

STATE OF MICHIGAN
COURT OF APPEALS

PINE HOLLOW ESTATES, L.L.C.,
Plaintiff-Appellant,

UNPUBLISHED
June 19, 2012

v

CITIZENS BANK,
Defendant-Appellee.

No. 303600
Genesee Circuit Court
LC No. 09-092066-CZ

Before: GLEICHER, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Citizens Bank foreclosed upon Pine Hollow Estates, L.L.C.'s multimillion-dollar development project when Pine Hollow ceased repaying its mortgage-secured debt. Pine Hollow does not challenge Citizens Bank's authority to take the property, only the methods by which the Bank advertised and conducted the foreclosure sale. The trial court properly summarily dismissed and ruled from the bench that Citizens Bank published and posted the foreclosure sale notice consistent with the statutory requirements. Although we disagree with the trial court's conclusion that Citizens Bank could sell the property as a whole, the court ultimately reached the correct result, ruling that the irregularities did not warrant setting aside the foreclosure sale. We therefore affirm.

I. BACKGROUND

Pine Hollow Estates, L.L.C. was formed by James and Wendy Sabo to develop a site condominium project and to sell and build the units. The property included 97 acres in Grand Blanc Township, spilling over into adjacent Atlas Township. In 2005, Pine Hollow attained a revolving line of credit from Republic Bank for \$2,224,000, which was secured by a future advance mortgage on the corporation's real estate. The mortgage interest was later transferred to Citizens Bank. In the following years, Pine Hollow used its credit line to develop the infrastructure on a portion of its 97-acre property located in Grand Blanc Township. It also sold several lots (or units) on which it built homes for the purchasers. Those units were then removed from the bank's lien.

Pine Hollow stopped making payments against its mortgage indebtedness after September 10, 2008. Pursuant to the future advance mortgage, Citizens Bank made the loan "immediately due and payable" and took advantage of the following rights granted by the parties' contract:

Upon occurrence of an Event of Default . . . the Bank may take any one or more of the following actions not contrary to law: (a) foreclose this Mortgage by legal proceedings and collect its actual attorney fees as awarded by the Court; (b) sell, grant, and convey the Property, or cause the Property to be sold, granted and conveyed at public sale . . . and in the event of a public sale and unless otherwise prohibited by law, the *Property may be sold as one or more parcels* [Emphasis added.]

The mortgage also permitted Citizens Bank to foreclose by advertisement as follows:

WARNING: THIS MORTGAGE CONTAINS A POWER OF SALE AND UPON DEFAULT MAY BE FORECLOSED BY ADVERTISEMENT. IN FORECLOSURE BY ADVERTISEMENT AND THE RELATED SALE OF THE PREMISES, NO HEARING IS REQUIRED AND THE ONLY NOTICE REQUIRED IS TO PUBLISH NOTICE *IN A LOCAL NEWSPAPER* AND TO POST A COPY OF THE NOTICE ON THE PREMISES. [Emphasis added.]

On February 4, 11, 18, and 25 and March 4, 2009, Citizens Bank published a notice in the Mt. Morris/Clio Herald regarding the foreclosure by advertisement. The notice included the legal description of Pine Hollow's property, identified the mortgage interest, and delineated the exact time and location of the sale. It also stated, in relevant part:

These properties will be sold separately with the Condominium Units being first offered for sale individually after which the balance of the property not subject to the condominium and located in Atlas Township, Michigan will be offered for sale.

The redemption period for the individual Condominium Units will expire six (6) months from the date of the sale

The redemption period for the undeveloped land located in Atlas Township will expire one (1) year from the date of the sale. [Emphasis added.]

The parties contested whether this notification was ever posted on the subject property. In an affidavit, Genesee County Deputy Sheriff John Harrington averred that he "personally posted a copy of the . . . Notice of Mortgage Sale in seven (7) separate and distinct conspicuous places on the real property described in the Notice" on February 19, 2009—one on the Atlas Township property and six "on the Condominium Units all as described in the Notice." More specifically, Harrington asserted that he posted one notice "on a fence post located on the Atlas Township Property immediately to the East of the Vassar Road main entrance to the Woods of Pine Hollow condominium" as well as six notices

scattered throughout the Condominium Units with one posting being affixed to the large entryway sign advertising the Woods of Pine Hollow condominium at the Vassar Road main entrance to the Woods of Pine Hollow condominium and the remaining five (5) postings being attached [to] the unit delineation signs which were placed by the developer to locate the Unit boundaries for the individual Units.

Sheriff Harrington further attested that he visited the property again on February 23, 2009,

in connection with my posting of another Notice of Mortgage Sale for an unrelated foreclosure on the home owned by C. James Sabo and Wedy [sic] Sabo. During that posting, I inspected the property and determined that someone had removed all Seven (7) of the postings I had made on February 19, 2009.

On March 6, 2009, Deputy Sheriff Harrington conducted the sheriff's auction. Apparently, James Sabo, Pine Hollow Estates resident Robert Budzynski, and a representative of Citizens Bank attended the sale. Harrington did not open the floor for bids on the individual condominium lots described in the sale notice. Instead, Harrington "called[ed] off the name of the party, who is being foreclosed on, and the address, and the amount that is due on the mortgage" Harrington informed the group that more than \$1.3 million was due on the mortgage, he asked for bidders, and no one responded except the bank representative.

Following the sale, the sheriff issued a Sheriff's Deed on Mortgage Sale. The deed indicated that notice of the sale had been published and posted in seven "conspicuous places on the Property." The deed further stated that the notice provided "that the Property would be sold individually with the Condominium Units being first offered for sale individually after which the Atlas Township Property would be sold." Finally, the deed noted that Citizens Bank was the highest bidder and delineated individual unit prices totaling \$1,313,471, and provided for the redemption of the property as a whole or by individual units.

Pine Hollow had until September 7, 2009 to redeem the individual condominium lots in Grand Blanc Township and until March 8, 2010 to redeem the undeveloped property in Atlas Township. On August 31, 2009, Pine Hollow filed suit against Citizens Bank seeking to set aside the sheriff's sale, to quiet title to the property, and for a declaratory judgment that the redemption period should have been one year for the entire property. Pine Hollow's claims were based on three premises. First, Pine Hollow asserted that Citizens Bank purposefully advertised the foreclosure sale in a newspaper "whose primary circulation does not include all of Genesee County" in order to prevent Pine Hollow from receiving notice and to avoid competing claims for the property. Second, Pine Hollow questioned whether Citizens Bank actually posted notice of the sale on the property. Third, Pine Hollow challenged the contents of the notice because it included a six-month, rather than one-year, redemption period. Pine Hollow asserted that the defective notice invalidated the sheriff's sale, which should therefore be set aside. In the alternative, Pine Hollow sought additional time to redeem the property.

On February 10, 2009, Citizens Bank filed a motion for partial summary disposition, seeking dismissal of Pine Hollow's claim that Deputy Harrington had not actually posted the foreclosure sale notices on the property. The Bank cited the deputy's affidavit that he had posted the notices. Pine Hollow challenged that Harrington had not posted the notices "on" the subject property, only "near" it and on the front entrance to the development. Pine Hollow also argued that the sheriff's department had instituted a policy of photographing such notice postings as a response to several deputies signing fraudulent affidavits swearing to have posted notices. And Harrington's failure to photograph the posted notices was a violation of sheriff department policy, claimed Pine Hollow.

On March 5, 2010, Citizens Bank filed a second motion for partial summary disposition regarding the publication issue. Citizens Bank contended that it followed statutory requirements by publishing the notice in a newspaper circulated within the county. Pine Hollow challenged that the Mt. Morris/Clio Herald was a local paper, but not circulated in Grand Blanc, and not in full circulation in Genesee County. Pine Hollow accused Citizens Bank of using that publication to defeat the purpose of notifying the mortgagor that its interests were in jeopardy. Pine Hollow further questioned the deputy sheriff's newspaper selection as his son owned and operated the Herald.

Ultimately, the trial court granted summary disposition on the publication issue, finding that Pine Hollow failed to create a genuine issue of material fact that the Mt. Morris/Clio Herald was not published within Genesee County, the only requirement under the statute. The court denied Citizens Bank's motion on the posting issue, however, and that issue proceeded to an "expedited trial." On August 11, 2010, after a three-day "hearing" on the issue, the court entered a partial judgment in favor of the Bank. The court determined that Deputy Harrington had actually posted the foreclosure sale notices on the property. The court ruled that the deputy was not required to post 24 individual notices on each vacant condominium site subject to the foreclosure. The court also ruled that the notice contents were sufficient to put Pine Hollow on guard.

The court had yet to resolve whether the sheriff's sale as conducted was valid. Accordingly, that issue proceeded to trial as well. Before trial, Pine Hollow amended its complaint to challenge that Deputy Harrington had not actually auctioned each unit individually as stated in the sheriff's deed, instead auctioning the property as a whole only. Pine Hollow further asserted that the notice published in the Mt. Morris/Clio Herald was insufficient to notify the general public regarding the sale.

On March 30, 2011, the trial court issued its final judgment. The court agreed with Pine Hollow that the deputy sold the property in its entirety at the sheriff's sale, not as individual units. However, the court determined that neither the sheriff nor the Bank was required to sell the property as individual units. Even if the deputy had been required to sell the property as individual units, the court determined that it would find no ground to invalidate the sale. Citizens Bank gave Pine Hollow the chance to redeem the property piecemeal or in its entirety. And no one would have bid the market value for each unit and thereby increase the sale's profit as suggested by Pine Hollow. The trial court agreed with Pine Hollow that the redemption period for the entirety of the foreclosed property should have been one year. The court ruled that the redemption period would begin with the entry of its judgment.

II. STANDARD OF REVIEW

Pine Hollow challenges the trial court's summary dismissal of its claims regarding the newspaper publication. It also challenges the court's bench trial rulings regarding the validity of the posting and the sheriff's sale.

We review a trial court's decision on a motion for summary disposition *de novo*. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

“A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.” In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004) (internal citations omitted).]

“This Court reviews a trial court’s findings of fact following a bench trial for clear error and reviews de novo the trial court’s conclusions of law.” *Trader v Comerica Bank*, 293 Mich App 210, 215; 809 NW2d 429 (2011).

In relation to both the summary disposition ruling and bench trial judgment, we review underlying issues of statutory interpretation de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003). The goal of statutory interpretation is to discern the intent of the Legislature based on the language of the statute. “If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written.” *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997). If a statute is ambiguous, however, judicial construction is permitted. *Detroit City Council v Mayor of Detroit*, 283 Mich App 442, 449; 770 NW2d 117 (2009).

We also review underlying issues of contract interpretation de novo. *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 80; 730 NW2d 682 (2007). We must apply the plain and unambiguous language of a contract as the document “reflects the parties’ intent as a matter of law.” *Hasting Mut Ins Co v Safety King Inc*, 286 Mich App 287, 292; 778 NW2d 275 (2009).

III. NOTICE

Pine Hollow continues to challenge the notice provided through publication and posting. In relation to a foreclosure by advertisement, the adequacy of notice is governed by statute and the duty to provide notice arises from the parties’ contract. *Cheff v Edwards*, 203 Mich App 557, 560; 513 NW2d 439 (1994). Due process concerns are not implicated. *Id.* Further, in reviewing Pine Hollow’s complaints, we must remember that “‘a defect in notice renders a foreclosure sale voidable,’ . . . not void.” *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 502; 739 NW2d 656 (2007), quoting *Jackson Investment Corp v Pittsfield Prods, Inc*, 162 Mich App 750, 755; 413 NW2d 99 (1987).

MCL 600.3208 provides for notice by publication and posting as follows:

Notice that the mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, shall be given by publishing the same for 4 successive weeks at least once in each week, in a newspaper published in the county where the premises included in the mortgage and intended to be sold, or some part of them, are situated. . . . In every case within 15 days after the first publication of the notice, a true copy shall be posted in a conspicuous place upon any part of the premises described in the notice.

A. Publication

Pine Hollow argues that “[a] literal application” of the publication provision “leads to absurd results” because it allows a foreclosing party to publish notice in remote newspapers within the county that could not possibly alert the landowner or interested parties about the sale. Yet, Pine Hollow concedes that the Mt. Morris/Clio Herald is “a newspaper published in the county where” the property is “situated” as anticipated by the plain language of MCL 600.3208. We may not ignore the plain language of the statute in the manner suggested by Pine Hollow. Moreover, our Supreme Court has repeatedly rejected challenges to the publication statute’s soundness despite the foreclosing party’s publication in remote newspapers. See *Moss v Keary*, 231 Mich 295, 299-300; 204 NW 93 (1924) (foreclosing party complied with the statute by advertising a Detroit foreclosure sale in Springwells Village, Wayne County newspaper with circulation of only 400); *Lau v Scribner*, 197 Mich 414, 419-420; 163 NW 914 (1917) (foreclosing party complied with statute by advertising Detroit foreclosure sale in Belleville, Wayne County newspaper). As the Mt. Morris/Clio Herald was published in Genesee County, the trial court properly summarily dismissed Pine Hollow’s claims based on the notice publication.¹

B. Posting

Pine Hollow contends that there was insufficient evidence that Citizens Bank actually posted notice of the foreclosure sale on the subject property. Pine Hollow asserts in the alternative that Citizens Bank was required to post notice at each vacant condominium site individually.

Deputy Harrington swore in an affidavit that he posted notice at seven particular locations around the subject property. At his March 4, 2010 deposition, Harrington testified that he posted one notice on a fence “across the street” from the property. He posted a second notice on a large sign at the property’s north entrance. The deputy claimed that many of the individual vacant lots within the condominium development did not have any posts, signs or fences to which the notices could be affixed. Accordingly, the deputy posted the notices on nearby street signs and lot marker posts.

At an April 16, 2010 hearing conducted as part of the court’s “expedited trial,” Harrington testified that Citizens Banks’ attorney, John Tucker, accompanied him when he posted notice on the subject property. Harrington testified that he normally posts foreclosure sale notices on the subject house. As this case involved vacant land, Harrington brought wooden stakes that he could drive into the ground to hold the notices. Upon inspection, Harrington discovered sufficient preexisting stakes and signs around the property to which the notices could be affixed. Harrington reiterated that he posted notices on a fence and a sign at the entrances to the property. He posted notices on “single post” and “double post” signs found within the

¹ We note that the parties’ contract—the future advance mortgage—varies from the statute and requires publication “IN A LOCAL NEWSPAPER.” Pine Hollow does not contend that Citizens Bank’s choice of newspaper violates the contract and we decline to address that issue on appeal.

development. Harrington also posted a notice on an intersection sign. Harrington testified that he returned to the property less than a week later on other business and discovered that the documents he had posted were gone. Pine Hollow contradicted Harrington's testimony with the statements of two condominium development residents who claimed never to have seen any posted foreclosure sale notices.

The trial court determined from Harrington's testimony that he had actually posted the notices and from the testimony of Pine Hollow's witnesses that the postings were removed by wind, concerned neighbors, or the developer himself. We must defer to the trial court's assessment of witness credibility as it received the testimony first-hand. *Amb's v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003). We therefore find no clear error in the trial court's judgment that Citizens Bank actually posted the notices as required by statute.

We further disagree with Pine Hollow's contention that Citizens Bank was required to post notice of the foreclosure sale on each individual vacant condominium lot. MCL 600.3208 simply requires posting "upon any part of the premises described in the notice." And MCL 600.3224, which governs the sale of distinct lots as separate units, does not apply to the posting of notice. We will not read additional requirements into the statutes.

C. Notice Contents

Pine Hollow's claim that the foreclosure sale notice omitted statutory elements is also without merit. MCL 600.3212 provides the notice content requirements:

Every notice of foreclosure by advertisement shall include all of the following:

- (a) The names of the mortgagor, the original mortgagee, and the foreclosing assignee, if any.
- (b) The date of the mortgage and the date the mortgage was recorded.
- (c) The amount claimed to be due on the mortgage on the date of the notice.
- (d) A description of the mortgaged premises that substantially conforms with the description contained in the mortgage.
- (e) For a mortgage executed on or after January 1, 1965, the length of the redemption period as determined under section 3240.
- (f) A statement that if the property is sold at a foreclosure sale under this chapter, under section 3278 the borrower will be held responsible to the person who buys the property at the mortgage foreclosure sale or to the mortgage holder for damaging the property during the redemption period.

Pine Hollow claims that Citizens Bank should have included descriptions and tax identification numbers for each individual vacant condominium lot within the mortgaged premises. However, this was not required by the statute. The description of the property must

“substantially conform[] with the description contained in the mortgage.” MCL 600.3212(d). Citizens Bank culled the property description in the notice directly from the future advance mortgage and thereby met its statutory duty.

IV. SHERIFF SALE IS NOT VOID

Pine Hollow contends that the sheriff’s sale must be set aside because the sheriff did not offer the property for sale in parcels before offering it for sale as a whole. MCL 600.3224 provides:

If the mortgaged premises consist of *distinct farms, tracts, or lots not occupied as 1 parcel*, they shall be sold separately, and no more farms, tracts, or lots shall be sold than shall be necessary to satisfy the amount due on such mortgage at the date of the notice of sale, with interest and the cost and expenses allowed by law but if distinct lots be occupied as 1 parcel, they may in such case be sold together. [Emphasis added.]

The statute is mandatory; if the property is composed of distinct tracts or lots, they shall be sold individually. *Sweet Air Investment*, 275 Mich App at 497. The purpose of the statute is to protect the mortgagor by ensuring that only enough of the property is sold to pay off the indebtedness and to permit the mortgagor to redeem a portion of his or her property if financially feasible. *Masella v Bisson*, 359 Mich 512, 517; 102 NW2d 468 (1960). However, the mortgagee need not sell the property in separate parcels if doing so would be “arbitrary or impractical.” *Sweet Air Investment*, 275 Mich App at 497. And, the mortgagor’s rights are “not superior to the right of the mortgagee to collect the debt.” *Security Trust Co v Sloman*, 252 Mich 266, 271; 233 NW 216 (1930).

The statute does not define the term “distinct” lots. This Court has held that “[d]istinct,” as used in the statute, means separate or different—not the same.” *Cox v Townsend*, 90 Mich App 12, 16; 282 NW2d 223 (1979). To be sold separately, the distinct lots must be “not occupied as 1 parcel.” *Id.*

“Occupancy” does not require that all land be fenced or improved Actual residency is also not a necessity. There may be constructive occupancy of part of the premises which would require sale in parcels, and by the same token, constructive occupancy of the whole as one parcel. [*Id.* at 16-17.]

Ultimately, whether property is composed of one or several lots “is a practical” question. *Security Trust Co*, 252 Mich at 270. “The premises constitute one parcel if held, treated, occupied or used as such at the time of the foreclosure sale.” *Cox*, 90 Mich App at 16.

The property was mortgaged as one unit and that usually indicates that the land is one distinct parcel. See *Sweet Air Investment*, 275 Mich App at 498. However, Pine Hollow had ceased to hold, treat, or use the property as one parcel by the time of the foreclosure sale. The property in Grand Blanc Township had been platted for a site condominium development. Roads and other infrastructure had been completed in the platted development. Several lots had been sold to third parties, homes had been built, and those parcels had been removed from the mortgage lien. The vacant land that had yet to be sold off had been carved into individual lots

and was being marketed as such. The vacant lots were not contiguous and were interspersed with the site condominiums (actually large, stately homes) that had already been built. “Plat lines are not conclusive of separate occupancy” and may be ignored when land is clearly used as distinct tracts or lots. *Baratto v Pitcher*, 263 Mich 307, 209; 248 NW 631 (1933). The converse is also true. The evidence in this case reveals that the property had been developed to the point that it was being used as distinct lots and not as one parcel. Accordingly, the trial court clearly erred in concluding otherwise.

As the property was held and treated as separate lots at the time of the foreclosure, Deputy Harrington was required to sell the lots separately at the auction. It is undisputed that Harrington did not do so. He admitted that he never opened the bidding to the individual parcels. Harrington simply described the entirety of the property subject to the mortgage and opened the bidding at over \$1.3 million. Based on this evidence, the sheriff’s sale clearly did not comport with the statutory requirements and the trial court clearly erred in ruling to the contrary.

The sale of the property as one parcel also violated the future advance mortgage under these circumstances. The mortgage document gave Citizens Bank discretion to sell the property “as one or more parcels” “unless otherwise prohibited by law.” As the property was divided into distinct lots, the Bank’s sale as a whole was prohibited by MCL 600.3224. The sale of the property as a whole was further in contravention of the notice provided to the public. Citizens Bank’s notice specifically asserted that the vacant condominium lots would be sold individually; yet Harrington indisputably ignored that requirement.

However, foreclosure sales are not easily voidable. “[I]t would require a strong case of fraud or irregularity, or some peculiar exigency, to warrant setting a foreclosure sale aside.” *Sweet Air Investment*, 275 Mich App at 497. Pine Hollow received the same protection it would have received had the sheriff properly sold the property by individual lots. The sheriff’s deed enumerated individual prices for each lot within the development. Pine Hollow was on notice that it had the ability to redeem the property in its entirety or to redeem only that portion within its financial means. The intent of the statute was therefore accomplished. As such, we find no fraud, irregularity or peculiar exigency supporting the relief requested by Pine Hollow. Despite the errors committed the trial court, we affirm its judgment.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly
/s/ Mark T. Boonstra