STATE OF MICHIGAN

COURT OF APPEALS

NATIONAL CITY BANK, f/k/a NATIONAL CITY BANK OF MICHIGAN/ILLINOIS, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED March 22, 2011
v BON CHANCE II, L.C., J. LAEVIN WEINER, ANTHONY J. WEINER and JOEL WEINER, Defendants/Counter-Plaintiffs-Appellants.	No. 295166 Oakland Circuit Court LC No. 2009-097463-CK

Before: K.F. KELLY, P.J., and BORRELLO and RONAYNE KRUASE, JJ.

PER CURIAM.

Bon Chance II, L.C. (Bon Chance), J. Laevin Weiner (Laevin), Anthony J. Weiner (Anthony) and Joel Weiner (Joel), collectively "defendants," appeal as of right the trial court's order granting summary disposition in favor of plaintiff, National City Bank, entered on September 16, 2009. On appeal, defendants argue that there is a genuine issue of material fact regarding whether plaintiff followed the proper statutory procedures to effectuate a valid foreclosure by advertisement sale. Finding that no genuine issue of material fact exists, we affirm the trial court.

Plaintiff filed a complaint on January16, 2009, alleging that plaintiff loaned Bon Chance $464,000 and in return received a mortgage, recorded on November 20, 2002, to commercial real property located at 61475 West Eleven Mile Road, South Lyon, Michigan (hereinafter "the property"). Laevin, Anthony and Joel all signed personal guaranties of payment by Bon Chance to plaintiff. Defendants defaulted on the mortgage and plaintiff foreclosed on the property. On August 12, 2008, a foreclosure by advertisement sale was held and plaintiff was the successful bidder for the property. Plaintiff alleged that after the foreclosure by advertisement sale, there was still a deficiency balance on the mortgage and defendants were liable for the deficiency balance of $158,040.88, plus interest and attorney fees, totaling $181,537.26.

Defendants denied the allegations contained in plaintiff's complaint. Defendants asserted that plaintiff failed to state a cause of action and there was not a valid foreclosure of the property because plaintiff failed to comply with MCL 600.3208 by failing to publish and post the

foreclosure notice. On June 23, 2009, plaintiff filed a motion for summary disposition pursuant to MCR 2.116(C)(10) on defendants' counter-claim, asserting that there was no genuine issue of material fact regarding whether plaintiff followed the proper statutory procedures to effectuate a valid foreclosure by advertisement sale. The trial court granted plaintiff a judgment pursuant to MCR 2.116(C)(10) in the amount of $186,392.66 and this appeal ensued.

On appeal, defendants argue that the trial court erred in granting the motions for summary disposition in favor of plaintiff because there is a genuine issue of material fact regarding whether plaintiff followed the proper statutory procedural requirements to effectuate a valid foreclosure by advertisement sale. Defendants' contend that the parties submitted competing affidavits regarding whether plaintiff complied with the statutory notice requirements for posting a foreclosure notice on the property.

This Court reviews the grant or denial of a motion for summary disposition under MCR 2.116(C)(10) de novo. *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Id*. A motion brought under MCR 2.116(C)(10) is reviewed by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is proper if there is "no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. There is a genuine issue of material fact 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*, 481 Mich 419, 425; 751 NW2d 8 (2008). This Court considers only that evidence which was properly presented to the trial court in deciding the motion. *Pena v Ingham Co Rd Comm'n*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

In general, the right to foreclosure by advertisement is statutory. *Church & Church, Inc v A-1 Carpentry*, 281 Mich App 330, 339; 766 NW2d 30 (2008), aff'd on other grounds 483 Mich 885 (2009). Foreclosure by advertisement is governed by MCL 600.3201[1] *et seq*. MCL 600.3208 provides:

> [n]otice 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

[1] MCL 600.3201 provides:

> [e]very 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, in the cases and in the manner specified in this chapter. However, the procedures set forth in this chapter shall not apply to mortgages of real estate held by the Michigan state housing development authority.

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.

Additionally, MCL 600.3256 provides:

(1) Any party desiring to perpetuate the evidence of any sale made in pursuance of the provisions of this chapter, may procure:

(a) An affidavit of the publication of the notice of sale, and of any notice of postponement, to be made by the publisher of the newspaper in which the same was inserted, or by some person in his employ knowing the facts; and

(b) An affidavit of the fact of any sale pursuant to such notice, to be made by the person who acted as auctioneer at the sale, stating the time and place at which the same took place, the sum bid, and the name of the purchaser; and

(c) An affidavit setting forth the time, manner and place of posting a copy of such notice of sale to be made by the person posting the same.

(2) Where any or all of such affidavits are endorsed upon or annexed to 1 instrument, a single copy of the notice of sale, and a single copy of any notice of postponement, shall be sufficient to annex to such instrument, and reference made in any of such affidavits to copy of notice of sale and to copy of any notice of postponement of sale as annexed or attached shall be deemed to refer to such single copy of notice of sale and to such single copy of any notice of postponement.

Pursuant to these statutes, plaintiff proffered the affidavit of Phameda Brown, who is the principal clerk of the printers for The Oakland County Legal News, which stated that a notice of a foreclosure sale was printed and circulated on July 11, 2008, July 18, 2008, July 25, 2008, August 1, 2008, and August 8, 2008, in The Oakland County Legal News. Plaintiff also proffered the affidavit of Brian Klerkx, which stated that on July 12, 2008, Klerkx went to the property and posted the notice of a foreclosure sale in a conspicuous place upon the property by attaching the foreclosure notice to the property's front door. Pursuant to MCL 600.3264[2], these affidavits were presumptive evidence that plaintiff complied with the requirements of MCL 600.3208.

[2] MCL 600.3264 provides: "[s]uch affidavits shall be recorded at length by the register of deeds of the county in which the premises are situated, in a book kept for the record of deeds; and such original affidavits, the record thereof, and certified copies of such record, shall be presumptive evidence of the facts therein contained."

To rebut this presumption, defendants proffered two affidavits. The first affidavit was from Alan Silver, which stated that as part of his employment duties, Silver inspected the property on a weekly basis throughout July and August 2008, and he never observed a foreclosure notice anywhere on the property. The second affidavit was from Robert Svatora, which stated that as part of his employment duties, Svatora regularly inspected the property in July and August 2008, and he never observed a foreclosure notice anywhere on the property. However, as the trial court correctly pointed out, defendants failed to submit any documentary evidence establishing a genuine issue of material fact. Where the party opposing summary disposition fails to present documentary evidence establishing the existence of a material factual dispute, the motion for summary disposition is properly granted. *Quinto v Cross and Peters Co*, 451 Mich 358, 363; 547 NW2d 314 (1996). However, a trial court may not make factual findings or weigh credibility in determining a motion for summary disposition. *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005). In looking at the evidence in the light most favorable to defendants, there is no genuine issue of material fact regarding whether plaintiff complied with the statutory procedures to effectuate a valid foreclosure by advertisement sale of the property. Klerkx's affidavit states that on July 12, 2008, a foreclosure notice was conspicuously posted on the property. Silver's and Svatora's affidavits state that throughout July and August 2008 they did not see a foreclosure notice posted on the property. As noted by the trial court, defendants' proffered affidavits do not contradict plaintiff's affidavit because the failure of the property managers to observe a foreclosure notice posted on the front door of the property does not mean plaintiff failed to post a foreclosure notice. Significantly, nothing in the affidavits states or implies that the property managers necessarily could have seen the foreclosure notice, nor is there a requirement that the posting be seen. Defendants' affidavits only prove that the property managers did not see the foreclosure notice. Accordingly, the trial court did not improperly determine the credibility of the affidavits, as argued by defendants. Rather, the trial court reviewed the contents of all the affidavits and properly concluded that there was no factual dispute. Because there was no genuine issue of material fact regarding whether plaintiff complied with MCL 600.3208 in conducting the foreclosure by advertisement sale, the trial court correctly granted summary disposition.

Defendants also argue that it was legal error for the trial court to enter judgment in favor of plaintiff as a matter of law because defendants were denied their rightful opportunity to present their case. Essentially, defendants' contend that had they been permitted an opportunity to go to trial, they could have proven that plaintiff failed to comport with state foreclosure statutes. However, such an argument belies the purpose of MCR 2.116(C)(10). As our Supreme Court state in *Lind*, 470 Mich at 238, the rationale behind MCR 2.116(C)(10) is for the trial court to determine if there is a genuine issue of material fact for a jury to decide. If there is no genuine issue of material fact, then the trial court is to determine judgment as a matter of law. *Latham*, 480 Mich at 111. As we previously discussed, there is no genuine issue of material fact regarding whether plaintiff complied with the statutory procedures needed to effectuate a valid foreclosure by advertisement sale. Thus, it was proper for the trial court to find judgment in favor of plaintiff as a matter of law. Additionally, because a motion brought under MCR 2.116(C)(10) is reviewed by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party, *id.*, defendants offered evidence to the trial court, and thus, they were not denied their rightful opportunity to present their case.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello
/s/ Amy Ronayne Krause