

STATE OF MICHIGAN
COURT OF APPEALS

STEPHEN KWAME BONSU,

Plaintiff-Appellant,

v

OCWEN LOAN SERVICING, LLC, f/n/a
SAXON MORTGAGE SERVICES,

Defendant-Appellee.

UNPUBLISHED
November 15, 2012

No. 307638
Wayne Circuit Court
LC No. 11-000267-CH

Before: MURPHY, C.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendant under MCR 2.116(C)(10). We affirm.

Plaintiff filed this cause of action after his home was foreclosed upon. Plaintiff alleged, among other things, that defendant breached a contract with him, made fraudulent misrepresentations to him, violated the Mortgage Brokers, Lenders and Servicer Licensing Act, MCL 445.1651 *et seq.*, and failed to comply with statutory foreclosure requirements. Defendant moved for summary disposition, claiming that there was no factual dispute that defendant did not breach its contract with plaintiff when it foreclosed on his home. The trial court agreed, finding that plaintiff's discovery admissions and the record evidence demonstrated that plaintiff failed to comply with the terms of the contract and was, therefore, not entitled to a permanent mortgage loan modification and exemption from foreclosure.

We review de novo a trial court's decision to grant or deny a motion for summary disposition under MCR 2.116(C)(10). *Lind v City of Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004). A motion brought under MCR 2.116(C)(10) tests the factual support for a plaintiff's claim. *Id.* This Court reviews the whole record in the light most favorable to the nonmoving party and grants summary disposition when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 720; 635 NW2d 52 (2001). This appeal also involves the interpretation of a contract, which is a matter of law that this Court reviews de novo. *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 367; 817 NW2d 504 (2012). Likewise, statutory interpretation involves a question of law, which this Court reviews de novo. *Dessart v Burak*, 252 Mich App 490, 494; 652 NW2d 669 (2002).

Plaintiff claims that he entered into a Trial Period Plan (“TPP”) with defendant whereby he was promised a final loan modification but, despite performing his obligations, defendant failed to provide a permanent modification and proceeded with foreclosure of his home. We disagree.

Generally, in interpreting a contract, this Court must seek to determine the parties’ intent by taking the contract as a whole and applying the plain language used by the parties. *Dobbelaere v Auto Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). Where a contract is clear and unambiguous, this Court must enforce the contract as it is written. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). Under Michigan law, after showing the existence of a valid contract, the plaintiff must demonstrate: (1) the terms of the contract, (2) a breach of one or more of the terms, and (3) the injury to the plaintiff caused by the breach. See *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

In August of 2009, defendant offered plaintiff a TPP under the Home Affordable Modification Program (“HAMP”). HAMP is a federal program enacted pursuant to the Emergency Economic Stabilization Act, 12 USC 5201, *et seq.*, which was designed to assist homeowners in avoiding foreclosure by giving lenders incentives to offer borrowers modifications with more favorable terms. See *Wigod v Wells Fargo Bank, NA*, 673 F3d 547, 556 (CA 7, 2012). In its motion for summary disposition, defendant argued that plaintiff failed to satisfy the terms of the TPP; specifically, defendant claimed that plaintiff did not provide defendant with an agreement signed by the co-borrower, did not make all payments, and failed to provide requested documents. The trial court agreed and granted defendant’s motion based on its finding that plaintiff failed to comply with the TPP when it did not provide an agreement with the co-borrower’s signature.

It is undisputed that both plaintiff and a co-borrower secured a loan with the mortgage at issue in this case in December 2006. The TPP contract has signature lines for plaintiff and the co-borrower and specifies that the borrower agrees “all persons who signed the Loan Documents or their authorized representative(s) have signed this Plan, unless a borrower or co-borrower is deceased or the Lender has waived this requirement in writing.” While plaintiff’s signature appears on the final page of the agreement, the co-borrower’s signature is missing. Plaintiff offered no proof of the co-borrower’s signature and presented no evidence that she had a representative sign for her, that she is deceased, or that defendant waived this signature requirement. Furthermore, for legal purposes plaintiff admitted that he failed to provide the co-borrower’s signature on the TPP based on his failure to respond to defendant’s request for admissions. See MCR 2.312(B)(1). Because plaintiff did not comply with this contractual obligation, there is no genuine issue of material fact that defendant did not breach the contract by failing to offer plaintiff a permanent loan modification.

Moreover, the evidence supports defendant’s related arguments that plaintiff failed to make timely payments and to submit requested documentation in a timely manner pursuant to the TPP. Initially, plaintiff was required to make three monthly payments in a specified amount by the first days of August, September, and October of 2009. Plaintiff claims that he made four payments to defendant, but plaintiff only provided receipts for three payments. Two of those receipts reflect payment dates consistent with those required in the TPP. One of those receipts is

barely legible and is dated 2010. Nevertheless, in a letter dated November 2, 2009, defendant acknowledges that plaintiff made all the trial period payments on time and qualified for a two-month extension, during which plaintiff was to provide the missing documents and make two additional payments.

Plaintiff failed to establish that he made both additional payments in compliance with the TPP extension. First, plaintiff claimed to have only made four total payments to defendant. Next, there is an illegible Western Union receipt for a payment made sometime in 2010, but no other proof of an additional payment. Finally, there is the discovery admission that plaintiff failed to make a required payment in February 2010. Thus, we conclude that the record fails to support plaintiff's claim that he made all requisite payments in a timely manner pursuant to the TPP.

Furthermore, plaintiff failed to provide all the supporting documents that defendant requested. Plaintiff alleges in his complaint that when he received the TPP, he "followed up as requested with hard copies of financial documentation, evidence of insurance and property tax information." However, plaintiff failed to offer any evidence to support his allegation. Conversely, defendant submitted two letters, the first notifying plaintiff that there were "missing documents" that he must provide, and the second notifying plaintiff that his loan modification was denied in part for failure to "provide us with documents we requested," despite notice and a deadline. In addition, plaintiff's discovery admission indicates that plaintiff had knowledge of these letters and failed to provide a specific income report on time. Thus, the record shows that plaintiff failed to provide the requested documentation in a timely manner pursuant to the TPP. Because plaintiff did not satisfy these terms of the TPP agreement, there is no genuine issue of material fact regarding whether defendant effectuated a valid foreclosure of plaintiff's property. Therefore, we hold that the trial court did not err in granting defendant's motion for summary disposition.

Similarly, plaintiff asserts that defendant violated federal law on foreclosure of homes when it failed to provide him with a permanent mortgage loan modification. Plaintiff's claim is based on the federal HAMP provision. Even assuming this argument is valid,¹ we disagree.

When plaintiff failed to satisfy all the terms of the temporary agreement, as this Court determined in the above-stated analysis, plaintiff was no longer entitled to a permanent modification of his mortgage loan. Therefore, defendant did not violate HAMP in failing to provide a permanent loan modification and in proceeding with the foreclosure and sale of

¹ Several courts have held that HAMP does not create a private right of action to enforce its regulations. See *Bolone v Wells Fargo Home Mtg, Inc*, 2012 US Dist LEXIS 34272 at 11 (ED Mich, 2012); *JP Morgan Chase Bank v Horvath*, 2012 US Dist LEXIS 40314 at 9 (SD Ohio, 2012); *Wright v Chase Home Fin LLC*, 2011 US Dist LEXIS 58977 at 4 (D Ariz, 2011); *Hart v Countrywide Home Loans, Inc*, 735 F Supp 2d 741, 748 (ED Mich, 2010).

plaintiff's home.² Accordingly, we conclude that the trial court properly granted summary disposition and dismissed this claim.

Plaintiff also asserts a claim of fraudulent misrepresentation, contending that defendant misrepresented that it was in a valid TPP with plaintiff and accepted payments from plaintiff while continuing foreclosure proceedings. We disagree.

Plaintiff only made a general assertion regarding defendant's representations. Mere allegations of fraud are insufficient to overcome a motion for summary disposition. See MCR 2.116(G)(4); see, e.g., *LaMothe v Auto Club Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995). Plaintiff did not allege when, how, or by whom the promise was made. Plaintiff includes the first names of defendant's representatives with whom he had telephone conversations, but those agents did not make promises regarding plaintiff's loan. In fact, the statements that defendant made concerning the loan are consistent with regulations for mortgage loan modifications. In a letter to plaintiff in May 2009, and in the TPP contract, defendant informed plaintiff that he had to comply with all trial period conditions to receive a permanent mortgage loan modification. As determined above, plaintiff failed to provide a properly signed agreement, make the requisite payments, and submit documentation in a timely manner. Plaintiff was notified of those shortcomings, and foreclosure proceeded. Furthermore, there is nothing in the record to support plaintiff's assertions that defendant continued foreclosure proceedings while the TPP was operable and that defendant misrepresented plaintiff's rights under applicable foreclosure statutes. Because plaintiff's claim of fraudulent misrepresentation was based on mere speculation and unsupported by the record, it was appropriately dismissed pursuant to MCR 2.116(C)(10).

Next, plaintiff claims that defendant violated the Mortgage Brokers, Lenders, and Servicers Licensing Act, MCL 445.1651 *et seq.*, when it breached the TPP agreement, failed to provide notice of a default, and misrepresented information to plaintiff. We disagree.

The Mortgage Brokers, Lenders, and Servicers Licensing Act ("MBLSLA") authorizes and licenses mortgage lenders to participate in mortgage lending and servicing in Michigan, subject to the administration of the commissioner of the office of consumer and industry services. There is no dispute regarding whether defendant is subject to the terms of the MBLSLA. Rather, the issue rests on whether defendant violated any of the terms of the act. Plaintiff cites MCL 445.1672, which provides:

² In conjunction with this allegation, plaintiff requests that this Court take judicial notice of a pattern and practice by such lenders as defendant based on a federal review finding that some banks were negligent and failed to comply with proper foreclosure procedures. Where the record establishes that defendant fully complied with HAMP in its dealings with plaintiff and his mortgage loan, we refuse to address plaintiff's speculative contention that defendant might have a pattern and practice of HAMP violations based on the allegation that some other lenders have been found to be noncompliant.

It is a violation of this act for a licensee or registrant to do any of the following:

(a) Fail to conduct the business in accordance with law, this act, or a rule promulgated or order issued under this act.

(b) Engage in fraud, deceit, or material misrepresentation in connection with any transaction governed by this act.

(c) Intentionally or due to gross or wanton negligence, repeatedly fail to provide borrowers material disclosures of information as required by law

Regarding defendant's business conduct, there is no record evidence that defendant failed to comply with this state statute. Plaintiff's allegations are based on defendant's failure to provide plaintiff with a permanent loan modification. Given the above-stated conclusion that defendant was not required to provide a permanent loan modification because plaintiff failed to comply with the terms of the TPP, plaintiff's claim lacks merit. Likewise, plaintiff's allegation of fraudulent misrepresentation has been found to be without merit. Furthermore, plaintiff does not specify any instance where defendant failed to make a material disclosure of information, and there is nothing in the record to support that such an omission occurred. A plaintiff may not make an allegation without offering facts to support that allegation. MCR 2.116(G)(4). Because there is no evidence to support plaintiff's claim that defendant violated the MBLSLA, the trial court properly granted defendant's motion for summary disposition.

Finally, plaintiff contends that defendant violated MCL 600.3205a³ by failing to provide plaintiff with notice of his right to request a meeting to discuss a loan modification, and thereby prohibiting such a meeting. We disagree and hold that the statute on which plaintiff relies is inapplicable since it was not in effect when the foreclosure proceedings of plaintiff's home commenced, and the Legislature did not intend for it to be applied retroactively. See *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583-584; 624 NW2d 180 (2001) (The fact that the Legislature includes no express language concerning retroactivity suggests an intention that the law be applied prospectively). Specifically, defendant sent notice of foreclosure of plaintiff's property in February 2009, and the statute, 2009 PA 30, became effective on July 5, 2009. Because the statute was not in effect when defendant began foreclosure proceedings, plaintiff is not entitled to relief under MCL 600.3205a, and his claim was properly dismissed.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ William C. Whitbeck

³ We note that MCL 600.3205a-d have been repealed, effective December 31, 2012. MCL 600.3205e.