

STATE OF MICHIGAN
COURT OF APPEALS

PNC MORTGAGE, PNC BANK, f/k/a
NATIONAL CITY BANK, and NATIONAL
CITY REAL ESTATE SERVICES, L.L.C.,

UNPUBLISHED
April 19, 2012

Plaintiffs/Counterdefendants-
Appellees,

v

LARRY D. LAMBERT, II,

Defendant-Appellant.

No. 302178
Oakland Circuit Court
LC No. 2010-110929-CH

Before: M.J. KELLY, P.J., and FITZGERALD and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right the circuit court's order granting plaintiffs' motion for summary disposition and dismissing his counterclaims. Because the trial court properly granted summary disposition for plaintiffs on their claim to reinstate the mortgage, defendant failed to present evidence demonstrating a genuine issue of material fact regarding his breach of contract and misrepresentation claims, he failed to present evidence that he was eligible for a mortgage loan modification, and MCL 600.3205 *et seq.* did not entitle him to a loan modification, we affirm.

On October 31, 2005, defendant borrowed \$257,590 from National City Mortgage, a division of National City Bank (collectively referenced as "National City"), which subsequently merged with defendant PNC Bank. As security for the loan, defendant granted National City a mortgage on real property located in Pontiac. In 2006, defendant defaulted on the loan, and a sheriff's sale was held on February 27, 2007. Thereafter, National City and defendant entered into a stipulated agreement that afforded defendant an opportunity to avoid foreclosure. The agreement, dated February 28, 2008, required defendant to pay \$15,000 on that date, followed by 23 monthly payments of \$3,322.38, with the last payment due on January 31, 2010. The agreement did not amend the terms of the original note and mortgage, and defendant's regular monthly mortgage payments were to recommence beginning February 1, 2010. On April 28, 2008, National City recorded with the Oakland County Register of Deeds an affidavit expunging the sheriff's deed on the mortgage sale. Defendant made the monthly payments required under the agreement until November 2008 and failed to make any payments thereafter.

In a letter dated July 1, 2009, National City informed defendant that he may qualify for a mortgage loan modification under the federal government's Home Affordable Modification Program (HAMP). The letter indicated that National City was "[n]ow a part of PNC." On July 28, 2009, defendant responded to the letter and purportedly attached the documentation necessary for National City/PNC to determine whether he qualified for a loan modification.¹ In an August 11, 2009, letter, National City informed defendant that he did not meet the eligibility requirements for the modification program.

At some point, plaintiffs discovered that National City had erroneously discharged defendant's mortgage on May 7, 2007, and recorded the discharge on June 14, 2007. On June 8, 2010, plaintiffs filed suit against defendant seeking to reinstate the mortgage. In response, defendant filed a countercomplaint alleging breach of contract, promissory estoppel, misrepresentation, bad faith, violation of MCL 600.3205 *et seq.*, and violation of the contractual obligation to modify defendant's loan pursuant to HAMP and the Economic Stabilization Act of 2008. Defendant also requested exemplary damages. The trial court granted summary disposition in plaintiffs' favor on all claims.

I. REINSTATEMENT OF MORTGAGE

Defendant argues that the trial court erroneously granted plaintiffs' motion for summary disposition on their claim to reinstate the mortgage because they failed to establish an ownership interest in the mortgage or assignment of the debt to PNC. The trial court granted summary disposition for plaintiffs under MCR 2.116(C)(10), on the basis that defendant failed to present any evidence that the mortgage was paid in full or written off. We review *de novo* a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). When evaluating a motion for summary disposition under MCR 2.116(C)(10), a trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the nonmoving party. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002). "In opposition to the motion, the nonmoving party may not rest upon mere allegations or denials, but must proffer evidence of specific facts showing that there is a genuine issue for trial." *Id.* at 163. "Summary disposition is appropriate when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law." *Dutton Partners, LLC v CMS Energy Corp*, 290 Mich App 635, 641; 802 NW2d 717 (2010). "A genuine issue of material fact exists if the record leaves open an issue upon which reasonable minds could differ." *Id.*

Defendant argues that plaintiffs never demonstrated ownership of the mortgage and that, consequently, a genuine issue of material fact precluded summary disposition. Defendant does not contend that he paid off the mortgage or that it was properly discharged. An erroneously discharged mortgage may be reinstated. *Linn v Linn*, 122 Mich 130, 135; 80 NW 1000 (1899). "The general rule is that the release of a mortgage may be rendered inoperative by a lack of

¹ Although defendant's response indicated that such documentation was attached, it is not included in the lower court record.

consideration therefor.” *Plasger v Leonard*, 316 Mich 174, 176; 25 NW2d 156 (1946) (quotation marks and citations omitted). When determining whether to reinstate an erroneously discharged mortgage, courts may consider whether the party opposing the reinstatement will suffer some inequitable injury or whether societal interests or public policy would be undermined by reinstating the mortgage. *Downing v Hill*, 165 Mich 559, 560-561; 130 NW 1115 (1911).

In support of their motion for summary disposition, plaintiffs presented the original mortgage that defendant granted to National City, the discharge of the mortgage signed by a National City representative, and the stipulated agreement that defendant and National City executed to avoid foreclosure. The evidence clearly reflected National City’s ownership of the mortgage. Defendant’s argument appears to be premised on the fact that National City merged with PNC. Defendant implies that this change in ownership somehow impaired the right of the lender to enforce his obligation to repay the loan. Defendant does not dispute, however, that a merger occurred. In fact, the July 1, 2009, letter to defendant indicated that National City was “[n]ow a part of PNC[.]” A corporate merger occurs when one corporation absorbs one or more other corporate entities. See *Handley v Wyandotte Chemicals Corp*, 118 Mich App 423, 427; 325 NW2d 447 (1982). When a corporate merger takes place, “[t]he title to all real estate and other property and rights owned by each corporation party to the merger are vested in the surviving corporation without reversion or impairment.” MCL 450.1724(1)(b). Thus, when National City merged with PNC, PNC acquired National City’s interest in defendant’s mortgage as a matter of law. In response to plaintiffs’ evidence supporting their motion for summary disposition, defendant was required to present evidence demonstrating a genuine issue of material fact regarding plaintiffs’ ownership of the mortgage. Defendant could not simply rely on allegations or denials regarding ownership of the debt. *Veenstra*, 466 Mich at 163. Because defendant failed to present any evidence demonstrating an issue of fact regarding ownership of the mortgage, the trial court properly granted summary disposition for plaintiffs and ordered that defendant’s mortgage be reinstated.

We reject defendant’s argument that reinstatement of the mortgage was improper because National City made a full credit bid at the February 2007 sheriff’s sale. “When a mortgagee makes a full credit bid, the mortgage debt is satisfied, and the mortgage is extinguished.” *New Freedom Mtg Corp v Globe Mtg Corp*, 281 Mich App 63, 68; 761 NW2d 832 (2008). Defendant, however, presented no evidence that National City made a full credit bid at the sheriff’s sale. In any event, on April 28, 2008, after defendant and National City entered into the stipulated agreement that allowed defendant to avoid foreclosure, plaintiffs recorded with the Oakland County Register of Deeds an affidavit expunging the sheriff’s deed from the sale, which indicated that National City would not rely on the sale and “will treat such sale as having not been held and void abinitio [sic].” Thus, the only evidence regarding the sheriff’s sale indicates that it was set aside.

We also reject defendant’s contention that the trial court erroneously granted summary disposition for plaintiffs because discovery was ongoing. As explained in *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292-293; 769 NW2d 234 (2009):

Generally, summary disposition under MCR 2.116(C)(10) is premature if it is granted before discovery on a disputed issue is complete. However, the mere fact that the discovery period remains open does not automatically mean that the trial court's decision to grant summary disposition was untimely or otherwise inappropriate. The question is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position. In addition, a party opposing summary disposition cannot simply state that summary disposition is premature without identifying a disputed issue and supporting that issue with independent evidence. The party opposing summary disposition must offer the required MCR 2.116(H) affidavits, with the probable testimony to support its contentions. [Footnotes containing citations omitted.]

Defendant has not identified a disputed issue, supported by independent evidence, that rendered summary disposition premature. Therefore, his claim that the trial court erroneously granted summary disposition for plaintiffs because discovery was ongoing lacks merit.

II. BREACH OF CONTRACT

Defendant next argues that the trial court erred by granting summary disposition for plaintiffs on his breach of contract claim. While defendant's argument on appeal pertains to two separate claims of breach of contract, he alleged only one of those claims in his countercomplaint. Defendant's argument pertaining to the alleged breach of the mortgage agreement was never properly before the trial court because defendant did not allege that claim in his countercomplaint. Defendant's failure to allege that claim below results in waiver of his argument regarding the claim on appeal. See *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). Although we have the inherent power to review an unpreserved issue to prevent a miscarriage of justice, our failure to review defendant's argument would not result in a miscarriage of justice given his failure to properly plead the claim below. See *id.*

In his countercomplaint, defendant alleged that plaintiffs breached the stipulated agreement. The trial court granted summary disposition for plaintiffs on the basis that defendant failed to establish a breach of contract. "[T]he interpretation of a contract is a question of law reviewed de novo on appeal, including whether the language of a contract is ambiguous and requires resolution by the trier of fact." *Reed v Reed*, 265 Mich App 131, 141; 693 NW2d 825 (2005). "Generally, if the language of a contract is unambiguous, it is to be construed according to its plain meaning[.]" *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010), and courts must enforce the contract as written. *Holmes v Holmes*, 281 Mich App 575, 594; 760 NW2d 300 (2008).

Defendant contends that plaintiffs breached the stipulated agreement by declaring him in default despite his compliance with the payment requirements. The stipulated agreement provided, in relevant part:

Borrower acknowledges that the initial down payment will be due on February 28, 2008 in the amount of \$15,000.00. Subsequent payments will be due beginning March 31, 2008 in the amount of \$3322.38 each and due the last of the month there after with the final payment becoming due on January 31, 2010 in

the amount of \$3322.38. The regular monthly payment amount will recommence beginning February 1, 2010.

Plaintiffs presented evidence of defendant's payment history, including his failure to make payments after October 2008. In response to plaintiffs' evidence, defendant failed to present evidence demonstrating a genuine issue of material fact for trial. In fact, defendant presented payment receipts and copies of checks confirming plaintiffs' claim that defendant stopped making payments in November 2008. Because defendant failed to demonstrate a genuine issue of material fact regarding his payment history, the trial court properly granted summary disposition for plaintiffs under MCR 2.116(C)(10).

III. MISREPRESENTATION

Defendant next asserts that the trial court erred by granting plaintiffs' motion for summary disposition with respect to his misrepresentation claim. The trial court granted summary disposition on this claim on the basis that defendant's allegations failed to state a viable cause of action, under the circumstances of this case. "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." *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). "The motion should be granted if no factual development could possibly justify recovery." *Id.* Although the trial court relied on MCR 2.116(C)(8) in granting summary disposition for plaintiffs, summary disposition was more appropriate under MCR 2.116(C)(10) because defendant failed to present any evidence demonstrating a genuine issue of material fact regarding plaintiffs' alleged misrepresentations.

In order to establish fraudulent misrepresentation,² a party must show that: (1) the opposing party made a material representation, (2) the representation was false, (3) it was known or should have been known to be false at the time that it was made, (4) the representation was made with the intention that the opposing party would act on it, and (5) the opposing party acted on the representation and suffered damages as a result. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 688; 599 NW2d 546 (1999).

Defendant's entire substantive argument pertaining to this issue in his brief on appeal is as follows:

In the instant matter, there are numerous misrepresentations by Appellees relating to the servicing of Appellant's mortgage loan, from misrepresenting to Appellant that Appellee would review his mortgage for a modification, to representing the sheriff's sale had been set aside, while during the whole time, taking Appellant's home to foreclosure and sheriff's sale.

² A review of defendant's countercomplaint indicates that his misrepresentation claim alleged fraudulent, rather than innocent, misrepresentation.

Appellant presents a prima facie case of misrepresentation and is entitled to summary disposition by the trial court.

Regarding defendant's argument that plaintiffs misrepresented that they would review his mortgage for a modification, a misrepresentation claim must be predicated on a statement relating to a past or existing fact and may not be based on a future promise. *Eerdmans v Maki*, 226 Mich App 360, 366; 573 NW2d 329 (1997). In any event, an August 11, 2009, letter to defendant indicates that a review of his mortgage was conducted and that he did not meet the program eligibility requirements under the HAMP. Further, defendant fails to indicate how plaintiffs' representation that the sheriff's sale had been set aside was false. Plaintiffs presented an affidavit expunging the sheriff's deed from the sale. The affidavit was recorded on April 28, 2008. Defendant failed to present any evidence indicating that the sheriff's sale had not been set aside. Accordingly, summary disposition for plaintiffs was proper under MCR 2.116(C)(10). Although the trial court relied on MCR 2.116(C)(8) rather than subrule (C)(10), we will not reverse where the trial court reaches the correct result for the wrong reason. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

IV. DEFENDANT'S ENTITLEMENT TO LOAN MODIFICATION

Defendant alleged in his countercomplaint, and asserts on appeal, that plaintiffs had a duty, pursuant to the HAMP, to modify his mortgage loan. Congress created HAMP pursuant to the Emergency Economic Stabilization Act of 2008, 12 USC 5201 *et seq.*, and the program "is governed by guidelines set forth by Fannie Mae and the United States Department of the Treasury." *Speleos v BAC Home Loans Servicing, LP*, 755 F Supp 2d 304, 306 (D Mass, 2010). Servicer participation agreements entered into under the program require mortgage loan servicers to perform loan modification and foreclosure prevention services as set forth in the HAMP guidelines. *Id.* It is undisputed that plaintiffs signed a servicer participation agreement and participated in the HAMP. Defendant contends that he meets the listed criteria and is eligible for a loan modification under the program.

Even if defendant may assert a private cause of action against plaintiffs for a HAMP violation, a proposition that numerous courts have rejected,³ he has failed to establish that he was eligible for a loan modification. Plaintiffs contend that they reviewed defendant's application for a loan modification, but that defendant was not eligible because his mortgage payment was less than 31 percent of his gross income. In an August 11, 2009, letter, plaintiffs informed defendant that he failed to meet the HAMP eligibility requirements. Although defendant argues that he

³ See *Nicdao v Chase Home Finance*, ___ F Supp 2d ___ (D Alaska, 2012) ("[M]any courts have found that a lender's failure to grant a loan modification under HAMP is not enforceable either on a private right of action or breach of contract theory."); *Parks v BAC Home Loan Servicing, LP*, ___ F Supp 2d ___ (ED Va, 2011) (mortgagors do not have a private right of action to enforce HAMP regulations and are merely incidental beneficiaries of HAMP contracts); *Sherman v Litton Loan Servicing, LP*, 796 F Supp 2d 753, 761 (ED Va, 2011) ("This Court, consistent with the decisions of numerous other courts, has held that HAMP creates no private right of action.")

meets the criteria for a loan modification, he presented no evidence of his eligibility for a modification in the trial court. Accordingly, he failed to demonstrate a genuine issue of material fact for trial regarding his alleged entitlement to a loan modification under the HAMP. *Veenstra*, 466 Mich at 163. To the extent that the trial court may have erred by granting summary disposition under MCR 2.116(C)(8) rather than MCR 2.116(C)(10), we will not reverse where the trial court reaches the correct result for the wrong reason.⁴ *Taylor*, 241 Mich App at 458.

V. VIOLATION OF MCL 600.3205 *ET SEQ.*

Defendant next argues that plaintiffs violated MCL 600.3205c⁵ by failing to modify his mortgage loan. We review de novo issues involving statutory interpretation. *Rowland v Washtenaw Co Road Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007). “When construing a statute, this Court’s primary goal is to give effect to the intent of the Legislature. We begin by construing the language of the statute itself. When the language is unambiguous, we give the words their plain meaning and apply the statute as written.” *Id.*

Defendant’s argument is based on the erroneous premise that this case involves a foreclosure action. It does not. MCL 600.3205c set forth the requirements of the state loan modification program. MCL 600.3205c(6) precluded foreclosure by advertisement if the borrower met the eligibility requirements for a loan modification, but did not preclude judicial foreclosure action pursuant to MCL 600.3101. MCL 600.3205c(8) explained:

If a mortgage holder or mortgage servicer begins foreclosure proceedings under this chapter in violation of this section, the borrower may file an action in the circuit court for the county where the mortgaged property is situated to convert the foreclosure proceeding to a judicial foreclosure. If a borrower files an action under this section and the court determines that the borrower participated in the process under section 3205b, a modification agreement was not reached, and the borrower is eligible for modification under subsection (1), and subsection (7) does not apply, the court shall enjoin foreclosure of the mortgage by advertisement and order that the foreclosure proceed under chapter 31.

Thus, the language of the statute explains the remedy available, i.e., conversion of a foreclosure by advertisement to a judicial foreclosure action. Nothing in the statutory language required

⁴ To the extent that defendant argues that the Economic Stabilization Act preempts Michigan’s foreclosure laws, he has abandoned his argument by failing to identify the specific Michigan provision that is preempted or indicate the theory of preemption on which he relies. “It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court.” *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). A party may not simply announce a position and leave it to the Court to rationalize the basis for his claim. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

⁵ We note that MCL 600.3205a-d were repealed by 2011 PA 302, effective December 31, 2012.

plaintiffs to modify defendant's mortgage loan, and the statute was inapplicable because this case does not involve a foreclosure. Because defendant failed to state a claim on which relief could be granted, the trial court properly granted summary disposition for plaintiffs under MCR 2.116(C)(8).

VI. EXEMPLARY DAMAGES

Finally, we decline to address defendant's claim that he is entitled to exemplary damages because it was not properly raised in his statement of questions presented and is therefore not properly before this Court. MCL 7.212(C)(5); *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 146; 807 NW2d 866 (2011). In any event, we note that plaintiffs' conduct did not "inspire feelings of humiliation, outrage, and indignity[.]" such that exemplary damages are appropriate. See *MePeak v McPeak*, 233 Mich App 483, 487; 593 NW2d 180 (1999).

Affirmed. Plaintiffs, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio