STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM D. MCMASTER and DIANE MCMASTER, Plaintiffs-Appellants, v TEMPLE INLAND MORTGAGE, BANKERS TRUST and WALSH ACCEPTANCE CORP., Defendants-Appellees.	UNPUBLISHED July 12, 2002 No. 228491 Oakland Circuit Court LC No. 98-010601-CH

Before: Jansen, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order of the circuit court granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(8) and (C)(10). We affirm.

On or about May 20, 1996, plaintiffs executed and delivered a real estate mortgage note in the amount of $248,000, payable to Standard Home Mortgage, Inc. (SMH), and as security for this note, a mortgage on their residence. SMH subsequently assigned the mortgage to Walsh Securities, Inc. (WS), who thereafter assigned it to defendant Bankers Trust. Defendant Temple Inland Mortgage serviced the loan on behalf of Bankers Trust. Plaintiffs made their last regular payment on the note in November 1996. The loan was thereafter submitted for foreclosure. Bankers Trust was the successful bidder at the foreclosure sale, paying $280,410 for the property.

On or about March 5, 1998, Bankers Trust filed an action under the Summary Proceedings Act[1] in the district court. Bankers Trust alleged that plaintiffs were wrongly holding over on the property. The district court entered a judgment in favor of Bankers Trust, and that judgment was subsequently affirmed by the circuit court. Although this action is not the subject of this appeal, defendants raise it in the context of an argument that plaintiffs' claims in the current case are barred by res judicata or collateral estoppel.

On November 16, 1998, plaintiffs initiated this cause of action by filling a six-count complaint in the circuit court. Count I sought declaratory relief, count II was to quiet title, count

[1] MCL 600.5701 *et seq.*

III alleged usury, count IV alleged a violation of Michigan's Consumer Protection Act (MCPA)[2], count V alleged breach of contract, and count VI sought equitable relief. At the heart of plaintiffs' cause of action was the allegation that they had reached an agreement with Temple prior to the foreclosure sale to reinstate the mortgage. Plaintiffs asserted that because they had lived up to their side of the agreement, the foreclosure sale was invalid.

The court granted defendants' motion for summary disposition. The court dismissed plaintiffs' usury claim under MCR 2.116(C)(8). "Because the Plaintiffs claim their rate of interest on the Mortgage Note was 15.25%," the court observed, "pursuant to MCL 438.41, the Plaintiffs failed to state a claim for usury." Observing that plaintiffs had failed to address the alleged MCPA violation in their responsive briefs, the court also dismissed this claim pursuant to (C)(8). The court then dismissed the remaining four counts under MCR 2.116(C)(10):

> The evidence in this case indicates that there is no question of fact that the Plaintiffs were in default of their Mortgage Note and that although the Defendants attempted to work with the Plaintiffs on several occasions prior to and after referring the loan to foreclosure, the Plaintiffs failed to comply with the conditions required, including making certain payments to the Defendants.
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> More specifically, the evidence in this case indicates that Defendant Temple Inland attempted to work with the Plaintiffs on several occasions. For example, prior to the foreclosure sale, Temple Inland offered the Plaintiffs a repayment plan but the Plaintiffs failed to sign the plan or make the required payments. Temple Inland attempted further resolution with the Plaintiffs prior to the planned foreclosure sale by permitting the Plaintiffs to provide a $15,000.00 payment by 11:00 a.m. on July 29, 1997 (the day of foreclosure sale) with an additional $15,000.00 to be paid by August 31, 1997. In addition, the Plaintiffs were required to sign a repayment plan by appearing at Temple Inland's counsel's office. The Plaintiffs admit that the first $15,000.00 payment was not received by 11:00 on July 29, 1997. . . . Furthermore, the remaining $15,000.00 payment was never paid. Even after the foreclosure sale occurred, Temple Inland again offered to work with the Plaintiffs if they paid the remaining $15,000.00 by the end of August, 1997, and signed a repayment agreement at Temple Inland's counsel's office. Again, the Plaintiffs failed to take the required steps to save their home. When the Plaintiffs failed to comply with the proposed agreement, Temple Inland returned the $15,000.00 that was paid on July 29, 1997.
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> Although the Plaintiffs have submitted an exhibit in support of their contention that the foreclosure sale did not or should not have occurred because of an agreement reached between the parties, the document was prepared by the Plaintiffs and there is no evidence that the Defendants executed or agreed to the terms of the Plaintiffs' proposal. . . . Thus, there is no evidence that the Defendants breached any contract with the Plaintiffs.

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[2] MCL 445.901 *et seq.*

We first turn to defendants' assertion that the present cause of action is barred by collateral estoppel or res judicata. The circuit court indicated that it was familiar with the district court action as a result of its handling of the appeal of that action. However, giving plaintiffs "every benefit of the doubt," the circuit court based its decision on MCR 2.116(C)(8) and (C)(10), not (C)(7). Further, the record on appeal does not include enough material related to the district court case for us to determine if either the issues relevant to this appeal were determined in the prior action, *Horn v Dep't of Corrections*, 216 Mich App 58, 62; 548 NW2d 660 (1996), or the claims were decided or could have been decided in the prior action, *People v Gates*, 434 Mich 146, 154, n 7; 452 NW2d 627 (1990). Accordingly, we are unable to determine the merits of this argument.

Plaintiffs' argument on appeal does not address the circuit court's summary dismissal of their usury, MCPA, and quiet title claims. Accordingly, they have abandoned any challenge to the court's dismissal of these claims. *Froling v Carpenter*, 203 Mich App 368, 373; 512 NW2d 6 (1993). This leaves only plaintiffs' claims for declaratory judgment, breach of contract, and equitable relief. Each of these counts was dismissed pursuant to MCR 2.116(C)(10). This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

> A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

The record shows that a valid foreclosure sale took place on July 29, 1997. Plaintiffs did not redeem the property in the subsequent six months. As this Court held in *Freeman v Wozniak*, 241 Mich App 633; 617 NW2d 46 (2000), when the statutory requirements of a foreclosure sale are complied with, "there is simply 'no room for equitable considerations absent fraud, accident, or mistake.'" *Id.* at 638, quoting *Senters v Ottawa Savings Bank*, 443 Mich 45, 55; 503 NW2d 639 (1993). Plaintiffs do not argue that the sale was invalid or should be put aside due to accident or mistake. Instead, even though they do not specifically identify it as such, plaintiffs seem to be arguing that Temple committed a fraud by breaching a binding reinstatement agreement.

All parties concur that the heart of this appeal centers on the question of whether an enforceable agreement was reached to forestall foreclosure and reinstate the mortgage. Both parties agree that discussions were ongoing prior to the foreclosure sale. Defendants assert that just prior to the sale, they were willing to "enter into a repayment agreement with certain conditions." According to defendants these conditions were (1) that plaintiffs provide a $15,000 payment before 11:00 AM on July 29, 1997, i.e., before the foreclosure sale; (2) that plaintiffs pay an additional $15,000 by August 31, 1997; and (3) that plaintiffs sign a repayment plan at the offices of defendants' counsel. Defendants assert that plaintiffs did not comply with any of these conditions, and thus, defendants had no contractual duty to forestall the foreclosure.

In support of their position, plaintiffs point to a document dated July 29, 1997, addressed to Temple's president, which clearly identifies it as "an offer for reinstatement." The terms set forth in that document are as follows:

> Payment of $15,000 today.
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> Payment of $15,000 by August 30, 1997.
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> Monthly payments of $3,185.46 when due.
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> Refinancing with different mortgage firm by December 31, 1997.
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> For your part, we ask your best efforts to expunge the foreclosure notice from our credit reporting services since proceedings were factually in legal dispute.
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> Of consideration is the statutory limit on the home mortgage interest rate in Michigan being 12% after foreclosure but before redemption instead of our 15.3% current rate.

Plaintiffs' argument on appeal vis-à-vis this letter can be interpreted in two ways. One possible position is that the letter simply sets down the terms verbally agreed upon by the parties. However, there is no evidence in the record that this is what occurred. In fact, the terms set forth are not in accord with what defendants indicate were the "conditions" of any reinstatement. For example, the letter's statement on when the initial $15,000 was to be paid is at odds with the position argued by defendants. The letter simply states that this payment is to be made "today," i.e., July 29, 1997, whereas defendants assert that a condition of their agreement was that payment had to be made before the foreclosure sale. It is clear from the record that the July 29, 1997, payment was not sent until more than three hours after the sale was scheduled to begin, and two hours after it was concluded. Defendants also claim that a condition of reinstatement was that plaintiffs sign a formal repayment plan at the defendants' counsel's office. Plaintiffs do not dispute that they never signed such a document. Further, there is no language in the letter referencing earlier discussions or indicating that the letter is simply memorializing a previous agreement. Indeed, the final two paragraphs indicate that negotiations were ongoing.

The other possible position being raised by plaintiffs is that the letter was an offer or counter offer[3], and that the totality of defendant's response indicates an acceptance, thereby creating a binding agreement. Given that there is no letter, no fax, no telephone records, nor any other document indicating that defendants communicated an acceptance of the offer, plaintiffs focus on the $15,000 that was sent on July 29, 1997. Noting that defendants apparently returned the $15,000 about two weeks after it was sent, plaintiffs concede that "[o]n the face it would appear that [Temple] . . . simply rejected the written July 29, 1997 offer of reinstatement submitted by Plaintiffs." However, plaintiffs assert that the fact that the monies were kept for approximately two weeks evidences a binding agreement. We disagree. Possession of the money for this two-week period is not the type of dominion and control that evidences

[3] A counter offer would terminate plaintiffs' power to accept any purported verbal reinstatement offer extended by defendants prior to the foreclosure sale.

acceptance. See Restatement Contracts, 2d, § 69(2). There is no evidence that defendants exercised full dominion over the funds during the two weeks. See *Country Fire Door Corp v CF Wooding Co*, 202 Conn 277, 281 (1987) ("If the creditor knowingly cashes such a check, or otherwise exercises full dominion over it, the creditor is deemed to have assented to the offer of accord."). There is also nothing in the record to indicate that defendants understood their silence during this period to be an acceptance. Indeed, the fact that the parties continued to bargain over how to resolve this matter suggests that no acceptance was tendered.

Plaintiffs assert that the reason they did not make the August payment of $15,000 was that defendants created an issue of anticipatory breach by returning the initial $15,000 payment. Again, we disagree. As the name suggests, an anticipatory breach or repudiation is one that occurs before the time for performance has arrived. *Stoddard v Manufacturers National Bank of Grand Rapids*, 234 Mich App 140, 163; 593 NW2d 630 (1999). However, if defendants' duty was to cancel the foreclosure sale and reinstate the mortgage, those duties had already passed by the time the money was returned. Additionally, the return of the $15,000 did not make impossible plaintiffs further performance under the alleged contract. See *Barnes v B & V Construction, Inc*, 137 Mich App 595, 599; 357 NW2d 894 (1984); Farnsworth, Contracts (2d ed), § 8.20, p 665-666. In other words, Temple's action did not make it impossible for plaintiffs to make the $15,000 payment in August 1997, nor did it make it impossible for plaintiffs to make monthly payments of $3,185.46. There is no evidence that these latter payments were made, and, in fact, Diane McMaster averred that plaintiffs did not continue making any monthly payments to Temple.

Therefore, we conclude that plaintiffs have failed to show that a genuine issue of material fact exists on whether an agreement was reached to forestall the foreclosure, or that assuming such an agreement existed, that plaintiffs complied with the requirements thereof. Accordingly, because plaintiffs failed to establish the existence of a material factual dispute, *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), summary disposition was properly granted.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Richard Allen Griffin