STATE OF MICHIGAN

COURT OF APPEALS

FLAGSTAR BANK F.S.B.,

Plaintiff-Appellee,

v

ESTATE PROPERTIES, INC. and ESTATE PROPERTIES II, INC.,

Defendants,

and

LARRY MULLINS,

Defendant-Appellant.

UNPUBLISHED
April 20, 2010

No. 289301
Oakland Circuit Court
LC No. 2007-084150-CK

Before: JANSEN, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order of dismissal. We affirm.

Defendant first argues on appeal that plaintiff, Flagstar Bank F.S.B., completed a valid foreclosure by advertisement sale and, therefore, it was error for the trial court to set aside the foreclosure by advertisement sale. We disagree. The decision to set aside a foreclosure by advertisement sale is a matter of equity, which this Court reviews de novo. *Mitchell v Dahlberg*, 215 Mich App 718, 727; 547 NW2d 74 (1996); see, also, *Federal Land Bank of St Paul v Edwards*, 262 Mich 180; 247 NW 147 (1933). The factual findings supporting equitable decisions are reviewed for clear error. *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 523; 730 NW2d 481 (2007).

In general, the right to foreclosure by advertisement is statutory. *Church & Church, Inc v A-1 Carpentry*, 281 Mich App 330, 339; 766 NW2d 30 (2008). "Such foreclosures are a matter of contract, authorized by the mortgagor, and ought not be hampered by an unreasonably strict construction of the law." *Id*. at 339-340. Although foreclosure by advertisement sale on a mortgage may lead to harsh results that often do occur, the Michigan Supreme Court has "'never held that because thereof, such sale should be enjoined, when no showing of fraud or irregularity

is made.'" *Id*. at 340, quoting *Calaveras Timber Co v Michigan Trust Co*, 278 Mich 445, 454; 270 NW 743 (1936). MCL 600.3204(1) provides:

> a party may foreclose a mortgage by advertisement if all of the following circumstances exist:
>
> (a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.
>
> (b) An action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage; or, if an action or proceeding has been instituted, the action or proceeding has been discontinued; or an execution on a judgment rendered in an action or proceeding has been returned unsatisfied, in whole or in part.
>
> (c) The mortgage containing the power of sale has been properly recorded.
>
> (d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage.

According to the Michigan Supreme Court, the failure of a party to seek court approval before proceeding with a foreclosure by advertisement sale once the property is in receivership renders the foreclosure by advertisement sale voidable, not void, because the sale would be done in contempt. *In re Chaffee*, 262 Mich 291, 296-297; 247 NW 186 (1933). The Court stated:

> [t]he mere fact that the statutory foreclosure is not strictly a proceeding in court does not immune it from judicial supervision in proper cases. The result of such foreclosure, if carried to an effective conclusion, would be in the instant case to dispossess the receiver of property without the consent of the appointing court. But that is the very thing forbidden by law on the ground that it would work an indignity to the authority of the court and prevent orderly procedure in the receivership.
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> * * *
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> [Contractual rights are] . . . held in abeyance during the receivership in so far as they affect the receiver's possession of property, unless the consent of the court is obtained. Receiverships are designed to accomplish in an orderly manner under supervision of the court the maximum degree of benefits to all concerned. In their operation they may effectuate a moratorium as to certain parties; but the matter of orderly procedure imposed is not an impairment of contractual rights. The lien holder is not deprived of his lien; but he may not proceed in total disregard of the receivership court. [*Id*. at 296-297.]

In this case, the foreclosure by advertisement sale was *voidable* because after plaintiff sought to place the properties into receivership, and after the trial court took possession of the properties through a receivership, plaintiff proceeded to conduct a foreclosure by advertisement

sale on Estate Properties II without the trial court's approval. Plaintiff's conduct was contemptuous because it amounted to plaintiff attempting to take possession of Estate Properties II away from the trial court without its consent. See *In re Chaffee*, 262 Mich at 296-297. The receiver filed the motion requesting that the trial court set aside the foreclosure by advertisement sale conducted by plaintiff because it was in the best interests of the receivership. While plaintiff agreed with the receiver that a higher amount of money could be received by selling both properties together, defendant apparently disagreed and believed that if the foreclosure by advertisement sale for Estate Properties II were completed, he, as the junior mortgage holder to plaintiff, would be entitled to surplus money.

Defendant offers the sheriff's deed on the mortgage sale of Estate Properties II to show that plaintiff completed a foreclosure by advertisement sale January 22, 2008, for $742,500 on Estate Properties II for the default of plaintiff's $18,000 mortgage on Estate Properties II. Since defendant's mortgage on Estate Properties II was for $270,000, defendant asserts there would be a surplus of funds, and he claims entitlement to $385,928.61[1] of the surplus. However, plaintiff held another senior mortgage on Estate Properties II for $1,220,000. Defendant admitted that his lien interest of $270,000 was subordinate to plaintiff's lien interest of $1,220,000 on Estate Properties II. Thus, defendant's position is futile because, even if the foreclosure by advertisement sale was not set aside, he would not be entitled to surplus funds until plaintiff received full payment on both of its lien interests in Estate Properties II. Further, the receiver in this case appears to have acted in good faith and in the best interests of both properties and lienholders when it requested the foreclosure by advertisement sale be set aside. Because the property was in receivership, and because there was no fraud in the transaction, it was proper for the trial court to use its powers to void the foreclosure by advertisement sale to avoid having the property taken out of its possession without its consent.

Defendant next argues the trial court abused its discretion in not requiring the receiver's motion to cite to legal authority. We disagree. This Court reviews a trial court's decision on whether a party's motion required a more definite statement for an abuse of discretion. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 625; 750 NW2d 228 (2008). "An abuse of discretion occurs when the [trial court's] decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

Defendant is correct in his argument that the receiver's motion to set aside the sheriff's sale does not cite to legal authority contrary to MCL 2.119(A)(2), which provides, "[a] motion or response to a motion that presents an issue of law must be accompanied by a brief citing the authority on which it is based." Nevertheless, an error by the trial court in a ruling or order is not a ground for granting a new hearing or disturbing an order unless refusal to take action appears to be inconsistent with substantial justice. MCR 2.613(A); *Zdrojewski v Murphy*, 254 Mich App 50, 64; 657 NW2d 721 (2002). Because we concluded that the trial court's actions in setting aside the foreclosure by advertisement sale were within the trial court's discretion, the trial court's error in accepting the receiver's motion without citation to legal authority was not inconsistent with substantial justice.

[1] Defendant also claims accrued interest.

Finally, defendant argues that the trial court erred in not setting forth findings of fact or conclusions of law in deciding his motion for reconsideration. This issue was not presented in defendant's statement of questions presented. An issue not contained in the statement of questions presented is considered waived on appeal. *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 458-459; 688 NW2d 523 (2004). Thus, we decline to address this issue.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly