STATE OF MICHIGAN

COURT OF APPEALS

FRANK MITAN, TRUSTEE of the FRANK MITAN LIVING TRUST, Plaintiff-Appellant,	UNPUBLISHED December 21, 2006
v	No. 270986 Oakland Circuit Court
FLAGSTAR BANK, FSB, Defendant-Appellee.	LC No. 2005-070858-CZ

Before: Borrello, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant in this dispute involving a commercial loan transaction. We affirm.

I

In August 2001, plaintiff obtained a $650,000 loan from defendant, which was secured by a mortgage on real property located in Green Oak Township in Livingston County. The loan transaction involved several separate agreements, including a Business Loan Agreement, a Term Note, an Assignment of Rents and Leases, a Commercial Mortgage, and an Agreement to Provide Insurance. As part of the transaction, plaintiff provided defendant with a mortgage title policy, which stated that the 1998, 1999, and 2000 property taxes on the Green Oak Township property had been paid.

According to plaintiff, shortly after the loan transaction was completed, he became involved in a dispute with Livingston County concerning whether the 1998, 1999, and 2000 property taxes had, in fact, been paid. Further, the County claimed that the taxes were delinquent and, therefore, the County would not accept payment of subsequent tax-year property taxes.

In July 2004, defendant notified plaintiff that he was in default on the loan for failing to pay the property taxes due in the amount of $128,293.43 and for failing to provide required financial reporting. Accordingly, defendant exercised its rights under the default provisions of the loan documents and accelerated the loan, demanding the balance due of $629,179.78. In August 2004, defendant paid nearly $130,000 in tax assessments for the years 1998, 2000, 2001, 2002, and 2003 and thereafter foreclosed on the mortgage.

On December 1, 2005, plaintiff filed this breach of contract action, alleging that defendant breached the parties' agreements in the various loan documents by declaring a default, and: (1) accelerating the entire balance due under the Loan Agreement (Count I); (2) increasing the interest rate under the Term Note from 8.19 percent to 12.19 percent (the default rate) (Count II); (3) collecting rents, income, and/or profits of the property (Count III); and (4) causing a foreclosure sale in violation of the Commercial Mortgage (Count V). Plaintiff further alleged that defendant breached the parties' agreement by failing to comply with the statutory foreclosure requirements under MCL 600.3220 (Count IV), and plaintiff therefore sought to quiet title to the property (Count VI).

The trial court granted defendant's motion for summary disposition. The court denied plaintiff's motion for reconsideration and motion for leave to amend the complaint.

II

Plaintiff first argues that the trial court erred in granting summary disposition in favor of defendant. Plaintiff contends that had the trial court viewed the record in a light most favorable to plaintiff, and given plaintiff the benefit of every reasonable doubt, the court could not properly grant defendant's motion for summary disposition. We disagree.

A

This Court reviews de novo a trial court's decision on a motion for summary disposition to determine whether the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> Summary disposition under MCR 2.116(C)(10) is properly granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. The court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The moving party must specifically identify the undisputed factual issues and has the initial burden of supporting its position with documentary evidence. *Id*. at 455; *Maiden, supra* at 120. The responding party must then present legally admissible evidence to demonstrate that a genuine issue of material fact remains for trial. *Id.*; *Smith, supra* at 455 n 2. [*ER Zeiler Excavating, Inc v Valenti, Trobec & Chandler, Inc*, 270 Mich App 639, 644; 717 NW2d 370 (2006).]

B

Plaintiff first argues that the trial court erred in concluding that plaintiff failed to show a genuine issue of material fact regarding whether (1) plaintiff was in default because the property taxes were unpaid or because financial reporting documentation had not been provided, and (2) the foreclosure sale complied with the requirements of MCL 600.3220. We find no error in the trial court's reasoning or conclusions.

As the trial court noted, the dispositive question with regard to plaintiff's claims in Counts I, II, III, and V was whether plaintiff was in default[1] under the parties' loan agreement, thereby warranting defendant's actions of accelerating the entire balance due (Count I), increasing the interest rate (Count II), collecting rents, income, and/or profits of the property (Count III), and causing a foreclosure sale (Count V). The trial court found that defendant's proofs of default, i.e., the unpaid property tax bills from Livingston County, were sufficient to warrant defendant's actions and that plaintiff failed to show a triable issue of fact to survive defendant's motion for summary disposition of Counts I, II, III, and V. We agree.

As the trial court noted, the parties' agreement essentially required that plaintiff timely pay all property taxes due unless the taxes were appropriately contested in good faith. Article V, ¶ 5.3, of the parties' Business Loan Agreement required that plaintiff:

> Duly pay and discharge or cause to be paid and discharged all taxes, assessments, and other governmental charges imposed upon it and its properties . . . except such items as are being in good faith appropriately contested and for which the Borrower has provided adequate reserves.

Likewise, the Commercial Mortgage, § 5, required that plaintiff:

> [p]ay when the same shall become due and before any interest and penalty for non-payment attaches thereto, all taxes, assessments, liens and charges on or against the Property, general and special, now existing or hereafter levied or assessed upon said Property . . . .

In his complaint, plaintiff essentially alleged that he paid the property taxes for the years 1998, 1999, and 2000, as shown by the mortgage title policy provided to defendant at the time of the loan, which stated that the 1998, 1999, and 2000 property taxes on the Green Oak Township property had been paid. Plaintiff further alleged that a dispute subsequently arose between him and Livingston County regarding property taxes for "1998 and thereafter." Plaintiff contended that he was not in default because the taxes were appropriately contested and there were adequate reserves.

In moving for summary disposition, defendant submitted proofs establishing that, according to Livingston County records, the property taxes at issue were unpaid, and that defendant paid the amount due, $128,293.43. In response, plaintiff submitted his affidavit, essentially reiterating the allegations in his complaint. The trial court found plaintiff's affidavit insufficient to demonstrate a triable issue of fact regarding whether plaintiff complied with the terms of the parties' agreement and, thus, was not in default.

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[1] As the trial court also noted, even if plaintiff was not in default, the parties' agreement permitted defendant's actions if defendant in good faith deemed itself insecure. Our analysis likewise applies to support the trial court's grant of summary disposition on this alternative basis.

Plaintiff argues on appeal that the court erred in finding that plaintiff's affidavit was insufficient to refute defendant's proofs. Plaintiff cites ¶ 5 of his first amended complaint in his affidavit in support of his contentions, which states:

> 5. That immediately before the execution of the Agreement, Mitan provided Flagstar with a mortgage title policy, verifying that the 1998, 1999, and 2000 property taxes upon the Property had been paid.

Plaintiff notes that defendant's answer admitted the above allegation:

> Flagstar admits the allegations contained in paragraph 5 of the Plaintiff's Amended Complaint. However, Flagstar has no independent basis to determine if the title company was correct in its assessment that the taxes on the property were current.

Plaintiff further relies on two paragraphs in his affidavit:

> 7. That shortly after the execution of the Agreement, he became involved in a dispute with Livingston County regarding whether the 1998, 1999, and 2000 property taxes upon the Property had been paid;
>
> 8. That while said dispute was pending, Livingston County refused to accept payment of the property taxes upon the Property for 2001 and thereafter, and he offered to open an account at Flagstar but Flagstar never requested any "reserves."

Plaintiff asserts that the fact that defendant paid the taxes does not establish that the 1998 and 2000 property taxes had not been previously paid and were merely being paid a second time. Plaintiff further argues that the averments in his affidavit establish that he complied with Article V, ¶ 5.3, of the Business Loan Agreement, concerning taxes "in good faith appropriately contested and for which the Borrower has provided adequate reserves." In the alternative, plaintiff argues that even if Livingston County's refusal to accept payment of the 2001 property taxes placed plaintiff in default, defendant nevertheless breached the parties' agreement by including the 1998 and 2000 property taxes in the balance due to defendant because the mortgage title policy verified that those taxes had been paid.

We find plaintiff's arguments unpersuasive. We agree with the trial court that plaintiff failed to present legally admissible evidence to create a triable issue of fact regarding whether plaintiff was in default. Plaintiff's bare assertions and continued reliance solely on the mortgage title policy previously provided, without any supporting explanation or evidence of the basis for contesting the tax bills, are insufficient to survive defendant's motion for summary disposition.

In responding to a motion for summary disposition, the nonmoving party must come forward with documentary evidence establishing the existence of a material factual dispute:

> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to

> establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [*Smith supra* at 455 (citations omitted).]

Plaintiff has failed to meet this burden.

2

Having found no error in the trial court's determination that defendant was entitled to summary disposition on the basis of plaintiff's default with regard to the failure to timely pay or appropriately contest property taxes, we need not address plaintiff's argument concerning his failure to provide financial records. Nonetheless, we agree with the trial court's reasoning and conclusion that plaintiff failed to provide documentary evidence sufficient to survive defendant's motion for summary disposition on this basis.

As the trial court noted, plaintiff's affidavit was insufficient to refute defendant's arguments and proofs. Defendant submitted an affidavit stating that plaintiff failed to provide copies of its federal tax returns as required under the parties' agreement. Plaintiff's affidavit in response, stating merely "[t]hat he supplied Flagstar with the financial reporting documentation which they requested in 2004," is insufficient to survive defendant's motion for summary disposition. "'Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.'" *Smith supra* at 455 (citation omitted).

Plaintiff argues that it was "illogical" for the trial court to conclude that his averment that he supplied defendant "'with the financial reporting documentation which they requested in 2004' somehow excluded income tax returns." Contrary to plaintiff's argument, the fact that his averment was "broad and all inclusive" does not permit him to survive defendant's motion because the averment fails to set forth "*specific facts* showing that a genuine issue of material fact exists." *Id*.

3

Plaintiff also argues that the averments in his affidavit were sufficient to survive defendant's motion for summary disposition with regard to the issue of compliance with the foreclosure sale requirements of MCL 600.3220. We disagree.

MCL 600.3220 provides:

> Such sale may be adjourned from time to time, by the sheriff or other officer or person appointed to make such sale at the request of the party in whose name the notice of sale is published by posting a notice of such adjournment before or at the time of and at the place where said sale is to be made, and if any

> adjournment be for more than 1 week at one time, the notice thereof, appended to the original notice of sale, shall also be published in the newspaper in which the original notice was published, the first publication to be within 10 days of the date from which the sale was adjourned and thereafter once in each full secular week during the time for which such sale shall be adjourned. No oral announcement of any adjournment shall be necessary.

Plaintiff's affidavit stated, in relevant part:

> 13. That on or about September 24, 2004, Flagstar offered to adjourn the foreclosure sale of the Property for thirty days in exchange for a $6,839.02 payment from him.
>
> 14. That on or about September 24, 2004, Flagstar accepted $6,839.02 from him, and the foreclosure sale was adjourned thirty days.
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> 15. That Flagstar did not publish the notice of said thirty day adjournment in the newspaper in which the original notice was published.

Plaintiff has failed to specify the basis or nature of his claim on appeal and provides only cursory argument with little or no citation to authority. An appellant may not merely give issues cursory treatment with little or no citation of supporting authority. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001). Further, an appellant may not merely announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, elaborate for him his arguments, and then search for authority either to sustain or reject his position. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Because plaintiff has failed to adequately argue the merits of this allegation of error, this issue is abandoned. *Id*.

In any event, we find plaintiff's claim without merit. The trial court found no factual basis for plaintiff's claim that defendant failed to follow the requirements of MCL 600.3220. Defendant provided affidavits attesting that it adjourned the sale at plaintiff's request and that the adjournment was effectuated on a week to week basis. The trial court noted that plaintiff did not dispute that there were interim weekly adjournments that were properly posted or that the sale was adjourned the agreed-upon thirty days.

The trial court found no legal or factual support for plaintiff's claim that defendant failed to comply with MCL 600.3220, i.e., adjourning the sale week to week to accomplish the agreed-upon thirty-day adjournment. We find no error in the trial court's reasoning or conclusion. Accordingly, the grant of summary disposition with respect to Counts IV and VI was proper.

III

Plaintiff argues that the trial court erred in granting summary disposition because discovery had not been completed. We disagree.

Summary disposition is not premature if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position. *Peterson Novelties, Inc v*

City of Berkley, 259 Mich App 1, 25; 672 NW2d 351 (2003). It is unlikely that further factual development would support plaintiff's position.

In support of his argument, plaintiff cites his general discovery request listing nineteen categories of documentation and argues that many of the requested documents would have provided additional support for his position. Plaintiff cites no specific discovery that would likely be helpful to his claims. Moreover, as defendant points out, given the nature of the disputed issues concerning default, factual support for plaintiff's claims would more likely be provided from documents in plaintiff's possession or control, e.g., records of tax bills and payments. Plaintiff has failed to show a reasonable chance of uncovering factual support for his position through further discovery and, therefore, the grant of summary disposition was not premature. For the same reason, we reject plaintiff's argument that the trial court failed to view plaintiff's affidavit under a less stringent standard, as required when discovery is incomplete. Plaintiff has failed to show how application of the less stringent standard, even if appropriate, supports his claims, thereby making the grant of summary disposition improper.

IV

Plaintiff argues that the trial court abused its discretion in denying plaintiff's motion for reconsideration without considering his supplemental affidavit. We disagree.

A

This Court reviews for an abuse of discretion a trial court's decision to grant or deny a motion for reconsideration. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). MCR 2.119(F)(3) provides:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration that merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

Plaintiff complains that the trial court failed to exercise its discretion with regard to his motion for reconsideration because the court struck plaintiff's supplemental affidavit attached to the motion, thereby "decimating" his motion, and, in effect, avoiding the exercise of the court's "*discretion* by refusing to consider the Motion for Reconsideration in its entirety." We find this argument without merit.

Plaintiff's argument rests on his assertion that his supplemental affidavit, specifically ¶ 2, removed any doubt regarding whether income tax returns were included in the financial reporting documentation that he supplied to defendant. Paragraph 2 of his supplemental affidavit stated:

> That he supplied Defendant Flagstar Bank, F.S.B. ("Flagstar") with the financial reporting documentation which it requested in 2004, *including federal tax returns*. [Emphasis added by plaintiff.]

Plaintiff's general averment was insufficient to survive defendant's motion for summary disposition. As noted above, in responding to defendant's motion, plaintiff was required to go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Smith*, *supra* at 455.

As the trial court noted, plaintiff's motion for reconsideration demonstrated no "palpable error by which the court and the parties have been misled," and did not "show that a different disposition of the motion must result from correction of the error," as required by MCR 2.119(F)(3). Plaintiff's motion merely presented theories or facts that could have been pleaded or argued before the trial court rendered its decision on defendant's motion for summary disposition, which is insufficient to establish an abuse of discretion. *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987).

Further, as defendant points out, the trial court granted defendant's motion for summary disposition on additional independent grounds, e.g., that plaintiff failed to pay the property taxes. Accordingly, even if defendant's general averment concerning the provision of federal tax returns was sufficient to overcome defendant's motion for summary disposition on that issue, summary disposition was nevertheless proper on the issue of the failure to the property taxes.

V

Plaintiff argues that the trial court abused its discretion in denying leave to file a second amended complaint to add a claim of reformation of the mortgage. We disagree.

"This Court reviews for an abuse of discretion a trial court's denial of a motion to amend a complaint." *Tierney v Univ of Michigan Regents*, 257 Mich App 681, 687; 669 NW2d 575 (2003). Amendment is generally a matter of right rather than grace, and a trial court should freely grant leave to amend if justice so requires. MCR 2.118(A)(2); *Tierney*, *supra* at 687. "'Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or where amendment would be futile.'" [*Id*. at 687-688, quoting *Jenks v Brown*, 219 Mich App 415, 419-420; 557 NW2d 114 (1996).]

Plaintiff's claim for reformation was based on his assertion that the parties never intended to give defendant the ability to foreclose on the basis of plaintiff's refusal to pay the same property taxes twice and that impossibility of performance, i.e., nonpayment of 2001 and subsequent property taxes, could not be a basis of default or of defendant deeming itself insecure. Plaintiff sought reformation of the mortgage to provide that "preexisting conditions, including the 1998, 1999, and 2000 property taxes upon the Property," and "impossibility of performance could neither cause a default of the Agreement nor cause Flagstar to in good faith deem itself insecure."

Plaintiff argues that his understanding of the parties' agreement, combined with defendant's representations of the agreement, and defendant's conduct, constitute a legally sufficient claim for reformation. Plaintiff cites *Coyne v Simrall Corp*, 140 F2d 574, 578 (CA 6, 1944), for the proposition that when one party has a certain understanding of an agreement and the other so represents the matter, and conducts himself accordingly, so that the first party reasonably construes the acts to reflect the agreement, reformation of the written instrument is granted to carry out the parties' understanding. However, the reformation in *Coyne* was based on mutual mistake. *Id*. at 576, 578. And the specific rule from *Coyne*, which plaintiff cites in support of reformation, is derived from *Bates v Bates*, 56 Mich 405; 23 NW 63 (1885), the circumstances of which are inapposite and do not support reformation in this case. In *Bates*, the Court reformed the legal description of land exchanged between two brothers after the grantee, who could not read or write, discovered that the deed failed to include land that the grantor represented was included.[2] *Id*. Plaintiff has presented no evidence of mutual mistake and nothing in the circumstances of this case support plaintiff's claim for reformation on the basis of defendant's representations and conduct.

Further, as the trial court noted, plaintiff's allegations concerning defendant's representations, and plaintiff's asserted basis for reformation, contradict the clear and unambiguous merger (or integration) and anti-waiver provisions of the parties' agreement. Plaintiff makes no attempt to address these obstacles to his reformation claim.

Plaintiff failed to show a legally sufficient basis for reformation of the mortgage and, thus, the amendment of the complaint would have been futile. The trial court did not abuse its discretion in denying plaintiff's motion to amend.

Affirmed.

/s/ Stephen L. Borrello
/s/ Janet T. Neff
/s/ Jessica R. Cooper

[2] *Bates* involved an allegation of fraud, in "that the four-acre parcel had been left out, and that instead of an undivided half of the south half of the south-west quarter of the north-east quarter of section 6, with the exceptions therein contained, only an undivided quarter of the same was contained in the deed; and complainant avers that such error is a fraud upon his rights, and was so purposely intended by defendants, and prays defendants may be decreed to convey to complainant the land he so purchased of them, and not contained in his said deed." *Bates, supra* at 407. The proceedings below involved no such allegation or evidence.