

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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TERRI L. ROEDER and LOUIS V. TELERICO,  
  
Plaintiff-Appellant,

UNPUBLISHED  
November 17, 2015

v

BANK OF NEW YORK MELLON TRUST  
COMPANY, NA and ROSCOMMON COUNTY  
BOARD OF COMMISSIONERS,

No. 322792  
Roscommon Circuit Court  
LC No. 12-721011-CH

Defendant-Appellee.

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Before: Gadola, P.J., and Hoekstra and M. J. Kelly, JJ.

PER CURIAM.

In this action involving a challenge to the validity of a mortgage foreclosure by advertisement, plaintiffs appeal as of right an order granting summary disposition to defendant Bank of New York Mellon Trust Company (hereinafter BNY Mellon) under MCR 2.116(C)(8) and (C)(10), and granting summary disposition to defendant Roscommon County Board of Commissioners under MCR 2.116(C)(7) and (C)(8). Because plaintiffs lack standing to challenge the foreclosure and the Roscommon County Board of Commissioners is entitled to the protections of governmental immunity, we affirm.

On February 6, 2004, plaintiffs executed a mortgage for the real property in question in favor of Mortgage Electronic Registration Systems (MERS). On January 4, 2008, MERS executed an assignment of plaintiffs' mortgage to The Bank of New York Company. The assignment was recorded in the Roscommon County Register of Deeds on January 8, 2008. At some point, The Bank of New York Company entered into a merger with Mellon Financial Corporation, that resulted in the formation of BNY Mellon. Later, on February 8, 2012, MERS executed a second assignment of plaintiffs' mortgage to BNY Mellon.<sup>1</sup> The second assignment was recorded in the Roscommon County Register of Deeds on February 23, 2012.

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<sup>1</sup> More specifically, the second assignment was made to "THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A. F/K/A THE BANK OF NEW YORK TRUST COMPANY, N.A."

On March 28, 2012 BNY Mellon's counsel signed both a Statement of Compliance and Affidavit of Purchaser stating that foreclosure by advertisement would commence against plaintiffs' property on March 30, 2012. On March 30, 2012, the Roscommon County Sheriff sold the property at a sheriff's sale to BNY Mellon. The amount needed for plaintiffs to redeem the property was set at \$144,681.33 plus interest and applicable fees. The redemption period, which would normally have expired on September 30, 2012, ran until October 1, 2012 because September 30, 2012 was a Sunday. See MCR 1.108(1).

On October 1, 2012, plaintiffs filed their complaint, arguing that the foreclosure sale should be set aside. Regarding BNY Mellon, plaintiffs brought claims to quiet title, for declaratory judgment, and for slander of title. The complaint also alleged a claim for violation of MCL 600.2558(5) against the Roscommon County Board of Commissioners, asserting that Sheriff Randall Stevenson was neglectful in performing his duties relating to the sheriff's sale insofar as he allowed BNY Mellon to foreclose on the property when BNY Mellon did not have an interest in the property.

Both BNY Mellon and the Roscommon County Board of Commissioners moved for summary disposition. The trial court granted the Roscommon County Board of Commissioners' motion for summary disposition, finding that the sheriff had no duty to perform a title check, there was no fraud or irregularity in the foreclosure proceedings, and plaintiffs' claims were barred by governmental immunity. The trial court also granted BNY Mellon's motion for summary disposition, finding that plaintiffs did not have standing to challenge the foreclosure sale and that they had failed to establish prejudice. Plaintiffs filed a motion for reconsideration arguing that prejudice existed because BNY Mellon's foreclosure precluded them from qualifying for the federal Home Affordable Modification Program (HAMP) that had recently expanded its eligibility criteria. The trial court denied this motion, stating that no error was demonstrated showing that the court or the parties were misled. Plaintiffs now appeal as of right.

On appeal, plaintiffs first argue that the trial court erred by granting BNY Mellon's motion for summary disposition. Plaintiffs contend that MERS could not assign the mortgage to BNY Mellon because it had already been assigned to The Bank of New York Company. In these circumstances, plaintiffs claim that BNY Mellon had no right to initiate foreclosure proceedings and that plaintiffs have standing to challenge these irregularities in the proceedings. Additionally, regarding prejudice, plaintiffs claim that it is "self-evident" that they have been prejudiced by the foreclosure process because the foreclosure prevented plaintiffs from obtaining mortgage assistance under the expanded HAMP program. With respect to the Roscommon County Board of Commissioners, plaintiffs maintain that, pursuant to MCL 600.2558(5), they may bring suit against the county for the sheriff's negligence in failing to ascertain that BNY Mellon lacked an interest in the property before conducting the sheriff's sale.

We "review[] the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Likewise, whether a party has standing to assert a claim poses a question of law that we review de novo. *Heltzel v Heltzel*, 248 Mich App 1, 28; 638 NW2d 123 (2001). Standing may be challenged in connection with a motion for summary disposition under either MCR 2.116(C)(8) or (C)(10). *Bd of Trustees of City of Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust v. City of Pontiac*, 309 Mich App 611, \_\_; \_\_ NW2d \_\_

(2015), slip op at 5. We also review the applicability of governmental immunity de novo. *Briggs v Oakland Co*, 276 Mich App 369, 371; 742 NW2d 136 (2007).

The first issue in the present case is whether plaintiffs have standing to challenge the validity of the foreclosure sale given that the redemption period expired without plaintiffs' exercising the right of redemption. Relevant to this inquiry, the right to foreclosure by advertisement is statutory, *Church & Church Inc v A-1 Carpentry*, 281 Mich App 330, 339; 766 NW2d 30 (2008), and, following foreclosure, the rights and obligations of the parties are controlled by statute, *Senters v Ottawa Sav Bank, FSB*, 443 Mich 45, 52; 503 NW2d 639 (1993). Under MCL 600.3240, "after a sheriff's sale is completed, a mortgagor may redeem the property by paying the requisite amount within the prescribed time limit[.]" *Bryan v JPMorgan Chase Bank*, 304 Mich App 708, 713; 848 NW2d 482 (2014). If the mortgagor fails to redeem the property within the requisite time limit, then the purchaser of the sheriff's deed is vested with "all the right, title, and interest" in the property pursuant to MCL 600.3226. At the same time, if the mortgagor has not exercised the right of redemption, all of the mortgagor's rights in the property are extinguished. *Piotrowski v State Land Office Bd*, 302 Mich 179, 187; 4 NW2d 514 (1942); *Bryan*, 304 Mich App at 713. When a mortgagor loses all interest in the property, it follows that, he or she also loses standing to challenge a foreclosure sale. *Bryan*, 304 Mich App at 714.

Consequently, in the present case, plaintiffs lost all interests in the property on October 1, 2012, the date on which the redemption period ended without plaintiffs redeeming the property. Plaintiffs made no effort to stay the redemption period before its expiration. Although it is true that plaintiffs filed suit on October 1, 2012, this did not toll the redemption period and, once the redemption period expired, plaintiffs' rights were extinguished. See *id.* Thus, plaintiffs lacked standing and, because plaintiffs lacked standing, the trial court properly granted BNY Mellon's motion for summary disposition under MCR 2.116(C)(8) and (C)(10).

We also note briefly that, even if plaintiffs had standing, the trial court nonetheless properly granted BNY Mellon's motion for summary disposition because plaintiffs have failed to state a claim and no material questions of fact remain. Specifically, "defects or irregularities in a foreclosure proceeding result in a foreclosure that is voidable, not void *ab initio*." *Kim v JPMorgan Chase Bank, NA*, 493 Mich 98, 115; 825 NW2d 329 (2012). Mortgagors seeking to set aside a foreclosure by advertisement must show prejudice, which requires a showing that the mortgagors "would have been in a better position to preserve their interest in the property absent defendant's noncompliance with the statute." *Id.* at 115-116. Thus, this Court has explained that there are three essential elements to a claim to set aside a foreclosure: "(1) fraud or irregularity in the foreclosure procedure, (2) prejudice to the mortgagor, and (3) a causal relationship between the alleged fraud or irregularity and the alleged prejudice, i.e., that the mortgagor would have been in a better position to preserve the property interest absent the fraud or irregularity." *Diem v Sallie Mae Home Loans, Inc*, 307 Mich App 204, 211; 859 NW2d 238 (2014).

Plaintiffs in this case have not established any of these requirements. First, plaintiffs' claim of irregularity is without merit. It is undisputed that BNY Mellon resulted from a merger of The Bank of New York Company and Mellon Financial Corporation. It is also uncontested that, on January 4, 2008, MERS executed an assignment of plaintiffs' mortgage to The Bank of New York Company. When The Bank of New York Company entered into a merger that

resulted in BNY Mellon, BNY Mellon acquired the property rights of The Bank of New York Company, including plaintiffs' mortgage. See MCL 450.1724(1)(b). See also *Kim*, 493 Mich at 111 n 23; 12 USCA 215a(e). On these facts, while the second assignment by MERS in 2012 might have been unnecessary, it does not alter the fact that BNY Mellon had the right to foreclose under MCL 600.3204(3) as a result of MERS assignment to The Bank of New York in 2008.

Second, plaintiffs have not shown prejudice or a causal relationship between the alleged irregularity in this case and the alleged prejudice. Even if we assume that BNY Mellon did not hold the mortgage at the time of the foreclosure and that BNY Mellon thus violated MCL 600.3204, plaintiffs have not shown how, but for this fact, they would have been in a better position to preserve their property interests. Cf. *Diem*, 307 Mich App at 211-212. That is, plaintiffs offer the undeveloped assertion that they might have been eligible for an improved HAMP program had the foreclosure not occurred. But, this is not prejudice as described in *Kim*, 493 Mich at 116 & n 33. Plaintiffs have not suggested that they were misled about the occurrence of the sale, they made no effort to redeem the property during the redemption period, and they waited until the last day of the redemption period to assert the purported irregularity at issue. See *Diem*, 307 Mich App at 211-212. At most, plaintiffs have asserted that the wrong entity initiated foreclosure proceedings, but even supposing that this irregularity occurred, there is simply “no indication of how or why the foreclosure initiated by [BNY Mellon]—rather than another entity—precluded plaintiff[s] from challenging the foreclosure.” *Id.* at 213. In these circumstances, plaintiffs have not shown prejudice and they have not shown a causal connection between the purported irregularity and their claimed prejudice. Consequently, the trial court properly granted BNY Mellon's motion for summary disposition under MCR 2.116(C)(8) and (C)(10).

Turning to plaintiffs' claims against Roscommon County, we find that the trial court properly granted summary disposition based on governmental immunity. “Except as otherwise provided in [the Governmental Tort Liability Act], a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.” MCL 691.1407. By statute, “a governmental function” is “an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law.” MCL 691.1401(b).

Roscommon County's Board of Commissioners constitutes a political subdivision and a governmental agency for purposes of the GTLA. See MCL 691.1401(a), (e). When a mortgage contains a power of sale clause, it is subject to foreclosure by advertisement under MCL 600.3201, and pursuant to MCL 600.3216, a county sheriff is required to hold foreclosure sales on property that is foreclosed by advertisement. Thus, when the Roscommon County sheriff held the foreclosure sale in this case, he was engaged in an activity expressly mandated by statute and the foreclosure sale constituted a governmental function. See MCL 691.1401(b); *HRSS, Inc v Wayne Co Treasurer*, 279 F Supp 2d 846, 851 (ED Mich 2003). Although there are

six recognized exceptions to governmental immunity, none of them are applicable in this case.<sup>2</sup> See generally *Lash v Traverse City*, 479 Mich 180, 195; 735 NW2d 628 (2007). Consequently, because the sheriff's sale constituted a governmental function, the Roscommon County Board of Commissioners was entitled to the protections of governmental immunity and the trial court properly granted summary disposition on this basis. See MCR 2.116(C)(7), (C)(8).

Affirmed.

/s/ Michael F. Gadola

/s/ Joel P. Hoekstra

/s/ Michael J. Kelly

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<sup>2</sup> Plaintiffs offer the cursory assertion on appeal that MCL 600.2558(5) permits them to bring suit against the Roscommon County Board of Commissioners. MCL 600.2558(5) indicates that a “sheriff . . . who neglects or refuses any of the services required by law . . . shall be liable to the party injured for all damages which the party sustains by reason of that neglect or refusal.” Contrary to plaintiffs undeveloped argument, even supposing that this provision would allow plaintiffs’ to file suit against the sheriff, nothing in the plain language of this statute suggests that it was intended to abrogate the broad grant of immunity afforded to the Roscommon County Board of Commissioners as a governmental agency pursuant to MCL 691.1407(1). Moreover, the sheriff in fact held the sale as required by MCL 600.3216, and we see no basis on which to conclude that the sheriff neglected or refused to perform any of the services required by law. Plaintiffs’ claims to the contrary are without merit.