STATE OF MICHIGAN

COURT OF APPEALS

PNC BANK, Plaintiff/Counter Defendant-Appellee,	UNPUBLISHED June 21, 2016
v	No. 326687 Oakland Circuit Court
NELLY GOODMAN, Defendant/Counter Plaintiff-Appellant,	LC No. 2012-130691-CH
and S & A CAPITAL PARTNERS, INC. Defendant.	

Before: MURPHY, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

Defendant Nelly Goodman[1] appeals the order of the trial court that granted summary disposition in favor of plaintiff. For the reasons provided below, we affirm.

I. BASIC FACTS

On August 2, 2002, defendant and her husband,[2] in order to secure a loan in the amount of $296,000, were granted a mortgage on real property located at 4390 Savoie Trail in West Bloomfield to National City Mortgage Co. Thereafter, on September 10, 2002, National City Mortgage Co assigned the mortgage to National City Bank of Pennsylvania, which in turn, pursuant to the terms of a Mortgage Partnership Finance Program Participating Financial Institution Agreement ("PFI Agreement"), transferred the mortgage to Federal Home Loan Bank

[1] Our use of the term "defendant" in this opinion will refer to Goodman. The other named defendant, S & A Capital Partners, Inc., is not involved in this appeal.

[2] Defendant's husband has since passed away on April 11, 2009.

of Pittsburgh ("FHLBP"). Although there was no formal "assignment" document,[3] the transfer was documented by a "Transaction Confirmation and Loan Funding Activity Report." Further, Michael Finelli, Jr., who as a senior director at Federal Home Loan Bank of Chicago, routinely reviewed transactions from National City Bank of Pennsylvania to FHLBP, provided in an affidavit that the promissory note and mortgage were "transferred from National City Bank of Pennsylvania to FHLBP pursuant to Master Commitment No. 7553, and Delivery Commitment No. 43057."

The PFI Agreement provided that National City Bank of Pennsylvania would remain the servicer for the mortgage, but it could assign its servicing rights with FHLBP's consent. Pursuant to the PFI Agreement, FHLBP and National City Bank of Pennsylvania entered into a Consent Agreement, which provided that National City Mortgage Co became the servicer of the mortgage. In December 2004, FHLBP consented to the assignment of the servicing rights from National City Mortgage Co to NCMC Newco, Inc. In July 2006, FHLBP consented to the merger of NCMC Newco into National City Bank and the resulting transfer of servicing rights to National City Bank. Thereafter, National City Bank merged with and into plaintiff on November 6, 2009. Thus, as a result of this latest merger, the servicing rights for the mortgage were transferred to plaintiff.

In addition, § 4.09 of the 2003 amendment to the PFI Agreement provides in relevant part that the servicer "shall in accordance with the Guides foreclose upon or otherwise comparably convert . . . the ownership of Mortgaged Properties securing such of the SF Mortgages as come into and continue in default and as to which no satisfactory arrangements can be made for collection of delinquent payments as permitted by this Agreement and the Guides." And § 107.4.1 of the Guides states that "[w]hen a Mortgage Loan reaches the 90th day of Delinquency and the Servicer has exhausted all reasonable means of curing the Delinquency, the Servicer must either begin the Foreclosure process or an alternative to Foreclosure . . . ."

It is undisputed that defendant stopped making payments on the underlying loan to the mortgage in August 2009. On July 25, 2014, plaintiff filed an amended complaint, which alleged four counts: count I-Judicial Foreclosure, count II-Judicial Declaration of Validity of Mortgage, count III-Reformation of Mortgage, and as an alternative to counts II and III, count IV-Equitable Mortgage. Defendant filed a counter-claim on August 11, 2014, which asserted one count of slander of title, based on plaintiff's recording of a "claim of interest," which was recorded in November 2009.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(5), (C)(8), and (C)(10). Plaintiff, in turn, moved for summary disposition on its claims pursuant to MCR 2.116(C)(9) and (C)(10), and moved for summary disposition on defendant's counter-claim pursuant to MCR 2.116(C)(7) and (C)(8). Defendant's primary position was that plaintiff lacked standing to foreclose because it was not the mortgagee, a successor, or an assignee of the mortgagee. Defendant also argued that plaintiff did not comply with both MCR 3.411 and 2.113,

[3] National City Bank of Pennsylvania did execute a document entitled "Assignment of Mortgage and Promissory Note," but the document left the name of the assignee blank.

which required the complaint to be dismissed. With respect to plaintiff's claim for reformation, defendant argued that the claim should fail because there was no mistake in the mortgage. Plaintiff asserted that it did have standing because, although it was not the mortgagee, successor, or assignee of the mortgagee, it was the servicer of the mortgage. Plaintiff further argued that MCR 3.411 and 2.113 were not implicated because (1) MCR 3.411 addresses actions to determine interests in land, and it was not seeking such a determination and (2) MCR 2.113 applies only to claims brought on a "written instrument," and it was only seeking to enforce a lien (and in any event, the mortgage was a public record, which did not need to be attached to the complaint). And plaintiff contended that although the mortgage provided a space for the property's legal description, such description was inadvertently omitted.

The trial court granted plaintiff's motion and denied defendant's motion. The trial court reasoned that the authority to foreclose may be delegated and that such authority was properly delegated to plaintiff as the servicer of the mortgage. The also court agreed with plaintiff that both MCR 3.411 and 2.113 were inapplicable. Finally, the court found that because the evidence reflects that both defendant and the mortgagee intended that the mortgage include the legal description of the property, the fact that it was omitted was ground to reform the mortgage to have that description included.[4] With respect to defendant's counter-claim, the trial court ruled that the claim was barred by the statute of limitations.

II. STANDARDS OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996).

A. REVIEW OF PLAINTIFF'S CLAIMS

A motion under MCR 2.116(C)(5) tests the plaintiff's capacity to bring the suit. See *McHone v Sosnowski*, 239 Mich App 674, 676; 609 NW2d 844 (2000).

> The pleadings, affidavits, deposition, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on the motion. This Court must review the record to determine whether the moving party is entitled to judgment as a matter of law. Further, whether a party has standing to bring an action is a question of law reviewed de novo. [*Franklin Hist Dist Study Committee v Village of Franklin*, 241 Mich App 184, 187; 614 NW2d 703 (2000) (citations omitted).]

"A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. The

[4] The court did not rule on the validity of plaintiff's alternative count IV because it held that plaintiff was entitled to judgment on counts II and III.

motion should be granted if no factual development could possibly justify recovery." *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001).

> Summary disposition under MCR 2.116(C)(9) is proper if a defendant fails to plead a viable defense to a claim. A motion under MCR 2.116(C)(9) tests the sufficiency of a defendant's pleadings by accepting all well-pleaded allegations as true. If the defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery, then summary disposition under this rule is proper. [*Village of Dimondale v Grable*, 240 Mich App 553, 565; 618 NW2d 23 (2000) (quotation marks and citations omitted).]

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The court reviews all of the submitted evidence in a light most favorable to the nonmoving party, and if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law, then the motion is properly granted. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

B. REVIEW OF DEFENDANT'S COUNTER-CLAIM

"Summary disposition under MCR 2.116(C)(7) is appropriate when the undisputed facts establish that the plaintiff's claim is barred under the applicable statute of limitations." *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013). "Although generally not required to do so, see MCR 2.116(G)(3), a party moving for summary disposition under MCR 2.116(C)(7) may support the motion with affidavits, depositions, admissions, or other admissible documentary evidence, which the reviewing court must consider." *Id.* "If there is no factual dispute, whether a plaintiff's claim is barred under the applicable statute of limitations is a matter of law for the court to determine." *Id.* at 523.

III. PLAINTIFF'S CLAIMS

A. STANDING

Defendant argues that plaintiff lacks standing to bring its claims because plaintiff is not the holder of the mortgage, nor its successor or assign. We disagree.

Defendant relies on MCR 2.201(B)(1), which provides that "[a]n action must be prosecuted in the name of the real party in interest." Further, under Michigan's standing jurisprudence, "a litigant has standing whenever there is a legal cause of action." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). Here, plaintiff is the real party in interest, as it is the one who is attempting to foreclose on the subject property. And, although plaintiff is not the mortgagee nor a successor or assign of the mortgagee, it may proceed with the action because the authority to foreclose was delegated to it. As this Court has noted, " '[a]n obligor can properly delegate the performance of his duty to another unless the delegation is contrary to public policy or the terms of his promise.' " *UAW-GM Human Res Ctr v KSL Recreation Corp*, 228 Mich App 486, 509-510; 579 NW2d 411 (1998), quoting Restatement Contracts, 2d, § 318, p 19; see also *Bruner v Discover Bank*, 360 SW3d 774, 777

(Ky App, 2012) ("[N]othing prohibits one company from specifically designating another as its agent for the purpose of colleting a debt and instituting legal proceedings on its behalf."), citing 3 Am Jur 2d, Agency, § 95. Further, contractual duties may be delegated as long as the duties do not require personal performance. *UAW-GM Human Res Ctr*, 228 Mich App at 510. And "personal performance will not be implied in the absence of an express agreement 'if the duty is of such character that performance by an agent will be substantially the same thing as performance by the obligor himself.' " *Id.*, quoting 3 Williston, Contracts, § 411, p 20.

Here, ¶ 20 of the mortgage provides that a loan servicer will "collect[] Periodic Payments due under the Note and this Security Instrument and perform[] other mortgage loan servicing obligation under the Note, this Security Instrument, and Applicable Law." And § 4.09 of the 2003 amendment to the PFI Agreement and the accompanying Guides expressly authorize the servicer to initiate foreclosure proceedings. Importantly, nothing prevented the mortgagee from delegating its duties under the contract to another party. Defendant's reliance on the contract only allowing the mortgagee, its successors and assigns to foreclose is misplaced. This limiting language did not act to prevent the mortgagee from delegating its duties or simply appointing an agent to act in its place. Further, the servicing of a loan or mortgage is not personal. In other words, whoever services the loan and mortgage will be of no material consequence to a mortgagor, like defendant. Accordingly, the mere fact that plaintiff was a servicer of the mortgage did not deprive it of standing, as it rightfully was attempting to foreclose on the property, pursuant to a valid delegation. See *CWCapital Asset Mgmt, LLC v Chicago Props, LLC*, 610 F3d 497, 500-501 (CA 7, 2010) (allowing mortgage servicer to sue in his own name); *Greer v O'Dell*, 305 F3d 1297, 1299 (CA 11, 2002) (holding that "a loan servicer is a 'real party in interest' with standing to conduct, though licensed counsel, the legal affairs of the investor relating to the debt that it services").

B. MCR 3.114(C)(2)

Defendant argues that plaintiff's claims must fail because it failed to comply with MCR 3.411(C)(2). We disagree.

MCR 3.411(C)(2) requires a plaintiff to "attach to the complaint . . . a statement of the title on which the pleader relies, showing from whom the title was obtained and the page and book where it appears of record." This court rule "applies to actions to determine interests in land under MCL 600.2932." MCR 3.411(A). MCL 600.2932(1), in turn, provides the following:

> Any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not.

However, the present claims are not seeking a determination of interests in the subject property. In other words, plaintiff never sought a determination that its claim was inconsistent with any interest owned by any other person. Plaintiff did not dispute that defendant owned the property. Instead, plaintiff merely alleged a claim for judicial foreclosure under MCL 600.3101

and did not file a claim to determine property interests under MCL 600.2932. Accordingly, the requirements of MCR 3.411 do not apply, and the trial court did not err when it ruled likewise.[5]

C. WHETHER THE MORTGAGE CONTAINED A MISTAKE

Defendant argues that plaintiff's reformation count must fail because there is no mistake to correct in the mortgage. We disagree.

Michigan law allows for contracts to be reformed based on the existence of a mutual mistake. See *Scott v Grow*, 301 Mich 226, 236; 3 NW2d 254 (1942); *Casey v Auto Owners Ins Co*, 273 Mich App 388, 398; 729 NW2d 277 (2006).

MCL 560.212 provides, in pertinent part, that "[a]fter an assessor's plat has been made and recorded with the register of deeds, all conveyances of land included in the assessor's plat shall be by reference to the plat." Here, page 3 of the mortgage includes a space for the legal description, but it was left blank. The fact that the document provided an area for the legal description, yet it was not filled out, contrary to MCL 560.212, indicates that the parties, indeed, made a mutual mistake in omitting the description. Therefore, the trial court properly granted plaintiff's motion for summary disposition on this count.

IV. DEFENDANT'S COUNTER-CLAIM

The trial court ruled that defendant's counter-claim, which alleged slander of title was time barred. However, defendant never addresses this ruling and instead focuses on the underlying merit of the claim. The failure to address the court's actual ruling results in the issue being abandoned, and we need not consider it. See *City of Riverview v Sibley Limestone*, 270 Mich App 627, 638; 716 NW2d 615 (2006) ("[A] party's failure to brief an issue that necessarily must be reached precludes appellate relief."); *Roberts & Son Contracting, Inc v N Oakland Development Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987). Regardless, even if we were to review the issue, it is clear that the trial court did not err because MCL 600.5805(9) provides for a one-year limitations period, *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 471; 487 NW2d 807 (1992), and defendant filed her counter-claim nearly three years after the limitations period lapsed.

Affirmed. Plaintiff, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Henry William Saad
/s/ Stephen L. Borrello

[5] At the trial court, defendant also argued that plaintiff's complaint was deficient because of a failure to comply with MCR 2.113(F), but defendant does not challenge the trial court's rejection of that argument on appeal. Accordingly, we need not address it.