STATE OF MICHIGAN

COURT OF APPEALS

DEUTSCHE BANK NATIONAL TRUST COMPANY, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED February 18, 2010
V STEVE PERFETTO AND MICHELE PERFETTO, Defendants/Counter-Plaintiffs-Appellants.	No. 288652 Wayne Circuit Court LC No. 08-107659-CZ

Before: Gleicher, P.J., and O'Connell and Wilder, JJ.

PER CURIAM.

In this eviction action, defendants appeal as of right an order granting summary disposition in plaintiff's favor. We affirm.

I.

In 2004, defendants executed a home mortgage for $182,700. In August 2006, defendants failed to make a mortgage payment and plaintiff notified defendants of their right to cure the delinquency within thirty days of the notice. When defendants failed to cure the delinquency, plaintiff accelerated the loan and initiated foreclosure proceedings by advertisement. A sheriff's sale was scheduled for November 29, 2006, but the parties entered into a forbearance agreement by which defendants would pay $4,000 immediately as a non-refundable payment toward the total deficiency and, in addition to the monthly mortgage payment, defendants would pay the $4,677.29 remaining in the deficiency over the course of five months. Pursuant to this agreement, plaintiff agreed to "forbear[1] from commencing/continuing foreclosure" and plaintiff's representative sent weekly notices adjourning the sheriff's sale to a Wayne County Sheriff's Deputy for public posting at the Coleman A. Young Municipal Center

[1] Black's Law Dictionary (8th ed) defines "forbearance" as "The act of refraining from enforcing a right, obligation, or debt."

in Detroit (footnote added). In December 2006, defendants failed to pay their first installment, which included the mortgage and forbearance payments. Plaintiff notified defendants that the request for forbearance was denied and, pursuant to the forbearance agreement, foreclosure proceedings continued. Nevertheless, plaintiff's representative subsequently sent weekly notices adjourning the sheriff's sale to the sheriff's deputy.

In February 2007, the parties entered into a second forbearance agreement by which defendants would pay $8,000 immediately as a non-refundable payment toward the total deficiency and the $1,722.73 remaining in the deficiency over the course of 11 months. Thereafter, plaintiff's representative continued to send the weekly notices adjourning the sheriff's sale to the sheriff's deputy. In early March 2007, defendants failed to pay the first installment according to the forbearance agreement. Again, plaintiff notified defendants that the request for forbearance was denied and, pursuant to the forbearance agreement, foreclosure proceedings continued. Plaintiff's representative sent weekly notices adjourning the sheriff's sale until March 21, 2007.

When defendants failed to redeem the property within six months and refused to vacate the home, plaintiff instituted eviction proceedings in the district court. Defendant's filed a counter-complaint: 1) requesting a declaratory judgment that the forbearance agreements violated the Michigan Consumer Protection (MCPA), 2) alleging breach of contract, and 3) requesting clear title to their home. The case was transferred to the circuit court and the parties moved for summary disposition pursuant to MCR 2.116(C)(10). The trial court entered an order dismissing the parties' claims in plaintiff's favor, finding that defendants failed to make their payments and they received adequate notice during the foreclosure proceedings.

II.

Review of a trial court's grant of summary disposition is de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). "When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted." *Martin v Ledingham*, 282 Mich App 158, 160; 774 NW2d 328 (2009). The court must consider this evidence in the light most favorable to the nonmoving party, *Corley v Detroit Bd of Educ*, 470 Mich 274, 278; 681 NW2d 342 (2004), and must draw all reasonable inferences in favor of the nonmovant. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). "A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) 'if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law.'" *Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact exists "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt*, LLP, 481 Mich 419, 426; 751 NW2d 8 (2008).

Defendants' first argument on appeal is that the mortgage agreement had a limited definition of the term "default," which did not include delinquent payments. Defendants maintain that absent a default under the mortgage agreement, plaintiff could not foreclose by advertisement. We disagree.

MCL 600.3201 provides, "Every mortgage of real estate, which contains a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement. . . ." Black's Law Dictionary (8th ed) defines default as "The omission or failure to perform a legal or contractual duty; esp., the failure to pay a debt when due." See *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 84; 730 NW2d 682 (2007), quoting *Greene v AP Products, Ltd*, 475 Mich 502, 510; 717 NW2d 855 (2006) ('"When considering a word or phrase that has not been given prior legal meaning, resort to a lay dictionary such as Webster's is appropriate.'").

The mortgage agreement provided:

> This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, warrant, grant and convey to Lender and Lender's successors and assigns, with power of sale, the [property].

Next, the mortgage agreement identified the parties' covenants:

> UNIFORM COVENANTS: Borrower and Lender covenant and agree as follows:
>
> **1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges.** Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note.
>
> * * *
>
> **8. Borrower's Loan Application.** Borrower shall be in default if, during the Loan application process, Borrower . . . gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan . . . . [Emphasis in original.]

Defendants claim that Section 8 of the mortgage agreement limited the definition of term default to the provision of, or failure to provide, certain information in the loan application. However, courts must give "effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). Defendants' interpretation would render the other covenants in the mortgage agreement, including the covenant to make payments when due in Section 1, surplusage. Because there is no factual dispute that defendants' payments were delinquent and the mortgage agreement contained a power of sale, defendants' argument that plaintiff could not foreclose by advertisement pursuant to MCL

600.3201 when they failed to perform a legal condition of the mortgage fails.[2] The trial court did not err when it dismissed defendants' breach of contract claim.

Defendants' second argument on appeal is that the notices of adjournment of the foreclosure proceedings were not in strict compliance with MCL 600.3220 and lack of notice voided the subsequent foreclosure sale. 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.

Viewing the evidence in a light most favorable to defendants, there is no genuine issue of material fact that the sheriff's sale was adjourned from week to week until March 21, 2007. A genuine issue of material fact may exist regarding whether the weekly adjournment notices were actually posted by a sheriff's deputy at the place where the sheriff's sale was scheduled to occur or published in the newspaper in which the original notice was published. See *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 502; 739 NW2d 656 (2007), quoting Worthy v World Wide Financial Services, Inc, 347 F. Supp. 2d 502, 510-511 (ED Mich, 2004) ('"a party who publishes an initial notice of adjournment may continue to adjourn a foreclosure sale from

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[2] Defendants also argue that plaintiff failed to suspend the foreclosure proceedings according to the forbearance agreements. Defendants' claim is inconsistent with the facts in the record. The forbearance agreements provided:

> The Borrower(s) consents and agrees that in making this Agreement the pending foreclosure action shall not be waived or terminated. The foreclosure action shall, however, be suspended so long as there is no default under this Agreement. Should the Borrower(s) default under this Agreement, or breach any other provision or term of the Note and Deed of Trust/Mortgage, the foreclosure action may proceed unabated . . . .

The record shows that the sheriff's sale was scheduled for November 29, 2006, but was suspended following the first forbearance agreement. Plaintiff's representative sent weekly notices adjourning the sheriff's sale from November 29, 2006 to March 21, 2007. Plaintiff only proceeded with the sheriff's sale on March 21, 2007, after defendants defaulted under both forbearance agreements.

week to week without having to republish a notice of adjournment every week.'"). Although plaintiff's representative stated that she sent these weekly notices to the court officer charged with handling sales, some of the notices are not signed by a deputy to affirm that they were posted at the Coleman A. Young Municipal Center.

Even if a defect in the weekly adjournment notices existed, however, such a defect only "'renders a foreclosure sale voidable,' not void." *Sweet Air Investment, Inc, supra* at 275 Mich App 502, quoting *Jackson Investment Corp v Pittsfield Products, Inc*, 162 Mich App 750, 755; 413 NW2d 99 (1987). In *Sweet Air*, the borrowers could not show prejudice from their allegations that the notice of adjournment was defective because they did not challenge the foreclosure sale timely, they did not attempt redemption, and they waited until the plaintiff initiated an eviction action to challenge the foreclosure proceedings. Likewise, in this case, there is no evidence that defendants challenged the sheriff's sale or attempted to redeem the property during the six-month redemption period. In addition, defendants waited to challenge the notices of adjournment until plaintiff initiated the eviction action. Because defendants cannot show that they were prejudiced by the alleged defects in the notices of adjournment, defendants' argument that the lack of notice voided the subsequent foreclosure sale fails. The trial court did not err when it dismissed defendants' action to clear title to the property.

Defendants' third argument on appeal is that plaintiff used unfair, unconscionable, or deceptive methods, acts, or practices and violated the Michigan Consumer Protection Act (MCPA).[3] We disagree.

Defendants claim that the provision in the forbearance agreements, which provided that the suspended foreclosure proceedings "may proceed unabated without further notice" if defendants defaulted on the forbearance agreements, violated MCL 445.903(1)(n) and (1)(t). We disagree. MCL 445.903 provides, in relevant part:

> (1) Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and are defined as follows:
>
> * * *
>
> (n) Causing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction.
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> * * *
>
> (t) Entering into a consumer transaction in which the consumer waives or purports to waive a right, benefit, or immunity provided by law, unless the waiver is clearly stated and the consumer has specifically consented to it.

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[3] In defense to defendants' MCPA claims below, plaintiff argued that it was exempt from the MCPA. However, plaintiff does not make this argument on appeal and we decline to address the issue.

With respect to MCL 445.903(1)(n), there is no genuine issue of material fact regarding whether the forbearance agreements caused a probability of misunderstanding as to defendants' legal rights, obligations, or remedies. The record shows that defendants knew that foreclosure proceedings had been initiated as a result of their delinquent payments. The forbearance agreements clearly stated that the foreclosure proceedings would not be "waived" or "terminated," and would only be "suspended so long as there is no default" under the agreements. Plaintiff's letters following each of defendants' defaults on the forbearance agreements further solidified that the foreclosure proceedings were continuing. Accordingly, there was no violation of MCL 445.903(1)(n).

With respect to MCL 445.903(1)(t), defendants allege that the provision that foreclosure proceedings "may proceed unabated without further notice" waived their statutory right to notice of foreclosure. MCL 600.3208 sets forth the following notice requirements for foreclosure of a mortgage by advertisement:

> Notice that the mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, shall be given by publishing the same for 4 successive weeks at least once in each week, in a newspaper published in the county where the premises included in the mortgage and intended to be sold, or some part of them, are situated. If no newspaper is published in the county, the notice shall be published in a newspaper published in an adjacent county. In every case within 15 days after the first publication of the notice, a true copy shall be posted in a conspicuous place upon any part of the premises described in the notice.

MCL 600.3212 also requires that the notice include:

> (a) The names of the mortgagor, the original mortgagee, and the foreclosing assignee, if any.
>
> (b) The date of the mortgage and the date the mortgage was recorded.
>
> (c) The amount claimed to be due on the mortgage on the date of the notice.
>
> (d) A description of the mortgaged premises that substantially conforms with the description contained in the mortgage.
>
> (e) For a mortgage executed on or after January 1, 1965, the length of the redemption period as determined under section 3240.

On appeal, defendants do not claim that plaintiff failed to satisfy these statutory publication and posting requirements prior to the scheduled November 29, 2006 sheriff's sale. MCL 600.3208 and MCL 600.3212. Instead, defendants claim that they were entitled additional statutory notice following their defaults on the forbearance agreements and the continuation of the foreclosure proceedings. Consequently, defendants claim that plaintiff's forbearance agreements were unfair, unconscionable, or deceptive because they forced defendants to waive that statutory notice. However, defendants provide no authority to support their assertion that additional statutory notice was required where MCL 600.3208 and MCL 600.3212 were satisfied and plaintiff continued foreclosure proceedings after temporarily refraining from enforcing their

power of sale pursuant to the forbearance agreements. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Therefore, defendants' claim regarding MCL 445.903(1)(t) is abandoned. Even if we were to address the issue, it is clear that plaintiff did not require defendants to waive a right provided by law. MCL 600.3208 and MCL 600.3212 provide for four weeks of notice by publication in a local newspaper and notice posted on the premises. Moreover, as we addressed above, MCL 600.3220 provides for notices of adjournment. The Act, however, does not provide for further notice of continued foreclosure proceedings following an adjournment. Thus, the clause in the forbearance agreements allowing plaintiff to proceed with foreclosure proceedings without further notice after default did not violate MCL 445.903(1)(t).

Defendants last claim that plaintiff violated MCL 445.903(1)(u) because plaintiff denied forbearance but failed to return the $12,000 that defendants paid for forbearance. MCL 445.903(1)(u) provides that an unfair, unconscionable, or deceptive method, act, or practice of trade or commerce includes:

> (u) Failing, in a consumer transaction that is rescinded, canceled, or otherwise terminated in accordance with the terms of an agreement, advertisement, representation, or provision of law, to promptly restore to the person or persons *entitled* to it a deposit, down payment, or other payment, or in the case of property traded in but not available, the greater of the agreed value or the fair market value of the property, or to cancel within a specified time or an otherwise reasonable time an acquired security interest. [Emphasis added.]

Plaintiff denied forbearance following defendants' defaults on the forbearance agreements. However, there is no genuine issue of material fact regarding whether defendants were entitled to have the $12,000 returned. According to the terms of the first forbearance agreement, the $4,000 payment was "non-refundable." Likewise, according to the second forbearance agreement, the $8,000 payment was also "non-refundable." Hence, there was no violation of MCL 445.903(1)(u) and the trial court did not err when it dismissed defendants' MCPA claims.

Affirmed.

Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Elizabeth L. Gleicher
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder