STATE OF MICHIGAN

COURT OF APPEALS

SELECT COMMERCIAL ASSETS, LLC, Plaintiff-Appellee,	UNPUBLISHED June 21, 2016
v	No. 326968 St. Clair Circuit Court
JAY W. CARROTHERS, Defendant-Appellant.	LC No. 14-002997-CH

Before: MARKEY, P.J., and OWENS and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right the trial court's April 6, 2015 ruling granting summary disposition in favor of plaintiff and the court's judgment of foreclosure of defendant's July 6, 2004 mortgage granted to Citizens State Bank of property commonly known as 402-418 South Waters Street, Marine City, Michigan. Defendant argued in the trial court that plaintiff lacked standing to foreclose because it had not satisfactorily shown that it owned the underlying debt and also argued that foreclosure was premature because plaintiff had not made a formal demand for payment before instituting this action. The trial court, applying *Residential Funding Co, LLC v Saurman*, 490 Mich 909; 805 NW2d 183 (2011), by analogy to judicial foreclosure actions, ruled that it was immaterial to plaintiff's right to foreclose as the mortgagee of record whether it also owned the underlying note. The trial court also ruled that plaintiff's action to foreclose was not premature because the undisputed facts established that the mortgage-secured debt was in default because defendant failed to pay a final balloon payment. We affirm.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). Defendant correctly notes that because the trial court considered the parties' affidavits and other documentary evidence in granting the motion, this Court reviews the trial court's decision as being based on MCR 2.116(C)(10). *Id*. A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The trial court in deciding the motion must view the substantively admissible evidence submitted up to the time of the motion in a light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). The motion should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of

material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*.

This case also presents questions of law regarding the interpretation of statutes and the terms of a contract, which are reviewed de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002); *Cuddington*, 298 Mich App at 271.

Whether a plaintiff has standing is a legal question that this Court reviews de novo. *Cadle Co v City of Kentwood*, 285 Mich App 240, 253; 776 NW2d 145 (2009). "An action must be prosecuted in the name of the real party in interest . . . ." MCR 2.201(B). "A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another." *Michigan Nat'l Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989).

At the outset, we note that defendant does not dispute, and the public record confirms, that defendant granted a mortgage in 2004 to Citizens State Bank to secure payment of a promissory note for $450,000, and any "renewals of, extensions of, modifications of, refinancing[] of, consolidations of, and substitutions of the promissory note . . . ." The original note was refinanced or extended in July 2007 with a promissory note for $450,000, which provided for a final balloon payment due in July 2010. Defendant does not dispute that he failed to make the balloon payment in July 2010 or any time thereafter. Additionally, defendant does not dispute that the public record shows that the Citizens State Bank went into the receivership of the Federal Deposit Insurance Corporation (FDIC), which on February 14, 2011, as receiver, sold and assigned to North CRE Venture 201-2, LLC and its successors and assigns, defendant's 2004 "Mortgage (and any and all notes secured thereby) . . . ." Further, defendant does not dispute that the public record shows that North CRE Venture 201-2, LLC, assigned defendant's mortgage to plaintiff on April 22, 2014. This assignment states that CRE "sold, assigned and transferred and does hereby sell, assign and transfer to the party of the second part [plaintiff], all the right, title and interest of the said party of the first part [CRE] in and to a certain real estate mortgage dated July 6, 2004, made by [defendant], to Citizens State Bank . . .." "[A] mortgage assignee has the same rights as the assignor," *Burkhardt v Bailey*, 260 Mich App 636, 653; 680 NW2d 453 (2004), and because CRE assigned all its right, title and interest in the mortgage to plaintiff, this assignment necessarily included the underlying debt. So, absent evidence to the contrary, the public record shows that both the mortgage and the underlying debt were assigned by the FDIC to CRE, who then assigned both the mortgage and the debt to plaintiff. The fact that the assignment to plaintiff misstates the original underlying debt, which the mortgage clearly states is $450,000, is no defense to an action to foreclose the mortgage.

Nevertheless, regardless of whether the mortgage debt was properly assigned to plaintiff, the trial court correctly ruled this determination was immaterial to plaintiff's right to foreclose as the mortgagee of record. Defendant's argument that plaintiff must be the owner of debt secured by the mortgage to bring a judicial action to foreclose the mortgage is without merit. The trial court ruled that although *Saurman* addressed foreclosure by advertisement, its holding that a mortgagee of record could foreclose without owning the debt applies by analogy to a circuit court foreclosure action. The *Saurman* Court interpreted MCL 600.3204(1)(d), which states the fourth of four circumstances required to permit foreclosure of a mortgage by advertisement: "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." This provision was added by a 1994 amendment to the statute and the Court concluded that the Legislature did not intend "to establish a new legal framework in which an undisputed record holder of a mortgage . . . no longer possesses the statutory authority to foreclose." *Saurman*, 490 Mich at 910. Instead, "the Legislature's use of the phrase 'interest in the indebtedness' to denote a category of parties entitled to foreclose by advertisement indicates the intent to include mortgagees of record among the parties entitled to foreclose by advertisement." *Id*. In so holding, the *Saurman* Court cited with approval the common-law rule that a mortgage and its beneficial interest (the debt) need not be in the same hands. *Id*., quoting *Adams v Niemann*, 46 Mich 135, 137; 8 NW 719 (1881).

> "It has never been necessary that the mortgage should be given directly to the beneficiaries. The security is always made in trust to secure obligations, and the trust and the beneficial interest need not be in the same hands. . . . The choice of a mortgagee is a matter of convenience." *Saurman*, 490 Mich at 910, quoting *Adams*, 46 Mich at 137.]

Thus, the existing "legal framework," including the common law, did not require that the mortgage and the debt it secured be owned by the same party before the mortgagee could foreclose on the basis that the debtor was in default. "A mortgage to a third person would be as valid as a mortgage to a creditor." *Adams*, 46 Mich at 137. Furthermore, the common law applies in Michigan until "changed, amended or repealed" by the Legislature or by our Supreme Court. Const 1963, art 3, § 7; *Woodman v Kera LLC*, 486 Mich 228, 231 n 1; 785 NW2d 1 (2010). Consequently, the trial court correctly ruled that regardless of whether plaintiff owned the debt, it could foreclose the mortgage as the mortgagee of record on showing that the debt was in default. Because the parties' affidavits established the undisputed fact that the debt was in default based on defendant's failure to pay the July 2010 balloon payment, the trial court correctly granted plaintiff summary disposition and a judgment of foreclosure.

Defendant cites MCL 600.3105 and *George v Ludlow*, 66 Mich 176, 179; 33 NW 169 (1887), to support his claim that to have standing to commence an action to foreclose a mortgage in Michigan, a plaintiff must show that it is the owner of the debt secured by the mortgage. Neither cited authority supports defendant's stated proposition. *George* presented a factual issue whether the decedent-mortgagee had discharged the mortgage before his death. The Court found the evidence of the amount due on the mortgage was unsatisfactory and decided the case based on what the evidence "satisfactorily established." *George*, 66 Mich at 179. In the present case, the undisputed evidence established that the debt was in default because defendant failed to pay the July 2010 balloon payment.

With respect MCL 600.3105, defendant does not state which of its three subsections support his argument. Subsection one prohibits an action for foreclosure where "a judgment has been obtained in any other civil action for the money, or part thereof, demanded in the complaint . . . unless the sheriff or other proper officer has returned an execution as unsatisfied, in whole or in part, and certified that he can find no property of the defendant out of which to satisfy the execution except the mortgaged premises." MCL 600.3105(1). Similarly, subsection two prohibits, after a complaint to foreclose has been filed, a "separate proceeding . . . for the recovery of the debt secured by the mortgage, or any part of it, unless authorized by the court."

MCL 600.3105(2). Essentially, these provisions set forth a one-action rule with respect to judicial foreclosures similar to prohibitions that apply to foreclosure by advertisement. See MCL 600.3204(1)(b). Finally, MCL 600.3105(3) permits the trial court to consolidate "all cases begun subsequent to the filing of [a] foreclosure complaint, by plaintiffs holding notes, bonds, or other evidences of indebtedness secured by the mortgage, to be consolidated with the action to foreclose . . .." Nothing in MCL 600.3105 requires that a mortgagee must be the owner of the secured indebtedness to have standing to bring a judicial action for foreclosure. And, nothing will be read into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself. *People v Breidenbach*, 489 Mich 1, 10; 798 NW2d 738 (2011). Defendant's standing argument based on this statute must fail.

Moreover, our Supreme Court has specifically held that a mortgagee, or assignee of the mortgagee, has standing to foreclose, even if the beneficial interest in the debt is owned entirely or in part by another party. *Continental Nat'l Bank v Gustin*, 297 Mich 134, 140-141; 297 NW 214 (1941) (holding that the assignee of certain notes and mortgages was a real party in interest to bring a foreclosure action, even if it must later account to the note holder); *Adams*, 46 Mich at 137. This is consistent with the rule that a real party in interest is "one who is vested with the right of action on a given claim, although the beneficial interest may be in another." *Mudgett*, 178 Mich App at 679. Furthermore, this Court has held that a mortgagee may foreclose where the underlying debt is shown to be in default without having to produce the note that the mortgage secures. See *Sallie v Fifth Third Bank*, 297 Mich App 115, 118-119; 824 NW2d 238 (2012). Thus, defendant's claim that plaintiff must show that it is the owner of the note in default to have standing to foreclose is completely without merit. Consequently, the trial court correctly ruled that plaintiff, as the holder of record of the mortgage, had standing to foreclose where the undisputed evidence showed the mortgage-secured debt was in default. Based on the undisputed material facts, plaintiff was entitled to judgment as a matter of law. The trial court properly granted plaintiff summary disposition and a judgment of foreclosure.

Defendant's claim that the foreclosure action was premature is equally without merit. This issue presents a question of law regarding the interpretation of a contract, which is reviewed de novo. *Archambo*, 466 Mich at 408. The main goal of contract interpretation is to enforce the parties' intent. *Burkhardt*, 260 Mich App at 656. When the language of a contract is clear and unambiguous, the contract must be enforced according to its terms. *Id*.

Defendant argues that the promissory notes in this case are demand notes, which do not become overdue (with a right of action) until the day after the day a demand for payment is made. Defendant asserts that provisions of the mortgage concerning events of default, rights and remedies on default, and notices, modify the provision in the notes that state that the borrower, "to the extent allowed by law, waive[s] presentment, demand for payment, and notice of dishonor." Defendant argues that plaintiff not only failed to establish ownership of the debt but failed to establish a demand for payment before filing its complaint, which for that reason must be dismissed. We disagree.

Defendant does not specify exactly what wording in the mortgage requires demand for payment or notice of default. An appellant may not merely "announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or

reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959); see also *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Accordingly, this Court could properly consider this issue abandoned. See *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002) (an appellate court may deem abandoned an issue that is not properly briefed).

But the plain language of the mortgage and notes demonstrates defendant's argument must fail. The 2007 promissory note which went into default provides: "If no demand is made, Borrower will pay this loan in 35 regular payments of $3,728.22 each and one irregular last payment estimated at $420,811.71. . . . Borrower's final payment will be due on July 5, 2010, and will be for all principal and all accrued interest not yet paid." The note also provides that one event of default occurs when: "Borrower fails to make any payment when due under this Note." Defendant does not dispute that he did not make the final balloon payment that was due on July 5, 2010. By the plain terms of the note, defendant was in default without necessity of the note holder or mortgagee making demand for payment. "An unambiguous contract must be enforced according to its terms." *Burkhardt*, 260 Mich App at 656.

Moreover, defendant recognizes that the note provides that the borrower (defendant), "to the extent allowed by law, waive[s] presentment, demand for payment, and notice of dishonor." Defendant cites no specific language in the mortgage that alters this clear and unambiguous waiver, even if a demand for payment was necessary before default would occur. Consequently, defendant's argument on this issue is without merit.

In sum, defendant's claim that plaintiff must show that it is the owner of the note in default to have standing to foreclose is without merit. Consequently, the trial court correctly ruled that plaintiff, as the mortgagee of record, had standing to foreclose where the undisputed evidence showed the mortgage-secured debt was in default. A formal demand for payment was not necessary under the plain terms of the note before plaintiff could initiate an action to foreclose. Based on the undisputed material facts, the trial court properly granted plaintiff summary disposition and entered a judgment a judgment of foreclosure.

We affirm. As the prevailing party plaintiff may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ Donald S. Owens
/s/ Mark T. Boonstra