STATE OF MICHIGAN

COURT OF APPEALS

MARVIN F. GROSS and CLAUDIA GROSS, Plaintiffs-Appellants,	UNPUBLISHED January 15, 2015
v	No. 318951 Oakland Circuit Court
JOHN HIRZEL and PEGGY HIRZEL, Defendants-Appellees.	LC No. 2012-131252-CK

Before: DONOFRIO, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting defendants' motion for summary disposition in this breach of land contract action. We affirm.

This case arises from a land contract entered into between plaintiffs-sellers and defendants-purchasers. Defendants subsequently defaulted on their payment obligations under the land contract and relinquished their interest in the subject property back to plaintiffs by quitclaim deed. Plaintiffs requested that defendants vacate the property, and plaintiffs retook possession. Plaintiffs subsequently demanded payment for the outstanding balance on the land contract. The parties were unable to resolve the matter, and plaintiffs filed a complaint seeking the balance they claimed was due. Defendants moved for summary disposition, arguing that the parties had abandoned the land contract. The trial court granted the motion, holding that plaintiffs made an election of remedies by taking back the property and no longer had a remedy under the land contract. This appeal followed.

Plaintiffs first argue that, as a matter of law, they have the right to money damages for defendants' breach of the parties' land contract and subsequent default. We disagree. "This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008).

Summary disposition was granted to defendants under MCR 2.116(C)(8) and (C)(10). A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Spiek v Mich Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). "The motion must be granted if no factual development could justify the plaintiffs' claim for relief." *Id.* "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109,

120; 597 NW2d 817 (1999). The moving party is entitled to judgment as a matter of law when the evidence presented fails to establish a genuine issue regarding any material fact. *Id*.

The trial court relied upon *Gruskin v Fisher*, 405 Mich 51; 273 NW2d 893 (1979), to find that plaintiffs' right to money damages under the land contract was extinguished when they accepted a quitclaim deed for the subject property from defendants and retook possession. In *Gruskin*, the purchasers defaulted on their payment obligations pursuant to a land contract and the sellers sent them a notice of their intention to forfeit the land contract. *Id.* at 60-61. When the purchasers' response time had expired, the sellers sent a notice of foreclosure. *Id.* The purchasers then sent a letter and quitclaim deed "given to surrender and deliver up possession of said premises pursuant to" the notice of forfeiture. *Id.* at 61. The sellers, through their attorney, rejected the tender of the quitclaim deed, electing to institute deficiency judgment proceedings on the land contract against the purchasers. *Id.* The Supreme Court held that, while a seller may not accept possession of the subject property and still seek money damages, he or she may, even after sending notice of forfeiture, refuse possession and either commence an action for money damages or for foreclosure of the land contract. *Id*. at 57-58.

Applying the unequivocal ruling of *Gruskin* to this case, it is clear that plaintiffs may not pursue a claim for money damages under their land contract because they accepted possession of the subject property. *Gruskin* specifically held that a "seller may not accept or take possession and still seek money damages." *Id.* at 57. In this case, following defendants' default under the parties' land contract, plaintiffs prepared a quitclaim deed for defendants to execute. Defendants executed the deed, transferring their rights in the property back to plaintiffs. Plaintiffs retook possession of the property, leased it to tenants, and ultimately sold it to purchasers other than defendants. Their election of the remedy of re-taking possession precludes any action for money damages under the land contract.

Plaintiffs argue that they neither formally sought a statutory foreclosure nor pursued a summary proceeding to reclaim the property against defendants and thus did not elect that exclusive remedy. However, neither filing a notice of forfeiture nor commencing a summary proceeding is required for a seller to make an election of remedies. A seller is considered to have elected his or her remedy by the acceptance of a deed or assuming possession of the property.

Plaintiffs next argue that the trial court erred in relying on *Gruskin*, 405 Mich 51, and should instead have followed this Court's holding in *Tidwell v Dasher*, 152 Mich App 379; 393 NW2d 644 (1986), which was binding as a matter of stare decisis, and denied defendants' summary disposition motion. We disagree.

Plaintiffs claim that the holding in *Gruskin*, 405 Mich 51, is unsupported dicta and is in direct conflict with the established law set forth in *Tidwell*, 152 Mich App 379. Plaintiffs assert that, in *Gruskin*, determining whether the sellers accepted the return of the property was not a necessary factual issue for the Court to make a ruling and thus constitutes nonbinding obiter

dicta.[1] However, "[a] decision of the Supreme Court is authoritative with regard to any point decided if the Court's opinion demonstrates application of the judicial mind to the precise question adjudged, regardless of whether it was necessary to decide the question to decide the case." *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 674; 760 NW2d 565 (2008) (quotation omitted).

The rule of stare decisis requires this Court to follow the decisions of the Supreme Court. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 447; 761 NW2d 846 (2008). Plaintiffs argue that since *Gruskin* was dicta, this court is bound under the principle of stare decisis to follow *Tidwell*. We disagree. The decision in *Gruskin*, in addition to addressing the central issues in the case, demonstrates "application of the judicial mind" to the "precise question" of whether taking possession of the subject property by a seller of a land contract is an election of remedies that then precludes the seller from seeking further damages and is therefore authoritative. *Detroit Int'l Bridge*, 279 Mich App at 674. Furthermore, *Tidwell*, 152 Mich App 379, is sufficiently factually dissimilar from the case at bar to be inapplicable. In *Tidwell*, the defendant ex-wife had defaulted on a land contract on which the plaintiff ex-husband held a lien. She subsequently filed for bankruptcy but executed a quitclaim deed in lieu of foreclosure so that the vendors could clear their title. The primary issue was whether there was a merger of the vendor's lien and the title when the ex-wife gave the quitclaim deed to the vendors and how the intervening liens were affected. *Id*. at 382-385. This Court found that the question of the intent of a mortgagee or vendor was a question of fact that could not be summarily dealt with. *Id.* This issue is not applicable to the facts of this case.

Plaintiffs also argue that their acceptance of the deed from defendants in lieu of foreclosure did not extinguish their right to the balance of the debt absent plaintiffs' intent for that to be the case. Again, we disagree. Under the merger doctrine, "when a holder of a real estate mortgage becomes the owner of the fee, the mortgage and the fee are merged and the mortgage is extinguished." *United States Leather Inc v Mitchell Mfg Group, Inc*, 276 F3d 782, 786 (CA 6, 2002). The exception to this rule occurs "when it is in the interest of the mortgagee and is his intention to keep the mortgage alive, there is no merger, unless the rights of the mortgagor or third persons are affected thereby." *Titus v Cavalier*, 276 Mich 117, 121; 267 NW 799 (1936). Michigan courts have explained that the purpose of this exception is to permit a mortgagee/lender to protect itself from claims of junior lien holders of the mortgagor/borrower. *United States Leather*, 276 F3d at 787. The exception would not apply here because there are no junior lien holders to the subject property and plaintiffs' priority to the property was not threatened. Once plaintiffs took possession of the quitclaim deed, the mortgage with defendants was extinguished.

[1] Obiter dictum is "a judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential. . . ." *People v Higuera*, 244 Mich App 429, 437; 625 NW2d 444 (2001) quoting *Black's Law Dictionary* (7th ed).

Further, plaintiffs' intent was clear. Plaintiffs provided defendants with a quitclaim deed to execute that divested defendants of any interest they may have had in the subject property. Plaintiffs then leased the property and ultimately sold the property to new purchasers. After they regained possession of the subject property, plaintiffs sought the balance they claim is still due under the land contract. However, plaintiffs clearly elected to abandon the contract while retaining the payments they had already received under the contract and retaking possession of the subject property. Although plaintiffs argue that they only did so to mitigate their damages, they have not provided the Court with any legal support for that assertion. Accordingly, this argument is abandoned. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims . . . and then search for authority either to sustain or reject his position.").

Accordingly, we find that the trial court did not err in granting defendants' motion for summary disposition.

Affirmed.

/s/ Pat M. Donofrio
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens