# STATE OF MICHIGAN

# COURT OF APPEALS

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THOMAS P. KENNY,

Plaintiff-Appellant,

v

FRANKLIN BANK, NA,

Defendant-Appellee.

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UNPUBLISHED
February 26, 2002

No. 227122
Oakland Circuit Court
LC No. 99-017070-CH

Before: Whitbeck, C.J., and Markey and K.F.Kelly, JJ.

PER CURIAM.

Plaintiff appeals by right the grant of summary disposition in favor of defendant Franklin Bank pursuant to MCR 2.116(C)(8). Plaintiff's complaint alleged that he was entitled to the "windfall" that defendant received when as foreclosure sale purchaser after the redemption period had expired, defendant both collected a fire insurance settlement and also sold the foreclosed fire-damaged property for more than the secured debt plaintiff owed. The trial court concluded that plaintiff had failed to state a cause of action for unjust enrichment because plaintiff had conferred no benefit on defendant, and title to the foreclosed property vested in defendant when plaintiff failed to redeem the property. We affirm.

Defendant bank held a one million dollar mortgage on plaintiff's former home on which defendant foreclosed after plaintiff failed to meet his payment obligations. Defendant subsequently purchased the property at foreclosure sale on October 14, 1997 for $1,021,460, the amount plaintiff owed defendant at that time. On July 19, 1998, during the one-year redemption period, a fire damaged the property. Defendant had maintained fire insurance on the property and after the redemption period expired, collected an insurance settlement from two insurance companies of less than the amount of plaintiff's debt, which the parties do not dispute was a total of $503,045.50. Also, after the redemption period had expired, defendant sold the damaged foreclosed property for $1,200,000.

The crux of plaintiff's complaint was that the mortgage he granted to defendant required defendant to give notice to him of any claim for insurance and also required defendant to use insurance proceeds to either rebuild the property or reduce plaintiff's debt, neither of which defendant did. Plaintiff alleged that defendant failed to provide the mortgage-required notice and that plaintiff had a legal and equitable right to have the insurance proceeds used to reduce the amount necessary to redeem the property. Plaintiff further alleged that because the property and

insurance on the property were only different forms of security for plaintiff's debt, plaintiff was entitled to any excess over the amount of his debt that defendant received. Plaintiff alleged that defendant was therefore unjustly enriched by the amount of the insurance settlement when the subsequent sale of the property exceeded plaintiff's debt.

A trial court's grant or denial of summary disposition is reviewed de novo on appeal. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In this case, defendant's claim to summary disposition was based on MCR 2.116(C)(8) (failure to state a claim upon which relief can be granted). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the claim based on the pleadings alone and may not be supported with documentary evidence. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). In deciding a motion for summary disposition based on failure to state a claim, the court must take factual allegations in support of the claim as true and construe them in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

To establish a claim of unjust enrichment the plaintiff must prove: (1) that defendant received a benefit from the plaintiff, and (2) that an inequity results to plaintiff because of the retention of the benefit by defendant. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993); *B & M Die Co v Ford Motor Co*, 167 Mich App 176, 181; 421 NW2d 620 (1988). In such circumstances, the law will imply a contract to prevent the unjust enrichment of the defendant. *Kammer Asphalt Paving Co v East China Twp Schools*, 443 Mich 176, 185-186; 504 NW2d 635 (1993). Because implying a contract ignores normal contract principles, the courts employ the doctrine of unjust enrichment with caution. *Id.* at 186; *Hollowell v Career Decisions, Inc*, 100 Mich App 561, 570; 298 NW2d 915 (1980). Moreover, a contract will not be implied where there is an express contract covering the same subject matter. *Barber, supra* at 375; *Martin v East Lansing School Dist*, 193 Mich App 166, 177; 483 NW2d 656 (1992).

In the case at bar, the trial court correctly determined that plaintiff had not alleged that he had conferred a benefit upon defendant. Plaintiff only alleged that he had defaulted on a substantial debt that forced defendant to foreclose the mortgage plaintiff had granted as security for the debt. Plaintiff also alleged that defendant maintained insurance on the foreclosed property (an obligation of plaintiff under the mortgage that was also in default). Plaintiff further alleged that a fire had damaged the foreclosed property (substantially impairing defendant's security). Finally, the complaint lacked any allegation that plaintiff took any action at all to redeem the property or file a claim for fire insurance proceeds.

Even if plaintiff conferred a benefit on defendant by defaulting on his debt, by failing to maintain insurance, and by taking no action to redeem the property, plaintiff's claim to an inequity is premised on the allegation that defendant failed to comply with the terms of the mortgage agreement to provide notice before an insurance settlement and apply any proceeds to either rebuild or reduce the debt. However, this claim fails because the foreclosure sale extinguished the mortgage. *New York Life Ins Co v Erb*, 276 Mich 610, 615; 268 NW 754 (1936); *Bank of Three Oaks v Lakefront Properties*, 178 Mich App 551, 555; 444 NW2d 217 (1989).

After foreclosure, the rights and obligations of the parties are governed by statute. *Senters v Ottawa Savings Bank, FSB*, 443 Mich 45, 50-53; 503 NW2d 639 (1993). For example, MCL 600.3240 governs redemption of foreclosed property and provides that the mortgagor is obligated to pay post foreclosure interest only if the mortgagor chose to redeem. *Bank of Three Oaks, supra* at 555. Likewise, plaintiff would be obligated to pay the expense that defendant "charged" to plaintiff to maintain insurance on the foreclosed property only if he chose to redeem. MCL 600.3240(4). Absent fraud, accident, or mistake, the statute leaves no room for equitable considerations. *Senters, supra* at 55.

Moreover, a benefit is not unjust and the party conferring the benefit is not entitled to restitution where the benefit is unconditionally conferred without mistake, coercion, or request. *In re McCallum Estate*, 153 Mich App 328, 335; 395 NW2d 258 (1986). In the case of *McCallum Estate, supra* at 331, the plaintiff's decedent, a bank shareholder, objected to the bank's conversion to a holding company and requested that his shares be purchased by the successor bank pursuant to statutory procedure whereby the price per share was determined by an independent appraiser appointed by the Commissioner of the Financial Institutions Bureau. The plaintiff alleged unjust enrichment on the part of the successor bank. *Id.* This Court disagreed because the forces that resulted in the alleged benefit were all put in motion by the plaintiff's decedent and the successor bank was the "involuntary" recipient of the plaintiff's stock. *Id*. at 335-336.

Likewise in this case, defendant did not request that plaintiff default on his debt, which put in motion foreclosure, nor is there any allegation that defendant prevented plaintiff from redeeming the property. While a different case may have been presented if defendant had failed to credit any insurance settlement against the price to redeem, plaintiff here made no effort at all to redeem. Thus, it is not unjust to permit defendant to retain any profit from the sale of the property to which it obtained legal title after the redemption period had expired. MCL 600.3236. Contrary to plaintiff's argument on appeal, a fair reading of the record establishes that the trial court recognized that full title did not vest in defendant until after plaintiff allowed the redemption period to expire. Equity will not intervene, absent fraud, accident, or mistake, even where it appears that compliance with the statutory foreclosure (or redemption) procedure results in a "windfall" to a party. *Senters, supra* at 57.

Finally, plaintiff's reliance on cases that preclude the mortgagee from collecting fire insurance proceeds where a fire occurs before foreclosure and the mortgagee bids the full amount of the debt at the foreclosure sale, is misplaced. See, e.g., *Smith v General Mortgage Corp*, 402 Mich 125; 261 NW2d 710 (1978); *Heritage Federal Savings Bank v Cincinnati Ins Co*, 180 Mich App 720; 448 NW2d 39 (1989). These cases are based on the theory that where the mortgage requires the mortgagor to maintain insurance, with a loss payable clause to the mortgagee, the insurance serves as an alternative source to secure payment of the debt. *Smith, supra* at 126-129. Where the mortgagee purchases the property at foreclosure sale for the amount of the debt, the debt has been satisfied, and there is no right to collect insurance to pay what has already been satisfied - i.e., the mortgagee has no right to "double payment." *Id.* at 128; *Heritage Federal Savings Bank, supra* at 724-726. The same rule applies where the fire occurs before foreclosure, and the mortgagee relies on an assignment of insurance proceeds in the mortgage. *Emmons v Lake States Ins Co*, 193 Mich App 460, 464-465; 484 NW2d 712 (1992).

The present case is distinguished because the fire occurred *after* the foreclosure sale. Also, it is undisputed that defendant maintained the insurance specifically to protect itself from the possibility of damage to the property during the redemption period and was also the named insured. Further, while the insurance policy had a reverse loss-payable clause extending rights to the mortgagor, plaintiff's rights, if any, arise from the insurance contract. *Better Valu Homes, Inc v Preferred Mutual Ins Co*, 60 Mich App 315, 319; 230 NW2d 412 (1975). Here, plaintiff did not file a claim for insurance, nor did he file a breach of contract action against the insurance company or companies. Indeed, plaintiff dismissed his claim against the insurance company. As noted above, where a person's rights are dependent upon an express contract, the law will not imply a contract to establish an unjust enrichment claim. *Barber, supra* at 375; *Martin, supra* at 177.

Finally, "double payment" is not present in this case. The amount of insurance proceeds as alleged in plaintiff's complaint was less than the amount of plaintiff's debt. Moreover, it is undisputed that defendant did not collect the insurance settlement until after the redemption period had expired, and it had succeeded to "all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter." MCL 600.3236. Therefore, defendant's interest in the insurance proceeds extended to the full value of the damage to the property and was not limited by the amount of plaintiff's debt. See *Heritage Federal Savings Bank, supra* at 724; *Better Valu Homes, supra* at 319.

In summary, the trial court properly granted defendant's motion for summary disposition under MCR 2.116(C)(8). Plaintiff failed to state a claim of unjust enrichment because the allegations of his complaint, viewed in the light most favorable to him, did not establish the necessary elements of conferring a benefit on defendant that would be inequitable for defendant to retain. *Barber, supra* at 375; *B & M Die Co, supra* at 181.

Plaintiff's final claim that summary disposition was premature is without merit because it was so clearly unenforceable as a matter of law that no further factual development could possibly justify a right of recovery.

The purpose of summary disposition is to avoid extensive discovery when a case can be quickly resolved on an issue of law. *American Community Mutual Ins Co v Comm'r of Ins*, 195 Mich App 351, 362; 491 NW2d 597 (1992). However, summary disposition may be premature if granted before discovery on a disputed issue is complete. *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996). Where further discovery cannot reasonably be expected to uncover factual support for the opposing party's position, summary disposition is appropriate. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000).

Moreover, in this case the parties agree that the trial court based its decision on MCR 2.116(C)(8), failure to state a claim upon which relief may be granted, which should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Maiden, supra* at 119. Here, the trial court properly concluded that plaintiff had failed to state a claim upon which relief could be granted.

Here, the only disputed fact was whether plaintiff had originally procured the American Modern Home insurance policy, a fact not material to rights and obligations of the parties at the

time of the fire loss when it is undisputed that defendant had "maintained," or paid the insurance premium to keep the policy in force. Because plaintiff failed to assert a claim for insurance within the redemption period, or redeem the property as permitted by law, further discovery could not possibly improve his unjust enrichment claim. Summary disposition was therefore appropriate despite plaintiff's claim that further discovery was necessary. *Maiden, supra* at 119; *Grable, supra* at 566.

We affirm.

/s/ William C. Whitbeck
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly