

STATE OF MICHIGAN
COURT OF APPEALS

NANCY L. ZACHARY

Plaintiff-Appellant,

v

HOWARD EMMER d/b/a/ ALUMINUM
CONSTRUCTION CO., and LESLIE LONDON,

Defendants-Appellees,

and

HENRY M. DEPPNER,

Defendant.

UNPUBLISHED

November 22, 1996

No. 181310

LC No. 93-465814

Before: Michael J. Kelly, P.J., and Hoekstra and E.A. Quinnett,*JJ.

PER CURIAM.

Plaintiff, Nancy Zachary, appeals as of right the trial court's order granting defendants-appellees motions for summary disposition.¹ We affirm but remand to the trial court for further proceedings.

Plaintiff alleged that in 1975 she contracted with Howard Emmer to construct a room addition to her home at 3143 Cummings in Berkeley. Plaintiff gave Emmer a mortgage on her home for \$6,049.00 in order to secure payment on the addition. The addition was completed by Emmer in the fall of 1975. Plaintiff alleged that the work Emmer performed on the addition did not meet her expectations or professional building standards and was not in compliance with the Berkeley City Code. The addition did not pass a final city inspection in 1975 because the addition lacked gutters, access to the crawl space, heating, the roof leaked, and a window did not close properly. According to plaintiff, Emmer ignored multiple requests by the city to make repairs to the addition so that it could pass inspection. Plaintiff, unsatisfied with the addition, never made payments to Emmer for the addition.

After unsuccessful attempts in 1981 and 1984 to resolve the dispute between the parties, in April of 1993, plaintiff received notice that Emmer was foreclosing the mortgage on her home by advertisement. The amount of debt claimed was \$8,131.77 in principal and \$6,520.08 in interest. The property was purchased by Leslie London for \$14,935.95 on May 14, 1993, who received a sheriff's deed to the property on November 14, 1993.

Plaintiff filed her complaint to quiet title in circuit on November 12, 1993, three days prior to the expiration of the mortgage redemption period, and alleged that the mortgage given to Emmer was never operational because Emmer's construction of the addition was below her expectation and below a reasonable standard of habitability. Plaintiff also claimed that even if the mortgage was found to be operational, the debt amount claimed by Emmer excessive and fraudulent.

On November 17, 1993, London initiated summary eviction proceedings in the district court. Plaintiff filed a motion for preliminary injunction in the circuit court to restrain the summary eviction proceeding. The parties stipulated that plaintiff could remain in possession of the property pending the resolution of plaintiff's complaint in circuit court.

In circuit court, on cross-motions for summary disposition, the trial court granted summary disposition pursuant to MCR 2.116(C)(7) in favor of Emmer finding that the statute of limitation's period expired on plaintiff's claim against him. With respect to plaintiff's claim against London, the court granted summary disposition in favor of London pursuant to MCR 2.116(C)(8) and (10) because the court found that London became the owner of the property after the statutory period of redemption expired.

I

Plaintiff first alleges that her cause of action was not barred by the applicable statute of limitations. According to plaintiff, the trial court should not have applied the general six-year statute of limitations for contracts, MCL 600.5807(8); MSA 27A.5807(8), to plaintiff's claim against Emmer but instead should have applied MCL 600.5813; MSA 27A.5813, the six-year statute of limitations for "other" personal actions.

A party supporting or opposing a motion pursuant to MCR 2.116(C)(7) need not support or oppose the motion by submitting documentary evidence. *Patterson v Kleiman*, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994). Unless specifically contradicted by the submission of documentary evidence, the contents of the complaint must be accepted as true. *Id.* Where the facts are undisputed, whether a plaintiff's action is barred by the statute of limitations is a question of law to be determined by the trial court. *Warren Schools v W R Grace & Co*, 205 Mich App 580, 583; 518 NW2d 508 (1994).

Section 5813 is a general six-year limitation period that is applicable where no another statute of limitations would cover the claim. *Hofmann v Auto Club Ins*, 211 Mich App 55, 117; 535 NW2d 529 (1995). When determining which statute of limitation to apply to a particular cause of action, the court must focus on the type of interest allegedly harmed. *Belleville v Hanby*, 152 Mich App 548, 551;

394 NW2d 412 (1986). The gravamen of an action is determined by reading the claim as a whole. *Simons v Apex Drug Stores*, 201 Mich App 250, 253; 506 NW2d 562 (1993). We find that the trial court correctly determined that MCL 600.5807(8); MSA 27A.5807(8) was the applicable statute of limitations for any claim challenging Emmer's performance on the construction contract underlying the mortgage. Thus, MCL 600.5813; MSA 27A.5813, was not applicable. *Hofmann, supra*. However, because both of these limitation sections provide a six-year limitation period, plaintiff would not gain additional time to bring her claim under either section.

Plaintiff also contends that her cause of action challenges the validity of the foreclosure proceeding by challenging whether the Emmer's mortgage was enforceable. We agree. Plaintiff's complaint alleges that the foreclosure proceeding was fraudulent because no default occurred on the mortgage. Under established Michigan law, a mortgagor may hold over after a foreclosure by advertisement and challenge the validity of the summary foreclosure proceedings. *Manufacturers Hanover v Snell*, 142 Mich App 548, 553; 370 NW2d 401 (1985). When a mortgagor challenges the foreclosure sale in this manner, the mortgagor's defenses are limited to the defenses that can be raised in the eviction proceedings. *Id.*, 553-554. Challenges by the mortgagor in the summary eviction proceedings appear to be limited to the validity of the foreclosure sale procedures while other "underlying equities" may not be raised in the eviction proceedings. *Reid v Rylander*, 270 Mich 263, 267; 258 NW2d 630 (1935). However, in this case plaintiff chose to challenge the foreclosure directly in the circuit court before eviction proceedings were initiated and prior to the expiration of the redemption period. Plaintiff should thus be able to challenge the validity of the mortgage.

A challenge to the validity of foreclosure by advertisement proceedings must be brought within five years from the expiration of the redemption period. MCL 600.5801(1); MSA 27A.5801(1). *Olmstead v Johnson*, 313 Mich 57; 20 NW2d 809 (1945); See also Cameron, *Michigan Real Property Law*, (2d Ed) § 18.91, p 748. That section states as follows:

No person may bring or maintain any action for the recovery or possession of any lands or make any entry upon any lands unless, after the claim or right to make entry first accrued to himself or to someone through whom he claims, he commences the action or makes the entry within the periods of time prescribed by this section.

(1) When the defendant claims title to land in question by or through some deed made upon the sale of the premises by an executor, administrator, guardian, or testamentary trustee; or by a sheriff or decree of a court or legal tribunal of competent jurisdiction within this state, or by a sheriff upon a mortgage foreclosure sale the period of limitation in 5 years. [MCL 600.5801(1); MSA 27A.5801(1).]

Other decisions of the Supreme Court have held that a mortgagor must challenge the validity of a foreclosure by advertisement promptly and without delay. See *White v Burkhardt*, 338 Mich 235, 239; 60 NW2d 925 (1953); *Fox v Jacobs*, 289 Mich 619, 625; 286 NW2d 854 (1939). We find that plaintiff's challenge to the foreclosure before the expiration of the redemption period was without delay and should be permitted.

We also note that in *Hogan v Hester Investment Co*, 257 Mich 627, 636; 241 NW2d 881 (1932), the Supreme Court determined that the plaintiff could not challenge the validity of a foreclosure by advertisement after the property at issue was sold to a bona fide purchaser. Although London may be a bona fide purchaser of plaintiff's property, this case is distinguishable from *Hogan* because plaintiff sought to challenge the foreclosure before the expiration of the redemption period. While in *Hogan*, the plaintiff did not challenge the validity of the foreclosure until after the redemption period expired. *Hogan, supra*, 257 Mich 636. Therefore, the trial court erred when it determined that plaintiff's claim was barred.

II

Plaintiff next contends that the trial court should have granted summary disposition in her favor because there were no genuine issues of material fact before the court. We disagree and find that the trial court should have entered summary disposition in favor of defendants pursuant to MCR 2.116(C)(10).

In order for a valid mortgage to exist, the obligation or debt secured by the mortgage must actually exist. *Ginsberg v Capitol City Wrecking Co*, 300 Mich 712, 717-718; 2 NW2d 892 (1942). A mortgage may not be enforced if the consideration underlying the debt the mortgage secured fails. *Id.*; *Cummings v Continental Tool Corp*, 371 Mich 177, 183; 123 NW2d 165 (1963). It was plaintiff's burden to establish that Emmer failed to give consideration for the mortgage. *Cummings, supra*, 371 Mich 183. However, our Supreme Court has also determined that a mortgage cannot be canceled or rescinded for inadequacy of consideration absent a showing of fraud or bad faith. *Turner v Peoples State Bank*, 299 Mich 438, 445; 300 NW2d 353 (1941).

The undisputed facts in this case indicate that Emmer did convey consideration to plaintiff in exchange for the mortgage by constructing the addition to her home. Because some consideration was transferred, plaintiff would not be entitled to summary disposition in her favor on the grounds that the mortgage was void as a matter of law for lack of consideration. The presence of consideration thus supports summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants on plaintiff's claim that the mortgage foreclosure was invalid. *Johnson v Wayne Co*, 213 Mich App 143, 149; ___ NW2d ___ (1995). Although Emmer moved for summary disposition based only on MCR 2.116(C)(7), the trial court may grant a party judgment as a matter of law where there are no genuine issues of material fact and judgment as a matter of law is warranted. MCR 2.116(I)(1)(i). *Asher v Exxon Co*, 200 Mich App 635, 638; 504 NW2d 728 (1993). Summary disposition in favor of defendants was thus appropriate with respect to plaintiff's claim that the mortgage was not operational due to a lack of consideration.

III

Finally, plaintiff contends that her claim that the amount due on the mortgage was overstated should not have been barred by the statute of limitations. After granting summary disposition in favor of Emmer, the trial court denied plaintiff's request not to enter the order because there was a dispute over

the contract price to construct the addition to plaintiff's house that the mortgage secured. Plaintiff alleged the that discovery had failed to locate the original contract for the house addition signed by the parties in 1975.

Plaintiff, by challenging the principal amount of the mortgage, is essentially challenging the contents of the contract executed in 1975 by plaintiff and Emmer. Any challenge to the contract is barred by the six-year statute of limitations for contracts, MCL 600.5807(8); MSA 27A.5807(8). The trial court thus did not commit error when it found that plaintiff's claim that the mortgage principal was excessive was untimely.

However, we do find that Emmer would be barred from foreclosing on those mortgage installments that were due more than fifteen years prior to the date of foreclosure based upon MCL 600.5803; MSA 27A.5803. On an installment mortgage like the one found in this case, the fifteen-year statute of limitation, MCL 600.5803; MSA 27A.5803, begins to run from the time each installment is due. *Degen v Oliveto*, 80 Mich App 573, 581-582; 264 NW2d 64 (1978). Mortgage installments which are not foreclosed fifteen years after they are due are barred from collection. *Id.* In this case, mortgage installments due more that fifteen years prior to foreclosure, i.e. installments due prior to May 14, 1978, are barred from foreclosure. Therefore, a remand is necessary to determine if any of the mortgage installments due prior to May 14, 1978 were foreclosed by Emmer.

We affirm the order granting summary disposition in favor of defendants. However, we remand this matter for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly

/s/ Edward A. Quinnell

¹ Henry Deppner, the deputy sheriff who conducted the foreclosure sale, did not participate in this appeal.