STATE OF MICHIGAN

COURT OF APPEALS

BIRMINGHAM BANCORP MORTGAGE CORPORATION, MARK BACKONEN and KENNETH G. LESSON, Trustee of the Kenneth G. Lesson Trust,

Plaintiffs-Appellants,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
September 16, 1997

No. 186172
Oakland Circuit Court
LC No. 93-453438

Before: Jansen, P.J., and Reilly and W.C. Buhl*, JJ.

PER CURIAM.

In this insurance coverage case, plaintiffs appeal as of right the circuit court order granting summary disposition in favor of defendant except as to plaintiffs' claim for reformation, denying plaintiffs' cross-motion for summary disposition, and entering a judgment of no cause of action.[1] Plaintiffs also appeal as of right the circuit court orders granting defendant's motion for protective order and denying their motion to compel deposition. We affirm in part, reverse in part, and remand for further proceedings in accordance with this opinion.

Plaintiff Birmingham Bancorp Mortgage Corporation (BBMC) was at one time the mortgagee with respect to each of four properties involved in this action: (1) Ward property, (2) Scherer property, (3) Whitlock property, and (4) Patterson property. BBMC assigned the mortgages to either Mark Backonen or the Kenneth G. Lesson Trust, the principal stockholders and operators of BBMC. The loans on each property became delinquent, and the properties were foreclosed upon and sold at sheriffs' sales. The mortgagee of each property, either Backonen or the Lesson Trust, purchased the properties at the sheriffs' sales.

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* Circuit judge, sitting on the Court of Appeals by assignment.

The properties were insured by homeowners' policies issued by defendant. The named insureds were the mortgagors Abe Ward, Emily Scherer, Royetta Whitlock and Dorothy Patterson. BBMC, its successors and assigns were listed under the heading "SECURED INTERESTED PARTIES AND/OR ADDITIONAL INTERESTED PARTIES" on the policies insuring the Scherer, Whitlock and Patterson properties. The policy insuring the Ward property listed only BBMC under that heading. Plaintiffs filed insurance claims with defendant seeking compensation for property damage losses that plaintiffs claimed had occurred on each of the four properties. Defendant denied each of the claims for various reasons.

Plaintiffs filed a five-count complaint against defendant alleging breach of contract, violation of MCL 500.2006; MSA 24.12006, misrepresentation, intentional infliction of emotional distress, and reformation. Defendant filed its answer and affirmative defenses. Plaintiffs subsequently filed their motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) on all their claims and defendant's affirmative defenses. Defendant filed its cross-motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) on all its affirmative defenses and plaintiffs' claims. After considering the parties' arguments, the circuit court denied plaintiffs' motion, granted defendant's motion in part, and entered judgment in favor of defendant.

I.

Plaintiffs first argue that the trial court erred in holding that an assignment of a mortgage constitutes a change of ownership requiring notice to the insurance company pursuant to the standard mortgage clause. We agree.

In granting defendant's motion for summary disposition, the trial court held that with regard to each property, BBMC violated the mortgage clause by failing to give defendant notice of its assignment of its mortgage interest to Backonen or the Lesson Trust. Each insurance policy issued by defendant contained the standard mortgage clause requiring the mortgagee to notify defendant upon any change of ownership in the insured property. Failure to do so rendered the policy null and void. BBMC did not notify defendant of the assignments of the mortgages to Backonen and the Lesson Trust. The trial court held that an assignment of a mortgage interest constitutes a "change in ownership" contemplated in the mortgage clause. However, a mortgage does not represent an ownership interest in property. *Midwest Bank v O'Connell*, 158 Mich App 565, 569; 405 NW2d 201 (1987). It merely serves as security for a debt. *Id.* Therefore, when Backonen and the Lesson Trust obtained BBMC's mortgage interests in the subject properties by assignment, there were no changes in ownership. Rather, there were merely changes in the party who possessed the security securing the loans on those properties. The purchases of the properties at the sheriffs' sales following foreclosure by Backonen and the Lesson Trust also did not result in changes in ownership such that notice was required. *Capital Mortgage Corp v Michigan Basic Ins*, 111 Mich App 393, 396; 314 NW2d 635 (1981). Thus, defendant was not entitled to summary disposition of the breach of contract claims on this basis.

II.

Plaintiffs argue that the trial court erred in holding that BBMC did not have an insurable interest in the insured properties at the time of the loss. We disagree.

The public policy of this state precludes recovery on an insurance contract unless the claimant has an insurable interest in the subject matter of the policy at the time of the loss. *Secura Ins v Pioneer Ins*, 188 Mich App 413, 415; 470 NW2d 415 (1991). Whether an individual has an insurable interest is not determined by the label attached to the insured's property right, but rather by whether the individual will suffer a direct pecuniary loss as a result of the destruction of the property. *Id.*

The trial court correctly found that BBMC did not have an insurable interest in the properties at issue. At the time of the losses, BBMC was not a mortgagee because the mortgages had been assigned previously to Backonen or the Lesson Trust. BBMC asserts that it had an insurable interest as the servicer of the assigned mortgages. However, at the times of the losses at the Scherer, Whitlock and Patterson properties, the mortgages had been extinguished by the sheriffs' sales after foreclosure. *Senters v Ottawa Savings Bank*, 443 Mich 45, 50; 503 NW2d 639 (1993). Thus, BBMC's argument that it had an insurable interest because it was servicing the mortgages on these properties is without merit because no mortgages existed at the time of the losses.

With respect to the Ward property, the date of the loss apparently preceded the extinguishment of the mortgage on that property.[2] Nevertheless, we are not persuaded that BBMC had an insurable interest as the servicer of the mortgage because there has been no showing that BBMC would suffer a direct pecuniary loss as a result of the damage to the properties. In *Capital Mortgage v Michigan Basic Ins*, 78 Mich App 570, 574-575; 261 NW2d 5 (1977), the case on which plaintiffs rely, the Court's holding that the servicer had an insurable interest was based on the servicer's contractual duty to procure insurance for the property. Plaintiffs have not presented evidence that BBMC had a similar contractual duty to procure insurance. Therefore, *Capital Mortgage* is inapposite. Thus, even if BBMC was the servicer for the mortgage on the Ward property at the time of loss, that role alone is inadequate for BBMC to have an insurable interest.

Accordingly, the trial court did not err in granting defendant's motion for summary disposition on its affirmative defense of lack of an insurable interest on the part of BBMC.

III.

Plaintiffs next argue that the trial court erred in granting defendant's motion for summary disposition on plaintiffs' misrepresentation claim. We disagree.

In order to show fraud or misrepresentation, a plaintiff must prove the following: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, defendant knew it was false, or made it recklessly without knowledge of its truth or falsity; (4) the defendant made it with the intent that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered injury. *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). An action for fraudulent

misrepresentation must be predicated on a statement relating to a past or existing fact. *Id.* Future promises are contractual and cannot constitute actionable fraud. *Id.*

The complaint alleged that defendant "made representations to Plaintiffs that [defendant] would cover the claims of [BBMC]'s successors and/or assigns if said successors and/or assigns purchased the property at a foreclosure sale and a loss occurred thereafter." We agree with the trial court that plaintiffs failed to state a claim for misrepresentation because the alleged oral representations related to future events, not a past or existing fact. Thus, the statements could not have formed the basis of a misrepresentation claim. Therefore, the trial court properly granted summary disposition in favor of defendant with respect to this claim.

IV.

Plaintiffs next argue that the trial court erred in granting defendant's motion for summary disposition on Backonen's intentional infliction of emotional distress claim. We disagree.

The elements of intentional infliction of emotional distress are: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995). Liability for the intentional infliction of emotional distress has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. *Id.* Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. *Id.* In reviewing such a claim, it is initially for the court to determine whether the defendant's conduct reasonably may be regarded as so extreme and outrageous as to permit recovery. *Id.* at 92. However, where reasonable minds may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability. *Id.*

The trial court correctly found that reasonable minds would not find that the conduct forming the basis of Backonen's claim was "outrageous." The conduct alleged by Backonen constituted mere annoyances and threats, conduct which cannot form the basis of an intentional infliction of emotional distress claim. See *id.* Therefore, the trial court properly granted summary disposition in favor of defendant on Backonen's intentional infliction of emotional distress claim.

V.

Plaintiffs argue that the trial court erred in holding that Backonen and the Lesson Trust had no standing to sue. We agree.

For purposes of determining standing, the court accepts as true all material allegations of the complaint, and construes the complaint in favor of the complaining party. *House Speaker v Governor*, 443 Mich 560, 573; 506 NW2d 190 (1993). Standing denotes the existence of a party's interest in the outcome of the litigation – an interest that will assure sincere and vigorous advocacy. *Allstate Ins Co v*

Hayes, 442 Mich 56, 68; 499 NW2d 743 (1993). Standing in no way depends on the merits of the case. *Rogan v Morton*, 167 Mich App 483, 486; 423 NW2d 237 (1988).

The trial court held that Backonen and the Lesson Trust did not have standing to sue because the insurance policies were void given BBMC's failure to give defendant notice of the change in ownership when the mortgages were assigned. The premise of the court's ruling is in error because, as we explained in Issue I, the assignment of the mortgages does not constitute a change in ownership.

Plaintiffs' complaint alleged that defendant issued policies on the Scherer, Whitlock, and Patterson properties insuring BBMC and its successors and/or assigns as mortgagee, and that BBMC assigned the mortgages to Backonen. It further alleged that defendant issued a policy on the Ward property insuring BBMC as mortgagee, and that BBMC assigned the Ward mortgage to the Lesson Trust. The complaint also alleged that Backonen purchased the Scherer, Whitlock and Patterson properties and the Lesson Trust purchased the Ward property at sheriffs' sales. Accepting these allegations as true, we conclude that Backonen's and the Lesson Trust's status as mortgagees (and then owners) was adequate to confer standing to assert their claims to recover the proceeds of the insurance policies. See *Better Valu Homes v Preferred Mutual*, 60 Mich App 315, 319; 230 NW2d 412 (1975). Whether they are entitled to those proceeds is a question concerning the merits of the case, rather than standing. Therefore, the trial court's order granting summary disposition in favor of defendant is reversed with respect to the breach of contract claims asserted by Backonen and the Lesson Trust.

VI.

Plaintiffs next argue that the trial court erred in denying their motion for summary disposition as to the Patterson claim. We disagree. As previously indicated, defendant was entitled to summary disposition with respect to the claim of BBMC because BBMC did not have an insurable interest. Although we have concluded that Backonen had standing to assert the breach of contract claim, there are unresolved issues concerning the validity of affirmative defenses raised by defendant, specifically relating to alleged misrepresentations and concealment by plaintiffs. Accordingly, we are not persuaded that Backonen has demonstrated that he was entitled to judgment as a matter of law with respect to the Patterson property.

VII.

Plaintiffs argue that the trial court erred in entering a protective order and denying plaintiffs' motion to compel the deposition of Robert Greene, an attorney who represented defendant. Plaintiffs sought Greene's testimony concerning conversations between Greene and Backonen and between Greene and defendant. Plaintiffs contend that the conversations were relevant to plaintiffs' claims of misrepresentation and to the affirmative defense that plaintiffs failed to give notice of alleged changes in ownership. Our resolution of the previous issues makes it unnecessary to address this argument. Although Greene's testimony might have supported the allegations in the misrepresentation claim, we have previously determined that the statements allegedly made did not concern a present or existing fact.

Plaintiffs are not entitled to a deposition for the purpose of fishing for other statements that might allow the claim to survive. Similarly, the affirmative defense to which Greene's testimony may have related is no longer at issue. As we have previously stated, an assignment of a mortgage is not a change in ownership requiring notice to the insurer. Because the testimony sought by plaintiffs concerns a claim and a defense that are no longer at issue in the case, the issue is moot, and we need not determine whether the trial court's ruling was an abuse of discretion.

VIII.

Plaintiffs contend that the trial court erred in granting defendant's motion for summary disposition as to their claim for twelve percent penalty interest. We disagree.

Section 2006 of the Uniform Trades Practices Act provides that an insurer must pay to an individual or entity entitled to insurance benefits twelve percent interest per annum if the claim is not paid on a timely basis, unless the claim is reasonably in dispute. MCL 500.2006; MSA 24.12006. Therefore, an insurer may refuse to pay a claim and be relieved of paying interest on the claim only when the claim is "reasonably in dispute." *Norgan v American Way Ins Co*, 188 Mich App 158, 164; 469 NW2d 23 (1991). We agree with the trial court that plaintiffs were not entitled to the penalty interest pursuant to MCL 500.2006; MSA 24.12006 because their claims were reasonably in dispute. The rejection of BBMC's claims under the policies was proper because BBMC did not have an insurable interest. Thus, BBMC was not entitled to insurance benefits, much less penalty interest. Although the question whether Backonen and the Lesson Trust are entitled to insurance benefits has yet to be resolved, the defenses raised by defendant are adequate to support the court's holding that the claims were reasonably in dispute.

The order granting summary disposition in favor of defendant on all but the reformation claim is reversed with respect to the breach of contract claims of Backonen and the Lesson Trust. The order is otherwise affirmed. We remand for further proceedings on the reformation and breach of contract claims. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ William C. Buhl

[1] The record does not indicate why the court entered a judgment of no cause of action in favor of defendant despite the fact that it denied the parties' motions for summary disposition with respect to the reformation claim.

[2] According to the proof of loss signed by Backonen as chairman of BBMC, a vandalism loss occurred at the Ward property on September 30, 1991, "just prior to foreclosure." The parties' stipulated facts states that Backonen advised the insurance agency of a vandalism claim with a loss date of "middle to

end of 1991." The property was purchased by the Lesson Trust at the sheriff's sale on November 8, 1991.