STATE OF MICHIGAN

COURT OF APPEALS

MARVIN MORRIS and LOUISE MORRIS, Plaintiffs-Appellants, v HOMEQ SERVICING CORPORATION, d/b/a BARCLAYS CAPITAL REAL ESTATE, INC., Defendant-Appellee.	UNPUBLISHED February 16, 2010 No. 288631 Wayne Circuit Court LC No. 08-109769-CH

Before: Sawyer, P.J., and Saad and Shapiro, JJ.

PER CURIAM.

Plaintiffs appeal from the trial court's order that granted summary disposition in favor of defendant and dismissed their claims that arose from defendant's servicing of their mortgage and foreclosure on their property. We affirm.

In October 2000, plaintiffs obtained a $54,000 loan from HomeOwners Loan Corporation. Plaintiffs executed a balloon note, under which the interest on the loan was 10.31% and monthly payments were $486.31, and gave HomeOwners a mortgage on their Detroit home. The note and mortgage were subsequently assigned to Monument Street Funding II, LLC. Defendant[1] is a mortgage loan servicing company that services the note on behalf of Monument.

Defendant initially attempted to foreclose upon plaintiffs' property in August 2004. Plaintiffs thereafter filed for Chapter 13 bankruptcy. Pursuant to their Chapter 13 Plan, plaintiffs were required to make monthly payments of $686 for 36 months, for a total of $24,665.40 over the 36-month period. HomeOwners was to be paid disbursements of $486.31 per month for plaintiffs' continuing mortgage obligation and $111.11 per month to cure a pre-petition mortgage loan arrearage of $4,000. However, plaintiffs' deposits were sporadic. By August 2007, plaintiffs were more than $4,500 behind in deposits, and the bankruptcy case was dismissed for failure to make payments. At this time, disbursements totaling $16,126.05 had been made to HomeOwners, leaving an amount owing of more than $4,000 through July 2007.

[1] Defendant notes that the original named defendant, HomEq Servicing Corporation, no longer exists. The term "defendant" in this opinion refers to HomEq and Barclays interchangeably.

Meanwhile, in 2005, plaintiffs filed a lawsuit against defendant in the Wayne Circuit Court, alleging that in July 2003, defendant notified them that it had advanced funds to pay delinquent City of Detroit property taxes and had increased their monthly mortgage payment accordingly. Plaintiffs alleged that, despite their assertions that they had paid their property taxes, defendant continued to overcharge them by more than $130 per month, in violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. Plaintiffs further asserted that defendant's conduct in overcharging them and instituting foreclosure proceedings constituted outrageous conduct, common-law fraud, and violations of public policy. Case evaluation resulted in a $17,000 award for plaintiffs, which the parties accepted. The parties executed a settlement agreement, under which defendant was to pay plaintiffs $17,000 in exchange for its release "from any and all actions, claims or demands or liabilities of any nature whatsoever, now accrued or which may hereafter accrue, whether known or unknown, arising out of, or pertaining to the Litigation." A stipulated order of dismissal with prejudice was entered.

Following the dismissal of plaintiffs' bankruptcy case, defendant notified plaintiffs that their account was delinquent by 13 months. Defendant noted that plaintiffs were five payments in arrears at the time bankruptcy was filed, that the amount defendant received from the bankruptcy trustee was insufficient to bring the account current, and that plaintiffs had made only one payment in the four months following the bankruptcy dismissal, resulting in a 13-month arrearage. Defendant then notified plaintiffs that their account was in default and that they had 35 days to bring their account current by paying $7,673.29 before defendant would accelerate the maturity date of the loan and refer the account for foreclosure. Plaintiffs did not cure the default, and defendant foreclosed on their home by advertisement. The home was sold at auction to defendant, and a sheriff's deed was executed, subject to a six-month period of redemption.

Plaintiffs initiated the instant lawsuit, and claimed that defendant had improperly billed them for mortgage payments in excess of $200 more than the monthly mortgage payments during the pendency of the bankruptcy proceedings and had thereafter declared the account to have been in default, despite having received payments from the bankruptcy court and despite the execution of the settlement agreement in the prior litigation. Plaintiffs further said that defendant breached the settlement agreement by reasserting the same alleged fees, costs and payments that were resolved in the previous settlement. Plaintiffs additionally alleged that defendant's failure to respond to their inquiry and make necessary corrections to their mortgage violated the Real Estate Settlement Procedures Act (RESPA), 12 USC 2605, *et seq*., the Fair Debt Collection Practices Act (FDCPA), 15 USC 1692 *et seq*., and the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. Plaintiffs also raised claims of wrongful foreclosure, slander of title, and intentional infliction of emotional distress. Noting that plaintiffs had failed to make adequate payments in the bankruptcy proceeding and that the complaint in the instant case was "virtually identical" to the complaint filed in the previous lawsuit, the trial court held that plaintiffs had failed to state a claim upon which relief could be granted and that defendant was entitled to summary disposition pursuant to MCR 2.116(C)(8).

As plaintiffs note, defendant's motion was brought on the bases of MCR 2.116(C)(7), (C)(8), and (C)(10); however, the trial court apparently believed the motion was brought solely under MCR 2.116(C)(8). Nevertheless, the trial court looked beyond the pleadings in granting defendant's motion. Where the parties and the trial court rely on documentary evidence beyond

the pleadings, this Court treats the motion as having been granted pursuant to MCR 2.116(C)(10), and examines the pleadings and the documentary evidence. *Mino v Clio School Dist*, 255 Mich App 60, 63; 661 NW2d 586 (2003); *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

This Court reviews de novo the grant or denial of a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004); *Tipton v William Beaumont Hosp*, 266 Mich App 27, 32; 697 NW2d 552 (2005). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004). "When a motion under [MCR 2.116(C)(10)] is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). The trial court may grant summary disposition under MCR 2.116(C)(10) if, considering the substantively admissible evidence in a light most favorable to the nonmoving party, there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. *Lind*, 470 Mich at 238; *Maiden v Rozwood*, 461 Mich 109, 119-121; 597 NW2d 817 (1999); see also MCR 2.116(G)(6).

We find that plaintiffs have failed to establish the existence of a genuine issue of material fact with respect to any of their claims and that summary disposition was therefore appropriately granted, albeit for reasons different from those cited by the trial court.[2]

Plaintiffs allege that defendant breached the parties' settlement agreement "by reasserting the same alleged fees, costs and payments that were resolved in the previous settlement and case. . . ." This argument is circuitous. The matter of the increased mortgage payment was put to rest with the entry of the parties' settlement agreement. Plaintiffs' default and the subsequent foreclosure on their home bear little relationship to the increased fees that were the subject of the previous lawsuit. Rather, defendant's correspondence indicated it initiated foreclosure proceedings because plaintiffs had defaulted as of December 2006 and had further failed, following the dismissal of the bankruptcy case, to make three out of four monthly payments due after the bankruptcy dismissal.

Plaintiffs further assert that defendant's employee falsely stated in an affidavit that in January 2008, plaintiffs' loan account was in default and due and owing for their December 2006 payment. Plaintiffs argue that was not possible because their account was being paid through the bankruptcy trustee at that time. This argument lacks merit. The bankruptcy records—whose accuracy plaintiffs have conceded—clearly indicate that they were making only sporadic payments, and that by December 2006, they were more than four months behind and had accumulated more than $3,000 in overdue payments. Plaintiffs have submitted no evidence to counter defendant's assertion, which was supported by documentary evidence, that their account was delinquent at the time foreclosure proceedings were initiated in January 2008. Nor have plaintiffs demonstrated that defendant's initiation of foreclosure proceedings was dependent

[2] This Court will not reverse where the trial court reaches the right result, albeit for different reasons. *Netter v Bowman*, 272 Mich App 289, 308; 725 NW2d 353 (2006).

upon the allegedly inappropriate increase in their mortgage debt at issue in the prior litigation. Because plaintiffs have failed to set forth, by affidavits or otherwise, specific facts showing that there is a genuine issue for trial, summary disposition of their breach of contract claim was appropriate. See MCR 2.116(G)(4).

Summary disposition was also appropriately granted as to plaintiffs' RESPA claim. Plaintiffs allege that defendant violated § 2605(e) of RESPA, which requires that upon the receipt of a qualified written request,[3] the servicer of a federally related mortgage loan must acknowledge receipt of the correspondence within 20 days, and within 60 working days must respond by making appropriate corrections to the borrower's account, if necessary and, after conducting an investigation, providing the borrower with a written clarification or explanation. 12 USC 2605(e)(1)(A) and (2). See *Keen v American Home Mortg Servicing, Inc*, ___ F Supp 2d ____ (ED Cal, 2009), slip op p 6.

Plaintiffs failed to present any evidence to demonstrate that they made a qualified written request within the meaning of RESPA, that any errors were made in the calculation of their loan balance, or that defendant failed to correct any errors. In the absence of any facts or evidence supporting plaintiffs' bare assertion that defendant "failed to respond to Plaintiffs' inquiry and make the necessary corrections to their mortgage," summary disposition of this claim was appropriate. See *Keen*, __ S Supp 2d at __, slip op at 7, n 4.

Plaintiffs' claim under the FDCPA likewise fails. Plaintiffs' complaint alleged, without further elaboration, that defendant "failed to provide proper verification of the alleged debt of Plaintiffs and failed to make necessary corrections," and that this constituted a violation of the FDCPA. However, defendant was not subject to the terms of the FDCPA as it related to plaintiffs' debt.

Section 1692(e) of the FDCPA prohibits a "debt collector" from using any false, deceptive or misleading representations or means in connection with the collection of any debt. 15 USC 1692(e). However, the FDCPA explicitly exempts from the definition of "debt collector" a person "collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person." 15 USC 1692a(6)(F)(iii). Accordingly, a mortgage loan servicer is not a "debt collector" under the FDCPA where the borrower was not in default at the time the servicer acquired its interest in the loans. *Alibrandi v Financial Outsourcing Services, Inc*, 333 F3d 82, 87-88 (CA 2, 2003); *Perry v Stewart Title Co*, 756 F2d 1197, 1208

[3] A "qualified written request" is defined in 12 USC 2605(e)(1)(B) as

> a written correspondence . . . that
>
> (i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and
>
> (ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

(CA 5, 1985). Moreover, the enforcement of a security interest through a nonjudicial foreclosure is not the collection of a debt for purposes of the FDCPA.[4] See *Montgomery v Huntington Bank*, 346 F3d 693, 700-701 (CA 6, 2003); *Rosado v Taylor*, 324 F Supp 2d 917, 924 (ND Ind, 2004); *Hulse v Ocwen Fed Bank, FSB*, 195 F Supp 2d 1188, 1204 (D Or, 2002).

Similarly, summary disposition of plaintiffs' MCPA claim was appropriate. The MCPA prohibits "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." MCL 445.903(1). However, § 4(1)(a) of the MCPA exempts any "transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." MCL 445.904(1)(a). In determining whether § 4(1)(a) applies, "the relevant inquiry 'is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.'" *Liss v Lewiston-Richards, Inc*, 478 Mich 203, 210; 732 NW2d 514 (2007) (quoting *Smith v Globe Life Ins Co*, 460 Mich 446, 465; 597 NW2d 28 [1999]); see also *Attorney General v Diamond Mortgage Co*, 414 Mich 603; 327 NW2d 805 (1982).

Residential mortgage loan transactions by banks—which are specifically authorized under state and federal law—are exempt from the MCPA. *Newton v West*, 262 Mich App 434, 441-442; 686 NW2d 491 (2004). Likewise, because defendant is a mortgage loan servicer that is specifically authorized under the Mortgage Brokers, Lenders, and Servicers Licensing Act (MBLSLA), MCL 445.1651 *et seq*., to engage in mortgage loan transactions, subject to the supervisory authority and control of the Commissioner of the Office of Financial and Insurance Services, MCL 445.1651a(b); MCL 445.1661(1), we find that defendant is exempt from the provisions of the MCPA. MCL 445.904(1)(a).

Plaintiffs failed to establish a genuine issue of material fact with respect to their slander of title claim. "To establish slander of title at common law, a [party] must show falsity, malice, and special damages, i.e., that the defendant maliciously published false statements that disparaged a plaintiff's right in property, causing special damages." *B & B Investment Group v Gitler*, 229 Mich App 1, 8; 581 NW2d 17 (1998). Plaintiffs' complaint alleged only that defendant "illegally foreclose[ed] and [sold] Plaintiffs' property at a sheriff's sale." No facts were set forth as to what false statements were made or whether they were made with malice. Plaintiffs did not establish the existence of a genuine issue of material fact with respect to either of these elements.

Finally, plaintiffs failed to establish a genuine factual issue regarding their claim of intentional infliction of emotional distress. "In order to state a claim of intentional infliction of emotional distress, a plaintiff must show (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 582; 603 NW2d 816 (1999). "Liability for such a claim has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as

[4] With the exception of § 1692f(6), which is not at issue in this appeal. See *Montgomery v Huntington Bank*, 346 F3d 693, 700-701 (CA 6, 2003).

atrocious and utterly intolerable in a civilized community." *Id.* at 582-583. Because plaintiffs failed to present any evidence demonstrating that defendant improperly billed them for their mortgage payment and that they were not in default at the time of foreclosure, summary disposition of this claim was appropriate.[5]

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Douglas B. Shapiro

[5] Plaintiffs do not address in their appellate brief the trial court's dismissal of their "wrongful foreclosure" claim. It is therefore deemed abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). In any event, because plaintiffs have not set forth evidence demonstrating there was a factual issue concerning whether they were in default on their mortgage loan, this claim was properly dismissed. Plaintiffs' request for "exemplary damages" fails for the same reason.