

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CLYDE SALLIE,

Plaintiff-Appellant,

v

FIFTH THIRD BANK,

Defendant-Appellee,

and

FORECLOSURE MANAGEMENT COMPANY,

Defendant.

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FOR PUBLICATION

June 19, 2012

9:15 a.m.

No. 302554

Kent Circuit Court

LC No. 10-003496-CH

Advance Sheets Version

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

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting summary disposition in favor of defendant Fifth Third Bank in this mortgage foreclosure dispute. Because defendant was able to pursue foreclosure as a remedy for plaintiff's default on the mortgage notwithstanding its loss of the underlying promissory note, we affirm.

In August 2000, plaintiff and his now-deceased wife borrowed \$63,665.32 from Old Kent Bank and granted the bank a mortgage on their home as security for the loan. In 2001, Old Kent Bank merged with defendant, and, in 2003, plaintiff's wife died. Plaintiff defaulted on the loan in September 2009, and defendant, pursuant to the power-of-sale clause contained in the mortgage, sought to foreclose on plaintiff's property by advertisement. Although plaintiff and his wife had signed a promissory note as part of the mortgage loan transaction, defendant was unable to locate the note at the time that it commenced foreclosure proceedings. Plaintiff challenged the foreclosure proceedings on the basis that defendant was unable to foreclose on the mortgage without producing the note.<sup>1</sup> The trial court granted summary disposition for

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<sup>1</sup> Plaintiff initially denied borrowing \$63,665.32 and executing the mortgage, claiming that his signature had been forged. Thereafter, he abandoned that argument and focused on defendant's inability to produce the note.

defendant, determining that regardless of the note, upon plaintiff's default defendant was able to pursue the remedies available under the mortgage, which included foreclosure.

Plaintiff argues that defendant was not entitled to foreclose on the mortgage without showing that it acquired and had possession of the promissory note, in addition to the mortgage, after Fifth Third merged with Old Kent Bank. The trial court's decision granting summary disposition for defendant on this issue was premised on MCR 2.116(C)(10). We review de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). In reviewing a motion for summary disposition under subrule (C)(10), we consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Id.* "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* We also review de novo issues involving the interpretation of statutes. *Ford Motor Co v Dep't of Treasury*, 288 Mich App 491, 494; 794 NW2d 357 (2010).

A mortgagee may foreclose on a mortgage without producing the note secured by the mortgage. *Snyder v Hemmingway*, 47 Mich 549, 553; 11 NW 381 (1882). In order to do so, however, the mortgagee must produce a valid mortgage and power of sale. *Id.* "[I]t is only under the power of sale that any steps can be taken." *Id.* The mortgagee must also give "clear proof" of the debtor's default and continuing debt obligation to the mortgagee. *Hungerford v Smith*, 34 Mich 300, 301 (1876); see also *George v Ludlow*, 66 Mich 176, 179; 33 NW 169 (1887); *Young v McKee*, 13 Mich 552, 556 (1865). This century-old case law is consistent with our current statutory law, which provides that "[e]very mortgage of real estate, which contains a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement, in the cases and in the manner specified in this chapter." MCL 600.3201. Pursuant to MCL 600.3204(1),

a party may foreclose a mortgage by advertisement if all of the following circumstances exist:

(a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.

(b) An action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage; or, if an action or proceeding has been instituted, the action or proceeding has been discontinued; or an execution on a judgment rendered in an action or proceeding has been returned unsatisfied, in whole or in part.

(c) The mortgage containing the power of sale has been properly recorded.

(d) 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.

Notably, the statute does not require that the mortgagee produce the underlying note in order to foreclose a mortgage by advertisement.

In the case at bar, defendant met all the requirements to foreclose by advertisement. Defendant produced a valid, recorded mortgage that contained a power-of-sale clause. The mortgage explicitly stated: “Warning. This Mortgage contains a power of sale, and, upon default, may be foreclosed by advertisement.” In addition, a “default in a condition of the mortgage” occurred, and defendant established plaintiff’s underlying debt and default with “clear proof.” See MCL 600.3204(1)(a); *Hungerford*, 34 Mich at 301. Defendant produced documentary evidence and presented testimony establishing plaintiff’s payment history, his default, and the amount outstanding on the debt. In fact, plaintiff admitted that he had stopped making payments on the debt.

Defendant also established that it owned plaintiff’s debt. Defendant provided unrefuted testimony that the lost note was never transferred, assigned, or sold. By establishing its continuing ownership of plaintiff’s debt, defendant eliminated the risk that plaintiff would face multiple collections on the same debt. See *George*, 66 Mich at 179. Moreover, defendant did not institute an action to recover the debt secured by the note as described in MCL 600.3204(1)(b). Accordingly, defendant is entitled to foreclose on the mortgage notwithstanding the loss of the note, and the trial court properly granted summary disposition for defendant.<sup>2</sup>

Affirmed.

/s/ Pat M. Donofrio  
/s/ Jane E. Markey  
/s/ Donald S. Owens

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<sup>2</sup> The parties’ reliance on MCL 440.3309 is misplaced because that provision pertains to the enforcement of an instrument that was lost. Because defendant is proceeding on the mortgage rather than the note, MCL 440.3309 is inapplicable.