STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of MARY HELEN GREEN OLSON,
Deceased.

KAREN ASTRID HOAD, Personal Representative of the Estate of MARY HELEN GREEN OLSON,

Petitioner-Appellee,

v

UNITY MORTGAGE CORPORATION, d/b/a REVERSE MORTGAGE COMPANY,

Respondent-Appellant.

UNPUBLISHED
September 29, 2009

No. 283818
Van Buren Probate Court
LC No. 2005-000002-CZ

Before: Jansen, P.J., and Hoekstra and Markey, JJ.

HOEKSTRA, J., *(dissenting)*.

Because I conclude that the trial court improperly granted petitioner relief from the October 2007 opinion and order, I respectfully dissent.

Mary Olson owned a house on a 40-acre parcel in a semi-rural part of South Haven, Michigan. She applied for a home equity conversion loan mortgage, or a reverse mortgage, from defendant Unity Mortgage Corporation (UMC). UMC sought to have the Federal Housing Authority (FHA) insure its loan to Olson. UMC requested a survey and an appraisal of the house and 40-acre parcel. Danny Hawkins, then a "HUD approved appraiser," conducted the appraisal, and informed UMC that, based on Department of Housing and Urban Development (HUD) guidelines, "only 10 acres will be considered as part of the mortgage and any other acreage will be deemed excess with no contributory value." UMC commissioned a second survey, which was conducted on a three-acre parcel on which the house sat. After UMC received a firm commitment letter from the FHA that it would insure the loan to Olson, UMC granted a reverse mortgage to Olson in the amount of $87,000. The mortgage contained the legal description of the 40-acre parcel.

After Olson died, UMC sought to foreclose on the mortgage. Petitioner moved to quiet title, asking the trial court to declare that the only property subject to the mortgage was the three-acre parcel on which the house sat and that the remaining 37 acres were held in fee simply by Green's estate.[1] Thus, one of the issues at trial was how many of the 40 acres were security for the mortgage. The parties specifically asked the trial court to determine whether HUD guidelines limited the number of acres that were subject to the mortgage and, if so, how many acres actually secured the mortgage. During closing arguments, UMC argued that even if it violated HUD guidelines, the violation, as was clear from case law, did not provide petitioner with a private cause of action to avoid the specific terms of the mortgage.[2] Petitioner requested the trial court to reform the mortgage so that it would only be secured by the three-acre parcel on which the house sat. According to petitioner, the evidence clearly established that it was a mistake by the parties that the mortgage contained a legal description of the 40-acre parcel rather then the three-acre parcel.

In the October 2007 opinion and order, the trial court noted that one of the issues presented during trial was the effect, if any, of UMC's violation of HUD guidelines in securing the mortgage with the entire 40-acre parcel. The trial court recognized that generally, pursuant to HUD guidelines, a reverse mortgage insured by the FHA is not to be secured by excess land:

> The point of contention on behalf of the estate is that the reverse mortgage was secured with excess land and therefore not in compliance with HUD guidelines and therefore not enforceable. [HUD] has issued guidelines for "reverse mortgages[.]" . . .
>
> Under guideline Directive 4150.2, HUD lays out various methods that can be used to determine the value of the land. On [sic] such method is the "market value" approach, which is "the most probable price which a property should in a competitive and open market under all conditions requisite for a fair sale." A review of the HUD guidelines would seem to indicate that the "reverse mortgage" would only be secured by the land necessary to secure the mortgage, and that any "excess land" would not be secured by the mortgage. [Petitioner's] position is that "excess land" was included in this mortgage in contravention of the HUD guidelines, and therefore the mortgage is not enforceable against that "excess land."

The trial court sought to determine whether the reverse mortgage was, in fact, secured by excess land:

---

[1] UMC filed a counter-complaint against petitioner. UMC requested, *inter alia*, that the trial court declare the mortgage to be "a valid first lien on the Subject Property in its entirety."

[2] UMC contested whether it did, in fact, violate HUD guidelines. According to UMC, HUD was the ultimate determiner whether any of the 40 acres should be deemed excess land and it was clear that HUD "came to the conclusion that inclusion of all 40 acres was not excessive."

> In the appraisal done in this case, it is stated that the forty (40) acre [parcel] is excessive, and should not be used to secure the mortgage. However[,] this recommendation is not the determination of the HUD office, and thus has no legal effect. Once the excess land recommendation was made and brought to the attention of the HUD representative, it was up to the HUD office as to whether to accept or reject the appraisal of the entire forty (40) acres, or to discount a portion due to excess land. According to the testimony of the appraiser, Danny Hawkins, HUD makes the ultimate decision as to whether a particular property would be considered excessive. . . .
>
> We can only speculate as to what the HUD officials may have thought when reviewing the appraisal concerning the subject property. They may have determined that the forty (40) acre parcel was not excessive, as compared to surrounding parcels. As spelled out in the Cost Approach in Section 4-5A of the HUD Guidelines, excess land is defined as:
>
> > . . . the area by which the plot exceeds the area of a readily marketable real estate entity. This occurs when the subject lot is considerably larger than typical lots in the neighborhood and the excess is capable of separate use. Generally, the defining characteristic is an excess portion that can be subdivided and marketed as an individual parcel. However, in small communities and outlying areas, appraisers must use different criteria sizes. The segment of the market may show wide differences in lot use.
>
> This specific parcel of land is in a rural area, fitting with what is described as "a small town or outlying area," and many neighboring parcels containing a high amount of acreage. Without speculating as to the thoughts of the HUD office, it is possible that they determined that this was not excess land compared to the other parcels nearby.

The trial court reached the following conclusions regarding the legal effect of HUD guidelines:

> The HUD Guidelines, while helpful, are not controlling, Hanover Mortgage Co. vs. Snell, 142 Mich App 548, 554-556 (1985). The HUD lenders handbook is merely a statement of HUD policy, which does not have the force of law, Brown vs. Lynn, 392 F. Supp 559 (ND ILL, 1975). The violation of HUD guidelines does not give the mortgagor an independent cause of action to void the mortgage, Hanover, supra; FHA vs. Morris Plan Co., 211 F2d 756 (CA 9, 1954).

The October 2007 opinion and order ended with the following orders:

> 1. That the Estate's complaint is dismissed in its entirety;
>
> 2. Judgment is granted in favor of [UMC] on its Counter-Complaint against [petitioner] . . . and allow [UMC] to invoke the Power of Sale contained in the Subject Mortgage and to foreclose on the property;

3. That title to all forty (40) acres of the subject property be quieted in the name of the Estate of Helen Green Olson, subject to all other liens and encumbrances of record not removed by judgment of this Court;

* * *

5. That the Ex Parte Petition and Order to halt mortgage foreclosure on real estate be dissolved.

That a judgment be granted in favor of [UMC] allowing it to foreclose according to the terms of the mortgage date[d] June 5, 2003, and recorded on June 24, 2003.

Thereafter, petitioner moved for rehearing, reconsideration, and relief pursuant to MCR 2.119(F) and MCR 2.612(C)(1)(f). Petitioner claimed that the October 2007 opinion and order was based on "palpable error" because the trial court improperly relied on *Manufacturers Hanover Mortgage Corp*, *supra* (hereinafter *Hanover*), to conclude that the entire 40-acre parcel was subject to the mortgage. According to petitioner, the *Hanover* Court addressed whether an FHA lender was bound to follow HUD regulations before foreclosing on mortgaged property. Petitioner claimed, however, that the distinct issue raised in the present case, and which the trial court did not address, was whether UMC had the authority to circumvent HUD guidelines when it issued a mortgage that was secured by excess land. Explaining that its position was never that the mortgage should be voided in the entirety, petitioner requested that the trial court clarify whether, given UMC's circumvention of the HUD guidelines, the amount of property subject the mortgage was 40 acres, ten acres, or three acres.

In its January 2008 opinion and order on petitioner's motion for rehearing, the trial court stated that while it had ruled that the mortgage was valid and, therefore, UMC could foreclose on the mortgage, its previous opinion was unclear as to how much of the 40-acre parcel was subject to the mortgage. The trial court began its analysis of determining how much of the 40 acres was subject to the mortgage by stating that it was "clear that the HUD guidelines are such that a lender is advised that HUD will not insure a loan unless the guidelines are followed." It then stated that based on Hawkins's statement to UMC that the FHA would consider any land in excess of ten acres to be excess land, the mortgage, because it covered all 40 acres, was secured by excess land. Thus, the trial court concluded that "when [UMC] included the Estate house plus forty acres in the reverse mortgage that [it] did so in violation of HUD guidelines." Then, quoting from *Hanover*, *supra*, and *Brown v Lynn*, 392 F Supp 559 (ND Ill, 1975), to explain its equitable power to prevent a foreclosure where the lender has disregarded HUD provisions, the trial court held that UMC was not entitled to foreclose on the entire 40 acres. It stated:

In the instant case, [UMC] issued a mortgage contrary to HUD regulations and have [sic] attempted to enjoy the double benefit of having their loan insured by the federal government while also having the mortgage protected by excess land.

Therefore[,] pursuant to the Hanover case, this Court finds that because [UMC] failed to follow HUD guidelines by including all forty acres in the mortgage[,] they will not be entitled to foreclose on the house and forty acres.

The trial court held that UMC was only entitled to foreclose on ten acres.

The issue presented is whether, pursuant to either MCR 2.119(f) or MCR 2.612(C)(1), the trial court properly granted relief to petitioner from the October 2007 opinion and order. I agree with the majority that, because MCR 2.119(f) only allows a trial court to reconsider a decision on a motion, the trial court did not have authority under MCR 2.119(f) to reconsider the October 2007 opinion and order. However, I disagree with the majority that MCR 2.612(C)(1) can properly be interpreted and applied under the circumstances of this case to permit relief from the trial court's October 2007 opinion and order following a bench trial.

A trial court's decision on a motion for relief from judgment is reviewed for an abuse of discretion. *Peterson v Auto-Owners Ins Co*, 274 Mich App 407, 412; 733 NW2d 413 (2007). However, the interpretation and application of a court rule is a question of law reviewed de novo. *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 123-124; 693 NW2d 374 (2005).

MCR 2.612(C)(1) provides six grounds on which a trial court may relieve a party from a final judgment. Petitioner relied on subsection (f) of the court rule in her motion for rehearing. MCR 2.612(C)(1)(f) states that a trial court may relieve a party from a final judgment for "[a]ny other reason justifying relief from the operation of the judgment." Relief may only be granted under MCR 2.612(C)(1)(f) if three requirements are met: "(1) the reason for setting aside the judgment must not fall under subsections a through e, (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice." *Heugel v Heugel*, 237 Mich App 471, 478-479; 603 NW2d 121 (1999). In addition, relief is generally granted under subsection (f) only where the judgment was obtained by improper conduct of the party in whose favor it was rendered. *Id.* at 479.

There is no allegation that the October 2007 opinion and order was obtained by any improper conduct of UMC. Moreover, there is no extraordinary circumstance that would mandate the trial court to set aside the opinion and order. Petitioner, as is usual of a losing party, was unhappy with the opinion and order, and she wanted it reviewed. However, the appellate process, the usual process by which a losing party seeks review of a trial court's judgments, was available to petitioner. This Court is an error-correcting court, *Burns v Detroit (On Remand)*, 253 Mich App 608, 615; 660 NW2d 85 (2002), mod 468 Mich 881 (2003), and, following a bench trial, it reviews both the trial court's conclusions of law and findings of fact, see *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). Thus, had petitioner claimed an appeal of the October 2007 opinion and order, this Court could have reviewed her argument that the trial court improperly relied on *Hanover, supra*, and failed to address the issue whether UMC's circumvention of the HUD guidelines limited the number of acres that was subject to the mortgage. Because petitioner had the right to seek this Court's review of the October 2007 opinion and order, MCR 7.203(A), I conclude that no extraordinary circumstance existed that would mandate the trial court to set aside the opinion and order.

The majority relies on MCR 2.612(C)(1)(a) to conclude that the trial court properly granted petitioner relief from the October 2007 opinion and order. MCR 2.612(C)(1)(a) allows a trial court to relieve a party from a final judgment on the basis of "[m]istake, inadvertence, surprise, or excusable neglect." However, petitioner did not, either below or on appeal, rely on

subsection (a), nor did the trial court cite subsection (a) in the January 2008 order. Because plaintiff has never relied on subsection (a), I believe it is improper for the majority to rely on subsection (a) to affirm the January 2008 order.

Regardless, I disagree with the majority's conclusion that the trial court in the October 2007 opinion and order mistakenly failed to take "its analysis an additional step" and determine whether the entire 40-acre parcel or a lesser amount, either ten or three acres, was subject to the mortgage. Initially, I note that the issue in the bench trial was whether the trial court should order the reformation of the mortgage so that it would only be secured by either three or ten acres, rather than the entire forty-acre parcel. That this was the controlling issue presented to the trial court for resolution at trial was crystal clear. So to say that the trial court mistakenly failed to address the issue is nonsensical on its face. Admittedly, the trial court did not explicitly state in the October 2007 opinion and order that the entire 40-acre parcel was subject to the mortgage. However, the trial court, by concluding that a violation of HUD guidelines does not provide a private cause of action to void a mortgage, rejected the legal basis for petitioner's argument that the mortgage could be reformed so that it was only secured by a three-acre parcel. Further, the trial court ordered that petitioner's complaint be "dismissed in its entirety," that judgment be granted in favor of UMC on its counter-complaint and that UMC be allowed to invoke the power of sale contained in the mortgage and to foreclose on the property, and that title to the 40 acres be quieted in the name of Olson's estate, "subject to all other liens and encumbrances of record not removed by judgment of [the] [c]ourt." The last sentence of the opinion and order stated "[t]hat judgment be granted in favor of [UMC] allowing it to foreclose according to the terms of the mortgage date[d] June 5, 2003 . . . ." Based on the trial court's rejection of petitioner's argument that it could reform the mortgage and on its specific orders, and contrary to the trial court's statement in its January 2008 order, it was perfectly clear that the trial court concluded that the entire 40-acre parcel was subject to the mortgage. Simply stated, there was no mistake nor any uncertainty regarding how many acres were subject to the mortgage in the October 2007 opinion and order.

Moreover, I note that a comparison of the October 2007 opinion and order and the January 2008 order shows that the trial court in the January 2008 did not merely "clarify[]" or "complet[e]" its ruling on how much of the 40-acre parcel was subject to the mortgage. Rather, the comparison shows that the trial court reversed its October 2007 opinion and order.

In the October 2007 opinion and order, the trial court stated that Hawkins's "recommendation" that the FHA would only insure a reverse mortgage covering 10 acres and that the remaining 30 acres were excess land "ha[d] no legal effect" and that it was HUD's decision "whether to accept or reject the appraisal of the entire forty (40) acres, or to discount a portion due to excess land." It then stated that it could only "speculate as to what the HUD officials may have thought when reviewing the appraisal" and that "it [was] possible that [HUD] determined that this was not excess land." It also stated, citing case law, that HUD guidelines "are not controlling," "do[] not have the force of law," and a "violation of HUD guidelines does not give the mortgagor an independent cause of action to void the mortgage." The trial court essentially concluded that petitioner was not entitled to have the mortgage reformed based on an apparent violation of HUD guidelines.

However, in the January 2008 order, the trial court found that UMC violated HUD guidelines when it issued a mortgage that covered the entire 40-acre parcel. It stated that "[t]he

record is . . . clear that the HUD guidelines are such that a lender is advised that HUD will not insure a loan unless the guidelines are followed," that "the record is clear that the Estate house plus forty acres includes 'excess land' that should not be included in the reverse mortgage," and that when UMC "included the Estate house plus forty acres in the reverse mortgage that they did so in violation of HUD guidelines." The trial court concluded that because UMC "failed to follow HUD guidelines by including all forty acres in the mortgage," UMC was not entitled to foreclose on the entire 40 acres. This conclusion is entirely contrary to the trial court's statements in the October 2007 opinion and order that HUD may have determined that nothing in the 40 acres was excess land, that HUD guidelines are not controlling and do not have the force of law, and that a violation of HUD guidelines does not allow for a private cause of action. Stated simply, in its January 2008 order, the trial court reversed its October 2007 opinion and order regarding whether petitioner was entitled to a reformation of the reverse mortgage based on UMC's apparent violation of the HUD guidelines.[3] The trial court did not correct a mistake; rather, it changed its mind regarding the effect of a violation of HUD guidelines.

MCR 2.612(C)(1)(a) does not afford relief from judgment because a trial court, after rendering a judgment following a bench trial, changes its mind. When the trial court issued the October 2007 opinion and order, the case was resolved. Petitioner's only recourse at that point was to appeal to this Court; its recourse was not to ask the trial court for a second bite at the apple. And the majority's recasting of the trial court's change of mind as a "mistake" subject to correction under MCR 2.612(C)(1)(a) is, in my judgment, an improper application of the rule.

I would reverse.

/s/ Joel P. Hoekstra

[3] I express no opinion regarding the merits of the present case. The legal issues raised in petitioner's motion for rehearing should have been raised in an appeal to this Court.