STATE OF MICHIGAN

COURT OF APPEALS

WELLS FARGO BANK MN NA,

Plaintiff-Appellee,

v

ENGLISH COLONY CONDOMINIUM ASSOCIATION,

Defendant-Appellant.

UNPUBLISHED
September 11, 2007

No. 267876
Macomb Circuit Court
LC No. 2005-003338-CH

Before: Whitbeck, C.J., and Wilder and Borello, JJ.

PER CURIAM.

In this action to quiet title to a condominium unit, defendant appeals as of right the trial court's order terminating the affidavit of abandonment filed by defendant, and its order awarding defendant additional costs and attorney fees. On appeal, defendant maintains that it properly filed the affidavit of abandonment in compliance with MCL 600.3241a. Defendant also argues that the trial court improperly considered plaintiff's equitable arguments. We affirm.

The property in dispute is unit 84 of English Colony Condominium. On April 2, 2004, plaintiff's predecessor-in-interest, Provident Bank, obtained title pursuant to a sheriff's deed after it foreclosed on a mortgage. On October 4, 2004, after the redemption period expired, title vested in Provident.

On November 17, 2004, defendant notified Provident that it was behind on its association dues and maintenance fees. On December 22, 2004, defendant notified Provident that it was substantially in arrears in the payment of maintenance fees, and, as a result, defendant filed a lien against the property. Defendant enclosed a copy of the lien in the notice.

On February 22, 2005, defendant again notified Provident that it was in default on its maintenance fees for the property. Defendant notified Provident that it accelerated payment of all unpaid installments of annual assessment for the fiscal year ending December 31, 2005. On March 3, 2005, defendant notified Provident of the lien foreclosure sale of the property.

On March 14, 2005, defendant faxed a payoff amount to discharge the lien. On March 24, 2005, Provident's attorney emailed defendant, asking for the total payoff amount. On March

30, 2005, defendant faxed Provident a notice advising that the lien foreclosure sale had been adjourned until April 8, 2005, in anticipation of the payoff payment.

On May 10, 2005, defendant notified Provident that the property had been sold to defendant at a sheriff's sale. The letter also informed Provident that it had six months to redeem.

On June 3, 2005, defendant wrote to Provident by certified mail directly at its last known address, instead of in the care of plaintiff's counsel, as was its previous practice. The letter stated, "[t]ypically, a 6-month redemption period would follow the foreclosure sale. However, pursuant to MCL 600.3241a(1)(b) we are sending you notice acknowledging that we consider this unit to be abandoned. As such, you will lose all rights of ownership 30 days after we file an Affidavit unless you . . . provide[] notice to us within 15 days of this letter that the premises are not abandoned." Defendant enclosed a copy of the affidavit of abandonment in the letter. The affidavit stated that after an inspection on May 24, 2005, it was revealed that Provident was not occupying the premises and a notice of abandonment was posted on the property.

On June 9, 2005, Provident Bank quit-claim deeded the property to plaintiff. On June 27, 2005, defendant again wrote Provident directly to notify it of the affidavit of abandonment. The letter warned that "[t]his Affidavit shortens the redemption period following our foreclosure sale to July 24, 2005."

On August 19, 2005, plaintiff filed this action to quiet title. Plaintiff first alleged that defendant sent the final two letters directly, not through counsel, "with the intent of fraudulently declaring the subject property abandoned knowing the response time was most likely to be greater than 15 days." Plaintiff also alleged that defendant purposely misled plaintiff as to the amount due by claiming assessments prior to Provident's foreclosure sale. Plaintiff further alleged that defendant failed to comply with MCL 600.3212. Plaintiff stated a second count against defendant, titled "Affidavit of Abandonment is of No Force or Effect," in which plaintiff alleged that the property was not abandoned but merely vacant. In count III, for fraud, plaintiff alleged that "[d]efendant erroneously submitted a payoff quote for the past due assessments that was significantly in excess of the amount due. . . with the intent of defrauding The Provident Bank."

On October 27, 2005, plaintiff filed a motion to dissolve the affidavit of abandonment and allow redemption, reiterating its allegation that defendant sent the abandonment notice letters to plaintiff's last known address, instead of to counsel of record, in bad faith. Plaintiff also again argued that the property was not abandoned. The trial court granted plaintiff's motion and dissolved the affidavit of abandonment, but awarded some costs to defendant.

Defendant's first issue on appeal is that the trial court erred as a matter of law by dissolving the affidavit of abandonment. Defendant argues that it satisfied the statutory requirements, thereby raising a conclusive presumption that the property was abandoned. The trial court ruled that abandonment had not occurred because the notices were sufficiently confusing so as to grant plaintiff relief. Upon de novo review, it is clear that the trial court's reasoning is inadequate to dispose of the parties' claims. However, we find that the lower court reached the right result, albeit for the wrong reason. See *Computer Network, Inc v AM Gen Corp,* 265 Mich App 309, 313; 696 NW2d 49 (2005).

An action to quiet title is equitable in nature. MCL 600.2932(5); *Richards v Tibaldi*, 272 Mich App 522, 528-529; 726 NW2d 770 (2006). This Court reviews de novo a trial court's equitable rulings to quiet title and its decision on a motion for summary disposition (to the extent that the trial court's ruling can be considered as such). *Wengel v Wengel*, 270 Mich App 86, 90-91; 714 NW2d 371 (2006). This Court also reviews issues of statutory interpretation de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

If a plaintiff makes out a prima facie case to quiet title, the defendant then has the burden of proving superior right or title in itself. *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 550; 600 NW2d 698 (1999). The applicable abandonment statute, MCL 600.3241a, provides, in relevant part:

> For purposes of this chapter, *if* foreclosure proceedings *have been commenced* under this chapter against residential property not exceeding 4 units, abandonment of premises shall be conclusively presumed upon satisfaction of all of the following requirements before the end of the redemption period . . . . [Emphases added.]

The highlighted language suggests that, in order for abandonment to be conclusively presumed, a party must first commence foreclosure proceedings. The question then becomes whether defendant properly commenced foreclosure proceedings.

The condominium act, MCL 592.208, requires foreclosures to be "in the same manner as a foreclosure under the laws relating to foreclosure of real estate by advertisement or judicial action[,]" and also provides that "[a] foreclosure proceeding may not be commenced without recordation and service of a notice of lien." MCL 559.208(2); 559.208(3)(c). The lien must be served on the delinquent co-owner at its "last known address." MCL 559.208(3)(c). Here, defendant served notice that a lien had been recorded on the property. The lien notice was served on the owner's local counsel, not at plaintiff's last known address.

Because MCL 559.208 required the notice of the lien be served before foreclosure proceedings were commenced, if the lien notice was statutorily deficient as in this case, it necessarily follows that foreclosure proceedings could not have properly commenced. Therefore, defendant could not have filed an affidavit of abandonment pursuant to MCL 600.3241a, which requires foreclosure proceedings to commence before filing. It would be unjust to allow defendant to claim that the lien notice used to commence foreclosure proceedings was sufficient using local counsel's address as the "last known address,"[1] when it argued both before the trial court and here on appeal that it sent the abandonment notice to the co-owner directly because the statute required that the notice be sent to the plaintiff's "last known address." Defendant ought not be permitted to use different meanings of "last known address" to

[1] There would have been no ethical dilemma for defendant to have sent the lien notice used to commence foreclosure proceedings to plaintiff directly, even if plaintiff was represented by counsel, because the statute requires that the lien notice be served on the delinquent co-owner at its "last known address." MCL 559.208(3)(c).

suit its purposes. Therefore, we affirm the lower court's decision dissolving the affidavit of abandonment, on the ground that defendant failed to fulfill the statutory requirements to commence foreclosure proceedings, thereby precluding defendant from satisfying the statutory requirements necessary to declare a property abandoned. See MCL 559.208(3); MCL 600.3241a.

Defendant's second issue on appeal is that the trial court erred by equitably extending the redemption period. Because we have decided that the foreclosure proceedings were not properly commenced, the sheriff's sale should be set aside. See *Jackson Investment Corp v Pittsfield Products, Inc*, 162 Mich App 750, 755-756; 413 NW2d 99 (1987) (failure to comply with the notice requirements of MCL 600.3208, the notice provision for foreclosure by advertisement, renders a foreclosure sale voidable if the defect results in harm). In this case, the trial court found that there was sufficient confusion in regard to the notices that it was necessary to grant plaintiff relief. The trial court found the notices defective, and the defects resulted in harm because the co-owner did not receive the notice at its last-known address, as required by law. Plaintiff's rights were harmed by the defective notices, and sale is therefore voidable. Accordingly, it is unnecessary to consider whether the trial court should have equitably extended the redemption period.

Because we have decided that the foreclosure proceedings were defective and that the sheriff's sale is voidable, we decline to review defendant's third issue because no determination on the redemption period is necessary. A court need not decide moot questions. *Ewing v Bolden*, 194 Mich App 95, 104; 486 NW2d 96 (1992).

Defendant's fourth and final issue is that the trial court erred by refusing to award defendant its actual costs and attorney fees incurred to date. The findings of fact underlying an award of attorney fees are reviewed for clear error, while questions of law are reviewed de novo. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 438; 695 NW2d 84 (2005). The decision whether to award attorney fees and the determination of their reasonableness are within the trial court's discretion, and are reviewed for an abuse of discretion. *Windemere Commons I Ass'n v O'Brien*, 269 Mich App 681, 682; 713 NW2d 814 (2006). If the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

As a general rule, attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute or court rule. *Haliw v City of Sterling Hts*, 471 Mich 700, 707; 691 NW2d 753 (2005). "Exceptions to the general rule are narrowly construed." *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, ____ Mich App ____, ____; ____ NW2d ____ (2007); *Spectrum Health v Grahl*, 270 Mich App 248, 253; 715 NW2d 357 (2006).

Here, recovery of costs and attorney fees is authorized by MCL 559.208(2) and MCL 559.208(8), which provide, in relevant part:

> A foreclosure shall be in the same manner as a foreclosure under the laws relating to foreclosure of real estate mortgages by advertisement or judicial action except that to the extent the condominium documents provide, the association of co-owners is entitled to reasonable interest, expenses, costs, and attorney fees for foreclosure by advertisement or judicial action. [MCL 559.208(2).]

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> The co-owner of a condominium unit subject to foreclosure under this section, and any purchaser, grantee, successor, or assignee of the co-owner's interest, is liable for assessments by the association of co-owners chargeable to the condominium unit that become due before the expiration of the period of redemption together with interest, advances made by the association of co-owners for taxes or other liens to protect its lien, costs, and attorney fees incurred in their collection. [MCL 559.208(8).]

The condominium bylaws provide, in relevant part, "[t]he expenses incurred in collecting unpaid assessments, including interest, actual attorney fees . . . shall be chargeable to the Co-owner in default and shall be secured by the lien on his unit." Based on the statutes quoted and the condominium bylaws, defendant argues that it is entitled to costs and attorney fees incurred after the foreclosure sale in an attempt to collect the amount owed by plaintiff, because defendant "was forced to defend a lawsuit triggered by [plaintiff's] errors." We disagree.

The trial court initially awarded defendant $500 in costs. On reconsideration, the trial court awarded defendant attorney fees up to the point that this lawsuit became an abandonment action, which meant an additional $68 in attorney fees, and $2,566.30 in utilities and repairs. The statutes only allow defendant to recover attorney fees and costs incurred in foreclosure proceedings. See MCL 559.208(2); 559.208(8). Also, there is nothing in the statutes or the condominium bylaws that allows a condominium association to recover attorney fees because it was "forced to defendant a lawsuit triggered by [the co-owner's] errors." Thus, we conclude that the trial court did not abuse its discretion when it awarded defendant only the costs and attorney fees incurred during the foreclosure proceedings. It awarded what was mandated by statute, and its decision was within the range of principled outcomes.

Affirmed.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello