledge of the payoff quote letter.

On July 23, 2004, the Kims refinanced their West Bloomfield and executed a $171,000 promissory note from Option One Mortgage, which was secured by a mortgage.[1] The mortgage was recorded August 26, 2004, and later assigned to Wells Fargo. The residential loan application reflects that an agent of Countryside Financial brokered the Kims' refinance. From an escrow account of the title insurance company handling the refinance, a $61,020 check was issued to plaintiff that the Kims' son hand-delivered to plaintiff on July 29, 2004. Wells Fargo asserts that plaintiff was given a notice of payoff that requested plaintiff discharge the mortgage. However, plaintiff also denied having received this document.

There is no dispute, however, that the check provides, in the lower left corner, that:

> File Number: 486195 6628 Embers
>
> Loan No: for Bok Yeon Kim $61,020.00

[1] Although only defendant Bok Yoen Kim executed the refinancing document, this opinion, for the sake of clarity, will continue to refer to the Kims collectively.

Plaintiff admitted that he cashed the $61,020 check and that it "was of a sufficient amount at the time of payment to pay in full the Promissory Note of [the Kims] dated February 26, 2004." Plaintiff averred that he simply cashed the check as a payment on Kims' son's loan, not as payoff of the Kims' mortgage.

Wells Fargo foreclosed on its mortgage and acquired a Sheriff's deed dated April 3, 2007, which was recorded on April 10, 2007. On May 9, 2007, plaintiff filed a "complaint for money damages and foreclosure of real estate" against the Kims and Wells Fargo. The complaint specifically sought money damages from the Kims based on the promissory note. The complaint also maintained that plaintiff's mortgage was senior in priority to Wells Fargo's mortgage. Wells Fargo responded with a motion for summary disposition, arguing there was no dispute that plaintiff's mortgage had been discharged through the $61,020 check. Wells Fargo maintained that plaintiff had indicated the payoff amount was $61,020.23, that a $61,020 check was transmitted to plaintiff along with a payoff notice that stated full payment had been made and requested that plaintiff's mortgage be discharged.

Plaintiff responded and, in an affidavit, averred that "I did not prepare (or have any third party at my direction prepare) and send a payoff letter." Plaintiff also averred that he did not receive a payoff notice. Plaintiff averred that Kims' son simply hand-delivered to plaintiff the $61,020 check without any other documentation. Although acknowledging that $61,020 check referenced the Kims' property, plaintiff maintained that he had "no idea where the funds came from and therefore did not have a duty to discharge his mortgage."

The trial court accepted plaintiff's affidavit as true and on August 8, 2007, initially denied Wells Fargo's motion for summary disposition allowing additional time for discovery. On February 27, 2008, the trial court conducted a hearing on Wells Fargo's renewed motion for summary disposition. After hearing arguments, the trial court held that the Kims fully paid their obligation under the note and granted them summary disposition.

Wells Fargo then moved for damages under MCL 565.44 to recover for plaintiff's failure or neglect to discharge its mortgage. The trial court awarded Wells Fargo the statutory $1,000 award, and $634.87 in costs. However, the trial court declined, in its statutory discretion, to double the award under MCL 565.44. Further, the trial court refused to award Wells Fargo attorneys' fees under MCL 565.44 because the statute did not expressly provide for an award of attorneys' fees. This appeal ensued.

II. Standards of Review

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (10), but the trial court ruled on the motion without specifying the subrule under which it decided the issue. However, because the trial court considered material outside the pleadings, this Court reviews the decision under MCR 2.116(C)(10). *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). In deciding the motion, a court must consider the pleadings, affidavits, depositions, admissions and

other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

Summary disposition of all or part of a claim or defense may be granted when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10).

In addition, questions in regard to statutory interpretation are issues of law reviewed de novo. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548; 685 NW2d 275 (2004).

III. Application of Check to Mortgage

Plaintiff first argues that there remains a question of fact in regard whether the $61,020 check was to be applied to the Kims' promissory note or the Kims' son's debt. We disagree.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). "It is axiomatic that statutory language expresses legislative intent." *Michigan Dept of Transp v Tomkins*, 481 Mich 184, 191; 749 NW2d 716 (2008). The Legislature is presumed to have intended the meaning it plainly expressed. *Rowland v Washtenaw County Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007). If the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). However, the language of a statute should be read in light of previously established rules of common law, including common law adjudicatory principles. *Nummer v Dep't of Treas*, 448 Mich 534, 544; 533 NW2d 250 (1995).

MCL 565.41, provides that;

> Within the applicable time period in section 44(2) after a mortgage has been paid or otherwise satisfied, the mortgagee or the personal representative, successor, or assign of the mortgagee shall prepare a discharge of the mortgage, file the discharge with the register of deeds for the county where the mortgaged property is located, and pay the fee for recording the discharge.

We conclude that the trial court properly concluded that there was no real dispute that the $61,020 check was to be applied toward the Kims' mortgage. Although Kims' son delivered the check to plaintiff, the check was issued from a title insurance company bearing the exact figure required to discharge the Kims' mortgage. The check not only included payment of the initial $60,000 promissory note, but it also included the exact current owing four percent interest, and a $50 demand statement fee. The check references the mortgaged property, the loan number and the mortgagee's name. Although plaintiff maintains that he had "no idea" where the funds came from, the amount of the check and the notations referring to the Kims' property overwhelmingly indicates that the check was to be applied toward the Kims' mortgage.

In addition, in moving for summary disposition, Wells Fargo initially provided two documents indicating that plaintiff had notice that the Kims intended the $61,020 check be applied to the mortgage; the payoff quote letter and the payoff discharge letter. Plaintiff responded through an affidavit, claiming he had never seen the documents. At his deposition,

however, plaintiff admitted that his partner, Challangoe, would have generated the payoff quote letter. Because plaintiff admitted to delegating the creation of the payoff quote letter to Challangoe, plaintiff's claim he had "no idea" about the letters is not genuine. In addition, plaintiff's admission also dispels the notion that "anybody could have prepared the document on any home computer." Thus, the trial court properly concluded that there was not a genuine dispute that the $61,020 check applied toward the promissory note.

Plaintiff also argues that the trial court erred in entering an order stating that the promissory note was fully paid. Plaintiff complains that this "order effectively nullifies Plaintiff's [default] judgment against Defendant Kim." Initially we note that plaintiff fails to provide legal support for its position. MCR 7.212(C)(7); *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). In any event, a claim based upon contingent future events that might not occur as anticipated or might not occur at all is not ripe. *City of Huntington Woods v City of Detroit*, 279 Mich App 603, 615-616; 761 NW2d 127 (2008). Here, the trial court did not render any decision in regard to plaintiff's default claim. Accordingly, plaintiff's claim is not ripe for review.

III. Costs under MCL 565.44

Defendant next argues that the trial court erred in granting plaintiff $1,000 and $634.87 in costs under MCL 565.44. MCL 565.44 provides,

> (1) If a mortgagee or the personal representative or assignee of the mortgagee, after full performance of the condition of the mortgage, whether before or after a breach of the mortgage, or, if the mortgage is entirely due, after a tender of the whole amount due, within the applicable time period in subsection (2) after being requested and after tender of the mortgagee's reasonable charges, refuses or neglects to discharge the mortgage as provided in this chapter or to execute and acknowledge a certificate of discharge or release of the mortgage, the mortgagee is liable to the mortgagor or the mortgagor's heirs or assigns for $1,000.00 damages. The mortgagee is also liable for all actual damages caused by the neglect or refusal to the person who performs the condition of the mortgage or makes the tender to the mortgagee or the mortgagee's heirs or assigns, or to anyone who has an interest in the mortgaged premises. Damages under this section may be recovered in an action for money damages or to procure a discharge or release of the mortgage. The court may, in its discretion, award double costs in an action under this section.
>
> (2) The discharge of mortgage, execution and acknowledgment of a certificate, or filing of a discharge of mortgage required by this section or section 41 shall be performed within whichever of the following time periods is applicable:
>
> > (a) For the first 2 years after the effective date of the amendatory act that added this subsection, 75 days
> >
> > (b) Beginning 2 years after the effective date of the amendatory act that added this subsection, 60 days.

Plaintiff concedes that the trial court "held that the language contained in the lower left hand corner of the payoff check was sufficient to put Plaintiff on notice that the funds were to pay off the secured portion of [the Kims' son's] obligation to plaintiff. However, plaintiff maintains that there was no request "that plaintiff discharge the mortgage." We conclude that regardless whether plaintiff received the payoff discharge letter, the trial court did not clearly err in concluding that plaintiff knew that the $61,020 check was intended to be applied toward the promissory note and that the proffered amount fully satisfied the note. Besides the Kims' son hand-delivering plaintiff the $61,020 check, plaintiff had no other reason to believe that $61,020 applied toward the Kims' son's debt. A cursory examination of the check would have dispelled any doubt, and the trial court did not err in concluding that an entire payment of the promissory note operated as a request to discharge the mortgage.

Plaintiff also argues that the trial court erred in awarding Wells Fargo $634.87 in costs without supporting documentation of costs. This issue was not mentioned below and therefore unpreserved. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). This Court reviews unpreserved issues for plain error affecting plaintiff's substantial rights. *Wolford v Duncan*, 279 Mich App 631, 637; 760 NW2d 253 (2008). Notably, the lower court record does not contain several documents. The last stamped filing was in December 2007, while the register of actions indicates that there were several filings after that date, including Wells Fargo's motion for attorneys' fees and costs filed on April 2, 2008. Wells Fargo claims on appeal that defense counsel supported the motion for costs through an affidavit, but the affidavit is not in the lower court record. Nonetheless, plaintiff cannot show that this moderate award of costs constitutes manifest injustice. The trial court was familiar with the case and the record does include some costs bills that list various filings fees and UPS charges. Here, the trial court presided over several motions in this case, including two motions for summary disposition, and was in a superior position to consider Wells Fargo's costs. We cannot conclude that the trial court erred in awarding $634.87 in costs.

IV. Attorneys' Fees

On cross-appeal, Wells Fargo claims that the trial court erred in denying its request for attorneys' fees.

> Michigan follows the "American rule" with respect to the payment of attorney fees and costs. *Dessart v Burak*, 470 Mich 37, 42, 678 NW2d 615 (2004). Under the American rule, attorney fees generally are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award. *Id*. The American rule is codified at MCL 600.2405(6), which provides that among the items that may be taxed and awarded as costs are "[a]ny attorney fees authorized by statute or by court rule." The American rule stands in stark contrast to what is commonly referred to as the "English rule," whereby the losing party pays the prevailing party's costs absent an express exception.

We note that, as in *Haliw*, claims to recover attorneys fees are typically premised on language providing for the recovery of "costs" and not, as here, "actual damages." And indeed, defendant has failed to cite any Michigan law referring to "actual damages," that allows for the recovery of attorneys' fees, unless the statute expressly indicates that "attorneys' fees" are

recoverable. On the other hand, plaintiff cites several statutes that allow for the recovery of "actual damages," but also expressly allow the recovery of attorneys' fees. Specifically, plaintiff cites, MCL 15.342d, MCL 15.364, MCL 213.51, MCL 290.649, and MCL 600.2919. See also MCL 445.911.

Here, the Legislature is familiar with the "American Rule" in regard to attorneys' fees, and has expressly provided exceptions to the "American Rule" in other statutes. The Legislature is presumed to be familiar with the rules of statutory construction, and when promulgating new laws is presumed to be aware of the consequences of its use or omission of statutory language. *In re Messer Trust*, 457 Mich 371, 380; 579 NW2d 73 (1998). Plaintiff's citations are persuasive evidence that the Legislature does not intend attorneys' fees to be recovered as "actual damages." The phrase "actual damages" does not allow for the recovery of attorneys' fees, unless the law expressly allows for the recovery of attorneys' fees.[2]

Affirmed.

/s/ Deborah A. Servitto
/s/ Peter D. O'Connell
/s/ Brian K. Zahra

[2] On cross-appeal, Wells Fargo argues that "there is precedent for a court awarding attorneys fees as damages under similar statutory language." Wells Fargo then cites an unpublished case of this Court, *New Properties, Inc v George D Newpower*, unpublished opinion per curiam of the Court of Appeals, issued September 14, 2006 (Docket No. 259932) (Davis, P.J., and Sawyer and Schuette, JJ.). However, "[a]n unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1). Thus, Wells Fargo's reliance is misplaced. Moreover, *New Properties* involved a complex conversion embezzlement scheme litigated within the rubric of several statutes. Thus, the case was factually unique and distinguishable from the instant case.