STATE OF MICHIGAN

COURT OF APPEALS

SHANNON D. KUTSCHKE,

Plaintiff-Appellant,

v

COUNTRYWIDE HOME LOANS and FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Defendants-Appellees.

UNPUBLISHED
June 5, 2012

No. 301374
Oakland Circuit Court
LC No. 2009-103822-CK

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

PER CURIAM.

Plaintiff appeals by right the trial court's grant of summary disposition to defendants because plaintiff failed to make court-ordered monthly escrow payments. We affirm.

This case arises from the foreclosure of a mortgage plaintiff Shannon D. Kutschke granted to H&R Block Mortgage Company as security for her $148,000 note. At some point, defendant Countrywide Home Loans, Inc., succeeded to H&R Block's interest in the note and mortgage. Block and its successors assigned the mortgage to the Mortgage Electronic Registration Systems, Inc., (MERS), as its nominee. This assignment was properly recorded on February 27, 2004. Kutschke defaulted on her note, and MERS commenced foreclosure by advertisement in December 2008. After several adjourned dates, MERS purchased the property and received a sheriff's deed on February 10, 2009. MERS transferred its interest in the property by quit claim deed to defendant Federal National Mortgage Association (Fannie Mae).

After the redemption period expired, Fannie Mae filed an action for summary proceedings in the district court to recover possession of the property. Kutschke retained counsel to defend the summary proceedings, and in September 2009, filed the instant circuit court action to quiet title and asserting various contract and tort theories, including unjust enrichment, implied contract, innocent misrepresentation, intentional misrepresentation, silent fraud, constructive trust, and "breach of public policy." All of these theories were premised on plaintiff's allegation that she received oral assurances that the sheriff's sale would not take place while plaintiff was attempting to obtain a loan modification.

The proceedings in the district court were stayed conditioned on plaintiff's paying $750 a month into an escrow account at the court. After Kutschke failed to make any escrow payments,

Fannie Mae moved to set aside the stay, and the court granted a judgment of possession. Kutschke appealed the district court's judgment of possession to the circuit court and the appeal was assigned to the same circuit court judge that had been assigned the instant case. In connection with the appeal, the district court entered an order on June 7, 2010, requiring plaintiff to pay a $2,500 appeal bond by June 15, 2010, and also to pay monthly escrow payments of $750, commencing within 8 days of the entry of the order. Plaintiff did not comply.

Defendants filed their motion for summary disposition in the instant case on April 15, 2010. Defendants asserted plaintiff's legal theories failed to state a claim on which relief could be granted, MCR 2.l16(C)(8), and that summary disposition should be granted under MCR 2.116(C)(10) because plaintiff's claims were based on alleged oral assurances barred by the pertinent statute of limitations, MCL 566.132(2). See *Crown Technology Park v D & N Bank, FSB*, 242 Mich App 538; 619 NW2d 66 (2000).

The first of a series of hearings on defendants' motion for summary disposition was held on July 7, 2010. Plaintiff's motion in the appeal case to stay execution of the judgment of possession was heard at the same time. The trial court, in essence, granted a temporary stay and allowed plaintiff more time to comply with the district's court order for escrow payments and suggested the parties attempt a settlement. No order was entered in the circuit court case or in the district court appeal file as a result of the July 7, 2010 hearing.

At the next hearing held in one week, the trial court asked whether plaintiff had made any of the escrow payments ordered by the district court and was informed that she had not. The trial court adjourned the hearing, stating "I'm going to give her a couple weeks to see if in fact the $2500 bond has been posted before we address the reconsideration request." The clerk of the court then called the appeal, and the trial court also adjourned that case for two weeks, noting the court would "give you the two weeks on this one as well. We'll do them both together."

The next hearing occurred on July 28, 2010. It was clear that plaintiff had paid neither the appeal bond nor any escrow payments to the district court. Defense counsel also reported that Fannie Mae had reviewed plaintiff's financial information to determine if she were eligible for a loan modification under Fannie Mae's then existing assistance program and that plaintiff did not qualify for a loan modification. After indicating that plaintiff had not provided proof she had paid any escrow payments the district court had ordered, the trial court continued:

> The Court also notes that once she had the proof [of paying the escrow payments] she would necessarily also have to file the appeal bond if she wanted this Court to stay the eviction.
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> The court rules do not allow us to waive an appeal bond ordered by a district court in eviction summary proceedings. We've given her a couple of weeks to pay. As of today's date, plaintiff's counsel still does not know whether in fact the amount has been paid. Defense counsel has indicated that based on a phone call to the district court it has not been paid.
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> Therefore, it's the order of the Court as follows: She has up until Friday the 30th, this Friday, at 3 o'clock to have proof of the payment presented to

> defendant's counsel and should she not have proof delivered to defendant's counsel's office by Friday at 3 o'clock, this Court is ordering that I'm granting the motion for reconsideration that plaintiff appellee [sic] filed, and if she has not paid the money into escrow, then, I'm also granting the summary disposition on Case Number 09-103822CK and I'm granting the reconsideration of case number, reconsideration motion on Case Number 10-DA9l79AB and dismissing the stay of eviction and dismissing the appeal.

Plaintiff's counsel asked about the total dollar amount plaintiff was required to pay, and the trial court recessed the hearing to allow counsel to discuss the issue. After the recess, plaintiff's counsel presented argument regarding the amount, to which the trial court replied the amount due was "based on what was ordered by the district court, so that shouldn't be difficult to determine." The court instructed counsel to get their respective calculations to it in writing as soon as possible. The court added that counsel might "want to copy the district judge's order" and that counsel should "cite to that."

After the July 28, 2010 hearing, defense counsel presented an order for entry under the seven-day rule, MCR 2.602(B), which had attached to it the district court's order for an appeal bond and escrow payments. The trial court record reflects a proof of service that notice of presentment was mailed to plaintiff's counsel on August 4, 2010. No objections were filed as to the proposed order, and the trial court signed the order on August 11, 2010; it was entered on August 12, 2010 and mailed to plaintiff's counsel on August 17, 2010.

The August 12, 2010 order provides, in pertinent part:

> IT IS HEREBY ORDERED that Plaintiff Shannon Kutschke shall pay an Escrow Payment (according to the attached Order entered on June 7, 2010 by Honorable Robert Bondy, Case No: 09-CO7156-LT) in the amount of $1,875 to Defendants' counsel by 3:00 pm on Friday, July 30, 2010.
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> IT IS FURTHER ORDERED that Plaintiff Shannon Kutschke shall pay an Appeal Bond (according to the attached Order entered on June 7, 2010 by Honorable Robert Bondy, Case No: 09-CO7156-LT) into the Clerk of the 5nd-1st Judicial District Court, by August 13, 2010 in the amount of $2,500.
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> IT IS FURTHER ORDERED that failure of Plaintiff Shannon Kutschke to make the payments as Ordered shall result in the Court granting relief to Defendants as described on the record at a hearing of said Court on July 28, 2010.

It is undisputed that plaintiff did not comply with this order; however, plaintiff did pay the $1,825 escrow arrearage to defense counsel on Monday, August 2, 2010. Plaintiff never paid the appeal bond and never made any further monthly escrow payments to the district court. An order was entered on September 2, 2010, dismissing the district court appeal.

Defendants moved for entry of an order of dismissal and a hearing was held on September 22, 2010. Plaintiff's counsel confirmed that plaintiff had not paid the appeal bond and that the escrow payment due under the August 12, 2010 order was paid late. Plaintiff's counsel also argued that he had been on vacation and had not personally received the order until

after the appeal bond payment deadline. Plaintiff's counsel stated his client could pay the $2,500 appeal bond "forthwith" and requested an extension of time to do so. The trial court ruled it would take the matter under advisement and scheduled a status review in about one week.

On October 6, 2010, the parties again appeared before the trial court on defendants' motion for entry of summary judgment. At the hearing, discussion occurred between the court and counsel as to whether the court had already ruled in favor of defendants on their motion for summary disposition. The hearing was recessed for the court to review a transcript of the July 28, 2010 hearing. The next docket entry is entry of the order granting defendants' motion for summary disposition on October 11, 2010, which order recites:

> This matter was before the Court on Defendants' Motion for Summary Disposition. The Court heard oral arguments and took the matter under advisement. The Court ruled if Plaintiff did not make the required payments, summary disposition would be granted. The Court, having checked with the clerk of the 52-1 District Court and being fully advised in the premises finds that Plaintiff has failed to make the required monthly escrow payments as ordered by the District Court on June 7, 2010. Accordingly,
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> IT IS HEREBY ORDERED that Defendants' Motion for Summary Disposition is GRANTED.

Plaintiff filed a motion for reconsideration on November 1, 2010, in which she asserted that at the hearing on July 28, 2010, the court had only required her to pay $1,875 by July 31, 2010.[1] Plaintiff also asserted that the court's August 12, 2010 order did not reflect the court's oral ruling from the bench in contravention of MCR 2.602(B)(3). Plaintiff contended palpable error had occurred in the court granting defendants' motion for summary disposition because the court's oral ruling from the bench did not require that she make payments to the district court. The trial court denied the motion for reconsideration by order entered November 12, 2010.

Plaintiff filed her claim of appeal in this Court on December 1, 2010. Defendants contest this Court's jurisdiction, arguing plaintiff's motion for reconsideration in the trial court was not timely. Defendants are mistaken because they base their argument on the dates that orders were signed rather than on the dates that the orders were entered in the trial court. MCR 7.204(A) provides that "for purposes of subrules (A)(1) and (A)(2), 'entry' means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions." In this case, the order appealed was "entered" on October 11, 2010, and plaintiff filed her motion for reconsideration within 21 days on November 1, 2010. The trial court's order denying reconsideration was "entered" on November 12, 2010, and plaintiff timely filed her claim of appeal within 21 days on December 1, 2010.

[1] The trial court's order required the payment be made by Friday, July 30, and plaintiff did not make the payment of escrow arrearage until Monday, August 2, 2010.

Plaintiff first argues the trial court improperly entered without counsel's "knowledge, approval or consent" its August 12, 2010 order, and that the order did not accurately reflect the trial court's oral ruling on July 28, 2010. Specifically, plaintiff argues that the trial court did not orally require plaintiff to make payments to the district court.[2] We disagree.

Defendants argue that plaintiff failed to timely object to entry of the August 12, 2010 order; therefore, appellate review of the order is precluded. See *Eriksen v Fisher*, 166 Mich App 439, 451; 421 NW2d 193 (1988), holding that the plaintiff's failure to object to an order as required by the court rule precludes appellate review of objections to the order. On the other hand, plaintiff arguably preserved this issue by vaguely raising it at the September 22, 2010 hearing, and by moving in the trial court for reconsideration, thereby obtaining a ruling, at least implicitly, on the merits when the trial court denied the motion. See *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010). Regardless of whether plaintiff preserved this issue, we conclude that her argument lacks merit.

This Court reviews de novo the trial court's ruling on a motion for summary disposition. *In re Forfeiture of a Quantity of Marijuana*, 291 Mich App 243, 249; 805 NW2d 217 (2011). The Court also reviews de novo issues of statutory interpretation, as well as the proper interpretation of the court rules. *Id.* The trial court's determination to dismiss an action because of a party's failure to comply with the court's order is reviewed for an abuse of discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). The trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Id.* Any findings of fact by the trial court are reviewed on appeal for clear error. MCR 2.613(C). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

Plaintiff's argument that the trial court's August 12, 2010 order to make payment was entered in violation of MCR 2.602(B)(3) lacks merit. The transcript of the July 28, 2010 hearing reflects that the trial court ruled that plaintiff must comply with the district court's June 7, 2010 order by paying both monthly escrow payments and paying an appeal bond, and must do so by a date certain or both the appeal from the district court judgment and plaintiff's circuit court action would be dismissed. Consequently, because the August 12, 2010 order comported with the trial court's decision and because plaintiff filed no objections to the proposed order after being served with notice of presentment, MCR 2.602(B)(3)(a) required the trial court to sign the order. The court rule provides: "If no written objections are filed within 7 days, the clerk shall submit the judgment or order to the court, and the court shall then sign it if, in the court's determination, it comports with the court's decision." *Id.*

[2] We note that "a court speaks through its written orders and judgments, not through its oral pronouncements." *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009). See also *Brausch v Brausch*, 283 Mich App 339, 353; 770 NW2d 77 (2009), "It is well settled that a court only speaks through written judgments and orders."

Although plaintiff's counsel argues that the August 12, 2010 order was entered without his "knowledge, approval or consent," the court rule merely requires proper service of notice of presentment, as the register of actions shows occurred here. MCR 2.602(B)(3). Moreover, counsel was served with a copy of the order after it was entered, with the district court's June 7, 2010 order attached. Thereafter, counsel acknowledged receipt of the order at the hearing held on September 22, 2010, and orally assured the trial court that plaintiff would "forthwith" pay the $2,500 appeal bond to the district court. Despite all this, plaintiff never paid the district court appeal bond, resulting in the dismissal of her appeal from the district court judgment of possession. Furthermore, plaintiff did not continue making escrow payments, either to the district court or to defendants' counsel, after her initial late payment of the escrow arrearage on August 2, 2010. When the trial court granted defendants summary disposition on October 11, 2010, escrow payments for the months of August and September had not been paid.

Plaintiff makes no argument whatsoever that the trial court abused its discretion by imposing the drastic sanction of dismissal for plaintiff's failure to comply with its order and that of the district court. Before imposing the drastic sanction of dismissal, the court should consider: "'(1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice.'" *Woods v SLB Property Mgt LLC*, 277 Mich App 622, 631; 750 NW2d 228 (2008), quoting *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 507; 536 NW2d 280 (1995).

Here, because plaintiff never presented any such argument to the trial court, it would be difficult to find that the trial court abused its discretion. See *Woods*, 277 Mich App at 630 (finding the trial court did not abuse its discretion when it failed to consider a nonexistent request for an extension with respect to scheduling order). Furthermore, given the repeated failure of plaintiff to comply with the district and the circuit courts' order to make escrow payments and pay an appeal bond, the trial court's entry of its order granting summary disposition to defendants was within the range of reasonable outcomes, and, therefore, not an abuse of discretion. *Id*.; *Maldonado*, 476 Mich at 388. Finally, because plaintiff has not argued that the trial court abused its discretion, to extent there is an issue, it has been abandoned. "It is not enough for an appellant in his brief simply to 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).

Plaintiff's remaining arguments, that the foreclosure that occurred in this case is void *ab inito*, and that defendants must comply with loan modification procedures of MCL 600.3205a–MCL 3205d, have not been preserved for appeal. *Gen Motors Corp*, 290 Mich App at 386. This Court need not address unpreserved issues. *Michigan Ed Ass'n v Secretary of State*, 280 Mich App 477, 488; 761 NW2d 234 (2008). Moreover, plaintiff's claims are without merit.

There is no basis to conclude that the MERS foreclosure of the property was illegal. *Residential Funding Co, LLC v Saurman*, 490 Mich 909; 805 NW2d 103 (2011). The legislation regarding loan modifications became effective on May 21, 2009, after the foreclosure in this case

had been completed on February 10, 2009, and is repealed effective December 31, 2012. MCL 600.3205e; 2011 PA 302.

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

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Jane E. Markey