STATE OF MICHIGAN

COURT OF APPEALS

KAI ANDERSON,

Plaintiff-Appellant,

v

FREMONT INVESTMENT & LOAN,

Defendant-Appellee.

UNPUBLISHED
November 17, 2009

No. 287397
Wayne Circuit Court
LC No. 07-729457-CH

Before: Hoekstra, P.J., and Murray and M.J. Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition and denying her cross motion for summary disposition and motion to amend her complaint. We affirm.

I. Background

This case arises out of plaintiff's default on her mortgage agreement. In August 2005, plaintiff executed a mortgage encumbering real property in Grosse Pointe Farms. When plaintiff subsequently failed to make her monthly mortgage payments for July 1, 2007, and August 1, 2007, defendant declared the mortgage in default and informed plaintiff of its intent to foreclose on the mortgage and accelerate repayment of the loan balance of $248,311.47 in the event the unpaid balance for July and August 2007 was not paid by September 16, 2007. The two missed payments totaled $3,844.80. According to plaintiff, the mortgage payments were delinquent because her tenants failed to pay rent timely and because she was paying her daughter's tuition at the University of California at Los Angeles.[1] With plaintiff still having failed to cure the default as of October 9, 2007, defendant scheduled a foreclosure sale for November 8, 2007, but informed plaintiff the mortgage could be reinstated if she paid all past due installments and foreclosure costs and fees.

[1] Plaintiff rents the property in question to her brother, who works for the law firm of plaintiff's father, Herman Anderson. Mr. Anderson has represented plaintiff throughout the entirety of this case.

On November 2, 2007, plaintiff filed her complaint requesting a temporary restraining order, preliminary injunction or an adjournment or cancellation of the sheriff's mortgage sale and reinstatement and reformation of the mortgage note and mortgage. In her complaint, plaintiff asserted that despite defendant's refusal to communicate the "reinstatement amount" (consisting of foreclosure costs and fees in addition to her delinquent payments), she was able to remit what she believed to be the "reinstatement amount" of $7,500.[2] The court subsequently adjourned the foreclosure sale until further notice and ordered plaintiff to pay defendant a monthly security of $2,235. Defendant filed its answer on November 8, 2007, asserting in part that plaintiff's proposed payment of $7,500 was insufficient to reinstate the mortgage. On December 19, 2007, defendant advised plaintiff that a payment of $22,993.49 (including seven payments as well as costs and fees through January 7, 2008) was required to reinstate the mortgage.

Having received no reinstatement payment, defendant moved for summary disposition on March 19, 2008, contending that because there was no genuine issue of material fact that plaintiff had failed to tender a reinstatement payment, the court should dissolve the injunction and permit defendant to proceed with the foreclosure sale.

Plaintiff countered that the hearing on defendant's motion should be adjourned to permit defendant sufficient time to respond to her loan modification proposal[3] and argued that a genuine issue of material fact existed because defendant's policy was to refrain from instituting foreclosure proceedings when a delinquent mortgagor makes a good faith attempt to submit a loan modification proposal.[4] Alternatively, plaintiff argued that summary disposition was improper because defendant neither owned nor serviced the property at issue, and was therefore not a party in interest. Plaintiff also filed a cross-motion for summary disposition requesting the court take judicial notice of preliminary injunctions ordered against defendant in Massachusetts and Ohio, and enjoin defendant from proceeding with foreclosure based on the doctrine of collateral estoppel. Finally, plaintiff moved to file an amended complaint to initiate a class action suit against defendant for violating federal lending and credit laws as well as the Michigan Consumer Protection Act, MCL 445.901 *et seq*.

At the motion hearing of May 9, 2008, plaintiff asserted that two press releases and "substantial information in the public record" indicated that defendant no longer held the mortgage. Defendant answered that its mortgage interest was still reflected in the chain of title. The court granted defendant's motion but denied plaintiff's in its entirety, finding that the press releases constituted hearsay and plaintiff had therefore failed to respond to defendant's motion

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[2] Plaintiff asserted at the motion hearing that defendant subsequently provided a reinstatement amount that she contested, but that she was willing to tender $10,000, which was the full amount of past due payments.

[3] Plaintiff claimed that she sent a loan modification proposal after defendant contacted her through a subsidiary dealing with loan restructuring.

[4] Plaintiff claimed this policy was evidenced by defendant's press release declaring: "[defendant] is continuing to work with regulators throughout the country to help delinquent borrowers retain home ownership through loan modifications and other proactive measures."

with admissible evidence. Additionally, the court elaborated that it was not defendant's responsibility to demonstrate whether the mortgage was assigned. On June 2, 2008, the court entered an order reflecting this ruling and lifting the injunction.

Plaintiff subsequently filed a motion for reconsideration after having received a letter from defendant on May 13, 2008, claiming that defendant had assigned the mortgage to Litton Loan Servicing, L.P., whose name did not appear in the notice of foreclosure by advertisement. Defendant responded that any assignment occurred after the court's decision and was therefore not relevant to this motion. On August 5, 2008, the court denied the motion under MCR 2.114(F)(3) for merely presenting the same issues already ruled upon and failing to demonstrate palpable error. The instant appeal ensued.

II. Analysis

A. Defendant's Motion for Summary Disposition

Plaintiff first challenges the court's order granting defendant's motion for summary disposition and lifting the injunction. Specifically, plaintiff asserts that based on MCL 600.3204 and MCL 600.3212, summary disposition was improper because defendant failed to prove it owned her mortgage and because the mortgage assignee failed to record its mortgage interest and provide proper notice. Plaintiff did not raise her argument on this ground, however, until filing her motion for reconsideration. And plaintiff does not challenge the trial court's denial of her motion for reconsideration on appeal.[5] As such, this issue is unpreserved, and our review is for plain error affecting substantial rights. MRE 103(d); *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

Initially, we note that the crux of defendant's motion for summary disposition was that there was no genuine issue of material fact that plaintiff had failed to tender any reinstatement payments. And, as defendant notes, the basis of plaintiff's complaint requesting an injunction was that she was able to tender payment sufficient to reinstate her mortgage. However, plaintiff ignores this key issue on appeal and instead focuses on the application of MCL 600.3204 and MCL 600.3212, which govern foreclosure sales by advertisement. *Senters v Ottawa Savings Bank, FSB*, 443 Mich 45, 50; 503 NW2d 639 (1993).

Plaintiff's argument on this point is wholly founded on the presupposition that defendant assigned her mortgage, and as such, foreclosure proceedings should be enjoined because the pending sale fails to comply with the foreclosure by advertisement statutes. Although these statutes do require the assignment of a mortgage to be properly noticed and recorded, the *only* evidence plaintiff presented at the time of the trial court's decision on the motion for summary disposition showing an assignment was two press releases. And while both press releases reveal defendant's agreement to sell sub-prime real estate loans and mortgage servicing rights, neither expressly implicates plaintiff's mortgage. Thus, irrespective of whether the press releases

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[5] Indeed, plaintiff only provides the standard of review for summary disposition under MCR 2.116(C)(10).

constituted hearsay as the court ruled, they were properly excluded because they were irrelevant to plaintiff's argument. See MRE 402 (evidence must be relevant to be admissible); see also, *Berkeypile v Westfield Ins Co*, 280 Mich App 172, 178; 760 NW2d 624 (2008) (a court may only consider substantively admissible evidence in deciding a motion for summary disposition). Therefore, because the only evidence plaintiff presented was inadmissible, she failed to sustain her burden of presenting substantively admissible evidence to demonstrate a genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition was appropriate.

We are cognizant of plaintiff's argument that defendant assigned the mortgage based on the notice of assignment to Litton Loan Servicing that plaintiff received on May 13, 2008, and the loan modification agreement that plaintiff executed with HSBC Bank USA National Association[6] on August 20, 2008. Neither document, however, was before the trial court when it decided the parties' summary disposition motions and lifted the injunction.[7] Indeed, plaintiff did not present the notice of assignment until filing her motion for reconsideration – the order on which, as we noted earlier, plaintiff does not challenge on appeal – and did not present the loan modification agreement until filing this appeal. It is axiomatic that a court may only consider evidence available to it when ruling on a summary disposition motion. *Maiden*, *supra* at 126 n 9. And in the same vein, it is impermissible to expand the record on appeal. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Thus, review of this evidence is inappropriate at this stage of the proceedings. Notwithstanding this, even assuming that the foreclosure by advertisement statutes were relevant, it would have been impossible for the trial court to evaluate whether defendant had complied with the recording requirements of MCL 600.3204 because plaintiff failed to present the Wayne County register of deeds. While defendant attached this register to its brief on appeal, we decline to address evidence that was not presented below. *Id*.

Regardless, while MCL 600.3204(1)(d) and (3) require that the party foreclosing the mortgage be either the mortgagee, a party with an interest secured by the mortgage or the party servicing the mortgage, and that any assignment of the mortgage be recorded, such a recording need only have occurred "prior to the date of sale . . . ." In this case, the foreclosure sale has yet to occur. Thus, defendant cannot be, *ipso facto*, in violation of this requirement simply by requesting the court to lift an injunction. A challenge on this ground is not ripe. *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 475 Mich 363, 371 n 14; 716 NW2d 561 (2006) ("Ripeness prevents the adjudication of hypothetical or contingent claims before an actual injury has been sustained. A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all."). Similarly,

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[6] The loan modification agreement lists HSBC Bank USA, National Association, as Trustee under the Pooling and Servicing Agreement dated as of November 1, 2005, Fremont Home Loan Trust 2005-D.

[7] Although the summary disposition order was entered June 2, 2008, the court granted defendant's motion (and dismissed plaintiff's) for the reasons set forth on the record of May 9, 2008.

MCL 600.3212 only requires, in relevant part, a notice of a foreclosure sale by advertisement to include the name of any foreclosing assignee. Such a requirement has nothing to do with whether defendant may request a court to lift an injunction because defendant has failed to reinstate her mortgage. Thus, plaintiff's argument on these grounds is meritless.[8]

Plaintiff urges this Court to follow an Ohio federal district court order dismissing a plaintiff-lender's foreclosure action where it failed to prove its status as mortagee. See *In re Foreclosure Cases*, opinion and order of the United States District Court for the Northern District of Ohio, issued October 31, 2007 (Docket No. 07 CV 2282). Setting aside that this opinion and order is not binding on this Court, *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004), we find noteworthy that plaintiff has referred to defendant as the "mortgagee (lender)" throughout the entirety of the proceedings, both below and on appeal. In any event, plaintiff's challenging of defendant's ownership of the mortgage is based on defendant's actions *after* her complaint was filed. At issue in *In re Foreclosure Cases* was that the mortgagee failed to prove its status as mortgagee *as of the date the complaint was filed*. Reliance on that case is not instructive.

In any case, of import is that the foreclosure sale by advertisement has yet to commence, and plaintiff has made no allegation that any deficiency of notice or recording has affected her substantial rights. Indeed, plaintiff did not even file a motion for relief from judgment under MCR 2.612(C)(1)(b) on account of newly discovered evidence. Therefore, reversal is not warranted.

B. Plaintiff's Cross Motion for Summary Disposition

Plaintiff next argues that the court erred in denying her cross motion for summary disposition because defendant failed to submit documentary evidence that it will be the owner of her mortgage at the time of the foreclosure sale. In support, plaintiff points to defendant's

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[8] Plaintiff cites MCL 600.3204(4), MCL 600.3205a(1) and MCL 600.3205a(5) as supplemental authority in support of her position. This authority fails to deliver the refuge plaintiff seeks. First, while MCL 600.3204(4) enumerates notice requirements that a mortgagee must fulfill before commencing a foreclosure by advertisement, MCL 600.3204(5) restricts application of those requirements to proceedings in which the first notice was published "after the effective date of the amendatory act . . . [,]" i.e., July 5, 2009. This action concerns notice published prior to this date. Thus, MCL 600.3204(4) is inapplicable. Similarly, MCL 600.3205a(1) regarding notice from a foreclosing party to a borrower, and MCL 600.3205a(5) providing a right to seek injunctive relief for a borrower upon whom notice is not properly served, also did not become effective until July 5, 2009. We cannot give these sections retroactive effect as statutes are deemed to operate prospectively unless contrary legislative intent is manifested otherwise. *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001). No contrary intent is manifest. Indeed, as this section imposes new duties on a mortgagee or foreclosing party, retrospective application of this section would be improper. *In re Certified Questions*, 416 Mich 558, 572; 331 NW2d 456 (1982) ("retrospective application of a law is improper where the law . . . creates a new obligation and imposes a new duty . . . with respect to transactions or considerations already past." [internal quotation marks and citation omitted].).

response to her motion for reconsideration acknowledging the recording requirements of MCL 600.3204. However, the motion for reconsideration is not at issue. Furthermore, plaintiff's argument for cross summary disposition below concerned only whether the court should take judicial notice of preliminary injunctions granted in Massachusetts and Ohio. Regardless, because the foreclosure by advertisement statutes imposed no burden on defendant at this stage of the proceedings, this argument fails.

C. Estoppel

Plaintiff contends the trial court abused its discretion in failing to consider evidence that defendant was estopped from foreclosing on the mortgage. However, as plaintiff raised the issue of estoppel in opposing defendant's motion for summary disposition, our review is de novo.[9] *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Maiden*, *supra* at 120. A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing this issue, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

"Estoppel arises where a party, by representations, admissions or silence, intentionally or negligently induces another party to believe facts, and the other party justifiably relies and acts on this belief, and will be prejudiced if the first party is permitted to deny the existence of the facts." *Casey v Auto Owners Ins Co*, 273 Mich App 388, 399; 729 NW2d 277 (2006). According to plaintiff, estoppel is appropriate because defendant did not respond to her loan modification proposal of April 2, 2008, until August 20, 2008 – over two months after the court entered the summary disposition order – even though defendant had informed plaintiff of its policy to promote loan modifications in a letter to her dated July 5, 2007, and even though plaintiff had requested an adjournment of defendant's motion for summary disposition.

Plaintiff has failed to satisfy the requirements of estoppel. First, defendant's July 5, 2007, letter inviting loan modifications made no promises or inducements. On the contrary, the letter indicated that contacting defendant "may" result in lower interests rates and payments and that a negotiated settlement "may be available." Thus, there was no basis upon which plaintiff could justifiably rely that defendant would not proceed to summary disposition and foreclosure proceedings when she made a loan modification proposal.[10] Indeed, defendant's letter of

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[9] In claiming our review of this issue is for an abuse of discretion, plaintiff cites *Peeples v Detroit*, 99 Mich App 285, 300; 297 NW2d 839 (1980). However, that case pertains to whether a trial court may permit amended pleadings, and as such is not instructive.

[10] Plaintiff contends that her attorney was advised on April 3, 2008, in a telephone conversation with Default Mitigation Management, L.L.C. (DMM) (the loan modification company retained by defendant) that her loan modification proposal of April 2, 2008, was received and that
(continued…)

December 19, 2007, told plaintiff in no uncertain terms that her $7,500 proposal for reinstatement "is not going to cut it."[11] Second, plaintiff has failed to show any prejudice. Indeed, the only argument plaintiff makes that remotely resembles prejudice is that she is uncertain as to the identity of her lender. Even were we to construe this argument generously to account for prejudice, however, such a claim is completely unrelated to failing to make reinstatement payments because plaintiff was awaiting an acceptance or rejection of her loan modification proposal. Estoppel is inapplicable.

D. Plaintiff's Motion to File an Amended Complaint

This brings us to plaintiff's final argument: that the trial court erred in denying her motion to amend her complaint to seek class action certification. We disagree. "This Court reviews a grant or denial of a motion for leave to amend pleadings for abuse of discretion." *Phinney v Perlmutter*, 222 Mich App 513, 523; 564 NW2d 532 (1997). A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

"A trial court should freely grant leave to amend if justice so requires." *Phinney*, *supra* at 523; MCR 2.118(A)(2). Because of this policy, a court must state specific findings and its reasons for denying a request to amend a complaint. *PT Today, Inc v Comm'r of Financial & Ins Services*, 270 Mich App 110, 143; 715 NW2d 398 (2006). Here, in denying plaintiff's motion to amend the complaint, the court provided no reasons. Thus, we must reverse unless the amendment would be futile. *Id*.; *Dampier v Wayne Co*, 233 Mich App 714, 734; 592 NW2d 809 (1999). "An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim." *Lane v Kinder Care Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

In requesting leave to amend the complaint, plaintiff alleged that defendant had violated the Truth in Lending Act, 15 USC 1601 *et seq*., the Equal Credit Opportunity Act, 15 USC 1691 *et seq*., the Home Owners Equity Protection Act, 15 USC 1602 *et seq*., and the Michigan Consumer Protection Act, MCL 445.901 *et seq*., and that defendant had "engaged in unfair and deceptive mortgage lending." However, other than asserting she had "discovered evidence" of these violations, plaintiff alleges no facts supporting these allegations. "Conclusory statements, unsupported by factual allegations, are insufficient to state a cause of action." *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003). Consequently, plaintiff has failed to state a claim, and her motion to amend the complaint was futile.[12] There was no abuse of discretion.

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defendant would be advised to accept or reject this proposal. However, no documentary evidence supports this bald claim, and we decline to address whether this conversation induced any reliance. See MCR 2.116(G)(4); *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006).

[11] While plaintiff claimed below that DMM invited a loan modification proposal on February 22, 2008, plaintiff does not raise this point in her brief on appeal.

[12] Similarly, on appeal, plaintiff makes the allegation that defendant's policies and refusals to evaluate loan modification proposals have injured other similarly situated parties. Plaintiff (continued…)

Affirmed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly

(…continued)

names not one of these parties. Her conclusive allegation is therefore insufficient. *Churella*, *supra* at 272.