STATE OF MICHIGAN

COURT OF APPEALS

DAVID SUTTON, JR. and COLEEN SUTTON,

Plaintiffs-Appellants,

v

FIRST FEDERAL OF MICHIGAN and CHARTER ONE BANK,

Defendants-Appellees.

UNPUBLISHED
November 26, 2002

No. 234284
Oakland Circuit Court
LC No. 2000-026839-CH

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

PER CURIAM.

Plaintiffs appeal as of right the circuit court's order granting defendants' motion for summary disposition under MCR 2.116(C)(8) and (10). Plaintiffs seek to nullify defendants' foreclosure of a mortgage that plaintiffs granted to defendants. We affirm and remand.

On appeal, plaintiffs argue that the trial court erred in denying its motion to amend its complaint following the court's granting of summary disposition to defendants. We disagree. We review a trial court's decision whether to allow amendments to pleadings for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997); *Dowerk v Oxford Twp*, 233 Mich App 62, 75; 592 NW2d 724 (1998).

Plaintiffs filed their motion to amend their complaint pursuant to MCR 2.116(I)(5), which states:

> (5) If the grounds asserted [in a motion for summary disposition] are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified.

Leave to amend should be liberally granted, MCR 2.118(A)(2) (leave "shall be freely given when justice so requires"), and should generally be denied only because of undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility. *Dowerk, supra* at 75, citing *Weymers, supra* at 654; *Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973). Additionally, if a trial court denies a motion to amend, it must specify its reasons for doing so.

Dowerk, supra at 75. Failure to provide the reasons for denying the motion constitutes error requiring reversal unless the amendment would be futile. *Dampier v Wayne Co*, 233 Mich App 714, 734; 592 NW2d 809 (1999). An amendment is futile if a claim is legally insufficient on its face. *Fyke, supra* at 660.

The trial court failed to provide specific grounds for denying plaintiffs' motion. However, this error does not require reversal because plaintiffs' amendments would have been futile. Each of plaintiffs' proposed new claims was legally insufficient on its face. In short, plaintiffs' due process claim and their assertion that defendants failed to satisfy the requirements for foreclosure by advertisement result from plaintiffs' mischaracterization of the nature and operation of subordination agreements. Additionally, in claiming that defendants failed to disclose the redemption amount for the property at issue, plaintiffs inappropriately relied on a provision of Michigan's Uniform Commercial Code, MCL 440.1101 *et seq.*, that does not apply to mortgages. Therefore, the trial court did not abuse its discretion in denying plaintiffs' motion.

Next, defendants assert plaintiffs' appeal was vexatious and request attorney fees and an order barring plaintiffs from filing any further lawsuits or appeals arising out of defendants' foreclosure, claiming that any further proceedings would be barred by res judicata. We agree that plaintiffs' appeal was vexatious.

MCR 7.216(C)(1) provides for the imposition of sanctions for filing a vexatious appeal where:

> (a) the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal; or
>
> (b) a pleading, motion, argument, brief, document, or record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court.

The instant appeal represents a "plain case" of a vexatious appeal and abuse of the appellate process. *In re Marx's Estate*, 201 Mich 504, 511; 167 NW 976 (1918); *DAIIE v Ayvazian*, 62 Mich App 94, 103; 233 NW2d 200 (1975). Merely because an issue is found to lack merit does not indicate that an appeal is vexatious, if the issue is not otherwise frivolous. *Jail Inmates v Wayne Co Exec*, 178 Mich App 634, 666; 444 NW2d 549 (1989). However, Michigan authority on each issue plaintiffs raised was clear, *cf. Cardinal Mooney H S v MHSAA*, 437 Mich 75, 79; 467 NW2d 21 (1991), and the result should have been apparent even to plaintiffs, *In re Greening Estate*, 9 Mich App 22; 155 NW2d 696 (1967).

Consequently, we may "assess actual and punitive damages, or take other disciplinary action." MCR 7.216(C)(1). However, "[d]amages may not exceed actual damages and expenses incurred by the opposing party because of the vexatious appeal or proceeding, including reasonable attorney fees, and punitive damages in an added amount not exceeding the actual damages." MCR 7.216(C)(2). We remand this case to the trial court for a determination of defendants' actual damages. *Id.*

However, we deny defendants' request for an order barring plaintiffs from filing further lawsuits or appeals stemming from this foreclosure. Defendants argue that any further proceedings would be barred by res judicata. Res judicata serves to bar a subsequent action where the first action was decided on its merits, the second action was or could have been resolved in the first action, and both actions involve the same parties or their privies. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). The doctrine also bars "every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Id*.

Although we may "take other disciplinary action" when a party files a vexatious appeal, MCR 7.216(C)(1), the order defendants seek would be unwarranted. Not every claim or appeal plaintiffs potentially could file in connection with this foreclosure would be governed by res judicata. In this regard, it would be inappropriate for us to bar all subsequent actions by plaintiffs. Second, to the extent plaintiffs file a lawsuit or appeal that addresses issues that satisfy the res judicata requirements, a court order is not necessary to bar the action. The doctrine of res judicata already bars it.

Affirmed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Jessica R. Cooper