STATE OF MICHIGAN

COURT OF APPEALS

CYNTHIA LEE BOURDOW, Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED February 11, 2016
v	No. 324801 Saginaw Circuit Court
LAKE HURON CREDIT UNION, Defendant/Counter-Plaintiff-Appellee.	LC No. 12-015018-CH

Before: BOONSTRA, P.J., and K. F. KELLY and MURRAY, JJ.

PER CURIAM.

Plaintiff Cynthia Lee Bourdow appeals as of right an order awarding attorney fees to defendant Lake Huron Credit Union. At issue in plaintiff's appeal are: (1) an order granting summary disposition to defendant on plaintiff's claims for declaratory relief, (2) an order granting summary disposition to defendant on plaintiff's claims for breach of contract and fraud, (3) an order denying plaintiff's motion for summary disposition and granting defendant's motion for summary disposition with regard to defendant's breach of contract counterclaim, and (4) an order awarding defendant $16,992.24 in attorney fees. We affirm the summary disposition orders, but vacate in part the order awarding attorney fees to defendant.

I. BACKGROUND FACTS

This appeal arises from the foreclosures of plaintiff's home located in Freeland (the Freeland property) and a rental property located in Saginaw (the Saginaw property). On April 21, 2009, two promissory notes were executed between plaintiff and defendant, and in order to secure the debt, plaintiff granted defendant a mortgage in the amount of $105,500 on the Saginaw property and a mortgage in the amount of $110,900 on the Freeland property.

After the execution of the mortgage documents, plaintiff subsequently defaulted on the mortgage regarding the Saginaw property. As a result, on April 20, 2010, plaintiff and defendant executed a loan modification agreement which lowered plaintiff's monthly payment and cured plaintiff's default.

After the loan modification, plaintiff made her May and June payments on the Saginaw and Freeland properties. Then, on July 17, 2010, plaintiff paid a portion of her July mortgage

payment for the Saginaw property, although payment was due on July 5, 2010. On July 29, 2010, because plaintiff had not yet fully paid her July monthly payment for the Saginaw property, Shelley Zehder, defendant's employee, sent an email to plaintiff telling her that her July payment was past due and inquired when plaintiff was planning on making her payment.

On August 4, 2010, plaintiff paid the remainder of her July monthly payment for the Saginaw property. Despite paying the July payment for the Saginaw property (albeit late), plaintiff subsequently failed to pay her monthly payments on both properties in August 2010.

As a result, on August 12, 2010, defendant sent plaintiff two letters stating that plaintiff was in default of her mortgages and that in order to cure the defaults, she must make all payments that are due, in addition to any late charges, within 30 days. Plaintiff failed to pay the past due amounts within the 30 day period.

Defendant then commenced foreclosure by advertisement on both properties pursuant to the power of sale provisions contained in the mortgage documents, and on September 14, 2010, plaintiff received a notice of foreclosure indicating that her properties would be sold at a sheriff's sale on October 22, 2010. At the sheriff's sale, defendant was the highest bidder on both properties. Specifically, defendant bought the Saginaw property for $84,000, and bought the Freeland property for $100,000. Pursuant to the sheriff's deed, plaintiff's statutory right to redeem the properties was six months, which expired on April 22, 2011. Plaintiff failed to exercise her right to redeem the properties within the statutory period.

II. PROCEDURAL HISTORY

On January 11, 2012, plaintiff filed the instant action seeking declaratory relief regarding the effect of the foreclosures of both properties. Plaintiff also alleged two counts of fraud, one count of breach of contract with regard to the Freeland mortgage and loan documents, and one count of breach of contract with regard to the Saginaw mortgage and loan documents.

Defendant responded by filing a motion for summary disposition under MCR 2.116(C)(8) and argued that plaintiff did not have standing to challenge the validity of the foreclosures as the statutory redemption period had expired without plaintiff redeeming the properties. In opposition to defendant's motion, plaintiff argued that the end of the redemption periods does not act as the statute of limitations to plaintiff's claims. Plaintiff argued that the correct statute of limitations period was five years, pursuant to MCL 600.5801, and that plaintiff filed her complaint within that time period. Additionally, plaintiff contended that *Manufacturers Hanover Mortgage Corp v Snell*, 142 Mich App 548, 553-554; 370 NW2d 401 (1985), permitted post redemption challenges to foreclosures.

After taking the motion under advisement, the trial court determined that plaintiff did not have standing to bring her claims for declaratory relief because the redemption period had expired without plaintiff redeeming the property. The trial court subsequently entered an order granting summary disposition to defendant on plaintiff's claims for declaratory relief.

Soon thereafter, defendant amended its pleadings to assert a counterclaim for breach of contract. Defendant alleged that plaintiff's properties sold at the sheriff's sale for less than the remaining mortgage balance, and that plaintiff was responsible for the deficiencies.

After amending its complaint, defendant filed a motion for summary disposition with regard to plaintiff's breach of contract and fraud claims. Defendant argued that it did not breach the mortgage and note documents when it foreclosed on plaintiff's properties because plaintiff was in default. Additionally, defendant maintained that plaintiff failed to create a genuine issue of fact regarding whether defendant committed fraud.[1]

At the motion hearing, plaintiff, in *propia persona*, admitted that she was late on her mortgage payments, but contended that she was not in default because the email from Zehnder allowed plaintiff to make her loan payments within 30 days after they were due. Plaintiff also argued that defendant did not have authority to acquire plaintiff's properties because defendant's board of directors failed to approve the acquisition of plaintiff's properties as required by the Michigan Credit Union Act. See MCL 490.342(f).

After arguments, the trial court subsequently entered a written opinion and order granting summary disposition to defendant. The trial court concluded that Zehnder's email did not amount to a valid waiver of the mortgage and loan documents. Additionally, the trial court concluded that there was no genuine issue of material fact regarding whether defendant committed fraud.

Plaintiff then filed a claim of appeal, which was dismissed for lack of jurisdiction because defendant's counterclaim had not yet been resolved.[2] After dismissal of plaintiff's appeal, plaintiff filed a motion for summary disposition on defendant's breach of contract counterclaim. Plaintiff argued that defendant could not recover on its deficiency claim as defendant did not have the authority to acquire plaintiff's properties at the foreclosure sale because defendant failed to comply with the Michigan Credit Union Act. MCL 490.340 et seq. Specifically, plaintiff argued that MCL 490.342(f) required defendant's board of directors to approve the acquisition of her properties, which did not occur.

In response, defendant filed a cross motion for summary disposition asserting that plaintiff admitted that she did not make her mortgage payments and that there was a deficiency between the loan amount and the purchase price of the properties. Defendant also argued that MCL 490.342(f) was not drafted to inhibit the enforcement of mortgage documents when foreclosing on real estate. Lastly, defendant contended that even if the statute applied, plaintiff was precluded from attempting to set aside the foreclosure sale as the redemption period had already expired.

---

[1] On November 9, 2012, the parties stipulated to the withdrawal of plaintiff's counsel. As a result, plaintiff did not file a response in opposition to defendant's motion for summary disposition. At the motion hearing, plaintiff attempted to submit documents to the trial court but the trial court refused to consider the proffered documents because they were not submitted seven days before the hearing.

[2] See *Bourdow v Lake Huron Credit Union*, unpublished order of the Court of Appeals, entered November 5, 2013, (Docket No. 315682).

The trial court agreed with defendant and entered a written opinion and order denying plaintiff's motion for summary disposition and granting defendant's motion for summary disposition. The trial court determined that because plaintiff defaulted on her loan obligations and a deficiency existed on both properties, defendant was entitled to recover the deficiency.

After the resolution of defendant's counterclaim, plaintiff objected to defendant's proposed order and judgment because it included an amount for defendant's attorney fees. Plaintiff particularly disputed that proposed order and judgment because (1) defendant failed to specify what provisions in the mortgage and loan documents provided defendant with reasonable attorney fees, (2) the fees were not reasonable and (3) defendant did not incur attorney fees because defendant's insurance was paying for defendant's attorney fees.

Defendant then filed a motion requesting an evidentiary hearing to prove the reasonableness of its requested attorney fees. Defendant contended that it was entitled to reasonable attorney fees and costs because the note and mortgage documents provided for attorney fees and that these fees were incurred despite the fact that an insurance policy covered defendant's attorney fees. Defendant also maintained that $64,372.51 for costs and attorney fees was a reasonable amount.

Plaintiff, in response, maintained that defendant was not entitled to attorney fees because they were not incurred by defendant as defendant's insurance company paid the attorney fees. Additionally, plaintiff contended that the total amount of the fee was not reasonable.

The trial court reviewed the parties' arguments and determined that defendant's requested amount of $64,372.51 was not reasonable. The trial court ultimately determined that one third of the amount of the judgment, $16,922.24, was a reasonable award of attorney fees. This appeal then ensued.

III. DECLARATORY RELIEF - STANDING

Plaintiff asserts that the trial court erred in granting summary disposition to defendant with regard to her claims seeking declaratory relief. We "review[] the grant or denial of summary disposition de novo to determine if the moving parting 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, 621; __ NW2d __ (2015).

A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the complaint on the basis of the pleadings alone to determine if the opposing party has stated a claim for which relief can be granted." *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013). All well-pleaded allegations are accepted as true and are construed in the light most favorable to the nonmoving party. *Id*. A motion under this subrule is properly granted if no factual development could possibly justify recovery. *Id*.

In order to have standing to contest a foreclosure, a plaintiff must have an interest in the property being foreclosed. *Trademark Properties of Mich, LLC v Fed Nat'l Mtg Ass'n*, 308 Mich App 132, 136-137; 863 NW2d 344 (2014). With regard to foreclosures by advertisement, "[i]f a mortgagor fails to avail him or herself of the right of redemption, all the mortgagor's rights in and to the property are extinguished." *Bryan v JPMorgan Chase Bank*, 304 Mich App 708, 713; 848 NW2d 482 (2014). As such, a plaintiff who does not bring an action challenging a foreclosure within the specific statutory redemption period set forth in MCL 600.3240 lacks standing to bring suit. *Id*. at 715.

Here, plaintiff lacked standing to bring her claims for declaratory relief contesting the foreclosures. The statutory redemption period for both of plaintiff's properties was six months from the date of the sheriff's sale, see MCL 600.3240(8), and plaintiff failed to redeem the properties within that period. In failing to redeem the property within the applicable time, plaintiff no longer had an interest in the properties and thus did not have standing to challenge the foreclosures. *Bryan*, 304 Mich App at 715.

Additionally, plaintiff relies on *Snell*, 142 Mich App 548, for the broad proposition that Michigan law supports post redemption challenges to foreclosures. In *Snell*, this Court stated:

> The Supreme Court has long held that *the mortgagor may hold over after foreclosure by advertisement and test the validity of the sale* in the summary [eviction] proceeding. Otherwise, the typical mortgagor who faces an invalid foreclosure would be without remedy, being without the financial means to pursue the alternate course of filing an independent action to restrain or set aside the sale. [*Id*. at 553 (citations omitted; emphasis added).]

Upon close examination, plaintiff's reliance on *Snell* is misplaced as this is neither a summary eviction proceeding nor is it a situation involving a hold over mortgagor. As such, *Snell* is inapplicable to the case at hand. Consequently, the trial court properly granted summary disposition to defendant as plaintiff does not have standing to contest the foreclosures.

IV. FRAUD AND EQUITABLE ESTOPPEL

Plaintiff also argues that the trial court erred in granting defendant's motion for summary disposition on plaintiff's fraud claims. We will review the trial court's decision pursuant to MCR 2.116(C)(10) because the trial court granted summary disposition pursuant to that subrule.

To properly establish fraud, a plaintiff must prove that:

> (1) the defendant made a representation that was material, (2) the representation was false, (3) the defendant knew the representation was false, or the defendant's representation was made recklessly without any knowledge of the potential truth, (4) the defendant made the representation with the intention that the plaintiff would act on it, (5) the plaintiff actually acted in reliance, and (6) the plaintiff suffered an injury as a result. [*Stephens v Worden Ins Agency, LLC*, 307 Mich App 220, 230; 859 NW2d 723 (2014).]

Additionally, "an action for fraud must be predicated upon a false statement related to a past or existing fact." *Vittiglio v Vittiglio*, 297 Mich App 391, 404; 824 NW2d 591 (2012).

Plaintiff contends that Zehnder's email contains a fraudulent misrepresentation. Zehnder's email states:

> Just wanted to remind you that you are 23 days DQ on your house. When will you be making that payment. I know our plan is that you are always going to stay under 30, right?

Plaintiff failed to create a genuine issue of material fact regarding whether defendant made a false representation. First, the email merely informed plaintiff that she was 23 days delinquent on one of her properties, which plaintiff admitted to the trial court as true. Thus, the first sentence of Zehnder's email is not a false misrepresentation. *Stephens*, 307 Mich App at 230. Furthermore, the last two sentences of the email merely ask plaintiff when she would be making her payment and asked for confirmation regarding the parties' plan of keeping her payments under 30 days late. These questions are not a statement of past or existing fact and thus cannot be the basis for plaintiff's fraud claims. *Vittiglio*, 297 Mich App at 404. Therefore, plaintiff failed to establish a genuine issue of material fact regarding whether defendant made a false representation. Summary disposition was appropriate on plaintiff's fraud claims.

Plaintiff's contention that defendant is equitably estopped from enforcing the default provisions in the loan and mortgage documents is also without merit. This issue was first raised in plaintiff's motion for reconsideration, thus, it is not properly preserved for review. *Vushaj v Farm Bureau General Ins Co of Michigan*, 284 Mich App 513, 519; 773 NW2d 758 (2009) ("Where an issue is first presented in a motion for reconsideration, it is not properly preserved."). Our review of unpreserved issues is limited to plain error affecting plaintiff's substantial rights. *In re Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Kern v Blenthen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

Equitable estoppel may prevent a contracting party from enforcing a specific provision in a contract. *City of Grosse Pointe Park v Michigan Municipal Liability and Property Pool*, 473 Mich 188, 204-205; 702 NW2d 106 (2005). In order to invoke the doctrine of equitable estoppel, there must have been (1) a false representation or concealment of a material fact, (2) an expectation that the other party will rely on the misconduct, and (3) knowledge of the actual facts on the part of the representing or concealing party. *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997).

Plaintiff does not contend that defendant concealed a material fact, but rather, that Zehnder's email is sufficient to establish a genuine issue of fact regarding whether defendant made a false representation. As discussed previously, Zehnder's email does not contain a false representation. Further, to the extent plaintiff relies on her deposition testimony that she was told by Zehnder that if she kept her payments "under 30 days" late "everything will be fine" to create a genuine issue of material fact regarding whether defendant made a false representation, this deposition testimony was not presented to the trial court at the time defendant's motion for

summary disposition was decided. Our review is limited to the evidence that was properly presented to the trial court at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475-476; 776 NW2d 398 (2009). Therefore, at the time the summary disposition motion was decided, no genuine issue of material fact existed regarding whether defendant made a false representation or concealed a material fact.

V. BREACH OF CONTRACT

Plaintiff's next contention is that the trial court erred in granting summary disposition to defendant on her contract claim. Because the trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10), we will review the trial court's decision pursuant to that subrule. A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id*. "Summary disposition under MCR 2.116(C)(10) is appropriately granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds could differ. *Debano–Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013).

Plaintiff contends that defendant was the first to breach the mortgage and loan documents by foreclosing on plaintiff's properties because defendant's conduct affirmatively waived the default provisions of the loan and mortgage documents. Under Michigan law, it is well established that the freedom to contract includes the right to waive the terms of a given contract and mutually agree to new contract terms. See *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372-373; 666 NW2d 251 (2003). A party alleging waiver of contractual terms must establish a mutual intention of the parties to waive the original contract. *Id*. at 372. This may be accomplished by establishing clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to waive the terms of the original contract. *Id*. at 373.

Although a party can generally prove waiver through evidence of an oral agreement or course of conduct, in cases involving financial instiutions,[3] a subsequent waiver of a contract must be in writing and properly signed. MCL 566.132. Specifically, MCL 566.132(2) provides:

> (2) An action shall not be brought against a financial institution to enforce any of the following promises or commitments of the financial institution unless the promise or commitment is in writing and signed with an authorized signature by the financial institution.

[3] A state or federal chartered credit union is considered a "financial institution." MCL 566.132(3).

* * *

> (b) a promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation.
>
> (c) a promise or commitment to waive a provision of a loan, extension of credit, or other financial accommodation.

This Court has previously explained that the statute's language "is unambiguous" and "plainly states that a party is precluded from bringing a claim – no matter its label – against a financial institution . . . to waive a loan provision [if the waiver does not comply with the statute]." *Crown Technology Park v D&N Bank, FSB*, 242 Mich App 538, 550; 619 NW2d 66 (2000). Furthermore, the "party seeking to enforce a promise or commitment must present evidence that the promise or commitment itself was reduced to writing and properly signed." *Hunting Nat Bank v Daniel J Aronoff Living Trust*, 305 Mich App 496, 510-511; 835 NW2d 481 (2014).

The only evidence of an alleged waiver that has been reduced to writing is Zehnder's email. Even assuming Zehnder's email constitutes an intentional relinquishment or abandonment of a known right, Zehnder's email does not comply with the statute of frauds as it does not contain "an authorized signature by the financial institution." MCL 566.132(2). As such, plaintiff, the party seeking to enforce the promise, failed to present evidence of a waiver that was reduced to writing and properly signed. *Hunting Nat Bank*, 305 Mich App at 510-511. Consequently, no genuine issue of fact existed regarding whether defendant waived its rights to enforce the default provisions of the note and mortgage documents.

VI. DEFENDANT'S DEFICIENCY CLAIM

Plaintiff next contends that the trial court erred in granting summary disposition to defendant, an issue which we review de novo. *Maiden*, 461 Mich at 118. The trial court properly grants summary disposition "to the opposing party under MCR 2.116(I)(2) if the court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law." *Sherry v East Suburban Football League*, 292 Mich App 23, 34; 807 NW2d 859 (2011).

MCL 600.3280 provides, in pertinent part:

> When, in the foreclosure of a mortgage by advertisement, any sale of real property has been made after February 11, 1933, or shall be hereafter made by a mortgagee, trustee, or other person authorized to make the same pursuant to the power of sale contained therein, at which the mortgagee, payee or other holder of the obligation thereby secured has become or becomes the purchaser, or takes or has taken title thereto at such sale either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, *shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation, or any other person liable thereon, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and set-off to the*

> *extent only of the amount of the plaintiff's claim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and such showing shall constitute a defense to such action and shall defeat the deficiency judgment against him, either in whole or in part to such extent.* [Emphasis added.]

Plaintiff does not challenge that the properties were fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value. Instead, plaintiff argues that the foreclosures should be set aside because defendant failed to comply with the Michigan Credit Union Act prior to acquiring plaintiff's properties at the sheriff's sales. MCL 490.101 et seq. Initially, we note that plaintiff does not have standing to raise this issue as plaintiff failed to redeem the foreclosed properties within the required statutory redemption period. See *Bryan*, 304 Mich App at 713. In any event, even assuming plaintiff did have standing to set aside the foreclosure, plaintiff's argument is without merit.

Michigan's foreclosure by advertisement statute is intended to give finality to purchasers of foreclosed properties, and thus, a court's ability to set aside a foreclosure sale is limited. See *Schulthies v Barron*, 16 Mich App 246, 247-248; 167 NW2d 784 (1969). When the redemption period expires, former property owners can only challenge the validity of the foreclosure when they have made a clear showing of fraud or irregularity sufficient to justify setting aside the foreclosure. *Sweet Air Inv, Inc*, *v Kenney*, 275 Mich App 492, 497; 739 NW2d 656 (2007). However, the mortgagor's claims of fraud or irregularity must relate to the foreclosure procedure itself, not to "underlying equities, if any, bearing on the instrument [or] legal capacity of the mortgagee or trustee." *Reid v Rylander*, 270 Mich 263, 267; 258 NW 630 (1935); see also *Snell*, 142 Mich App at 553. Additionally, 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 [foreclosure by advertisement statute]." *Kim v JP Morgan Chase Bank, NA*, 493 Mich 98, 115-116; 825 NW2d 329 (2012). Ultimately, there are three essential elements 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).

Plaintiff has failed to establish any of these essential elements. First, plaintiff cannot establish fraud or irregularity in the foreclosure process. Plaintiff contends that an irregularity occurred when defendant defendant's board of directors failed to approve the acquisition of plaintiff's properties at the sheriff's sales, as required by the Michigan Credit Union Act. MCL 490.342(f). However, plaintiff's argument is not a challenge to an irregularity in the foreclosure procedure or to the sheriff's sale itself. Rather, plaintiff's argument is a challenge to defendant's legal capacity to purchase the properties at the foreclosure sale, which is a challenge to the underlying equities and insufficient to set aside the foreclosure. *Reid*, 270 Mich at 267; *Snell*, 142 Mich App at 553. Moreover, plaintiff has not established that she was prejudiced. A plaintiff cannot establish prejudice when the mortgagor made no effort to redeem the foreclosed property during the redemption period. See *Diem*, 307 Mich App at 243. Therefore, because plaintiff failed to attempt to redeem her properties within the redemption period, she has failed to

show that she "would have been in a better position to preserve [her] interest in the property absent the fraud or irregularity." *Kim*, 493 Mich at 115-116. Consequently, summary disposition was properly granted to defendant.

VII. ATTORNEY FEES

Lastly, plaintiff contends that the trial court abused its discretion when it awarded reasonable costs and attorney fees to defendant. A trial court's ultimate decision to award attorney fees and its determination of the reasonableness of the fees are reviewed for an abuse of discretion. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). An abuse of discretion occurs when the trial court's decision results in an outcome falling outside the principled range of outcomes. *Woods v SLB Property Management, LLC*, 277 Mich App 622, 625; 750 NW2d 228 (2008).

"The general 'American rule' is that attorney fees are not ordinarily recoverable unless a statute, court rule, or common-law exception provides the contrary." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008) (quotation marks and citations omitted). One such common law exception exists where attorney fees are provided by contract between the parties. *Grace v Grace*, 253 Mich App 357, 371; 655 NW2d 595 (2002). The notes at issue specifically provide that the holder of the note (defendant) is entitled to reasonable attorney fees "paid or incurred" in protecting and enforcing the rights and obligations of the note.

Plaintiff contends that defendant has not "incurred" the attorney fees because defendant obtained insurance to pay for the costs and expenses of litigation. Despite plaintiff's contention, this Court has previously held that a party still incurs costs and attorney fees even when a third party finances and pays for the litigation. *Swickard v Wayne Co Medical Examiner*, 196 Mich App 98, 100-102; 492 NW2d 497 (1992). While we acknowledge that the Michigan Supreme Court has defined incur to mean "to become liable or subject to," *Douglas v Allstate Ins Co*, 492 Mich 241, 267; 821 NW2d 472 (2012), the relevant inquiry in determining whether attorney fees were incurred is whether an attorney-client relationship existed and services were provided, not whether the attorney pursues compensation from the client or whether the party became "liable or subject to" the attorney fees. *Macomb Co v Taxpayers Ass'n v L'Anse Creuse Pub Sch*, 455 Mich 1, 10-12; 564 NW2d 457 (1997). Therefore, contrary to plaintiff's argument on appeal, the mere fact that a nonparty source was being used to fund the cost of defendant's legal representation does not preclude an award of attorney fees. Because it is undisputed that an attorney client relationship existed between defendant and its attorneys, defendant is entitled to reasonable attorney fees. *Id*.

Having determined that defendant is entitled to reasonable attorney fees, plaintiff disputes the reasonableness of the fees imposed. "[T]he burden of proving the reasonableness of the requested fee rests with the party requesting them." *Smith*, 481 Mich at 528-529. The Michigan Supreme Court's opinion in *Smith* is intended to provide guidance to Michigan courts that are asked to impose reasonable attorney fees. *Kennedy v Robert Lee Auto Sales*, __ Mich App __, __; __ NW2d __ (2015); slip op at 7.

According to *Smith*, when determining the reasonableness of an award of attorney's fees, a trial court is to consider the following six factors set forth in *Wood v Detroit Auto Inter-Insurance Exchange*, 413 Mich 573; 321 NW2d 653 (1982):

> (1) the professional standing and experience of the attorney; (2) the skill, time, and labor involved, (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [*Smith*, 481 Mich at 529, citing *Wood*, 413 Mich at 588.]

In addition, courts should consider the following eight factors in MRPC 1.5(a), some of which overlap with the *Wood* factors. *Smith*, 481 Mich at 530. The factors set forth in MRPC 1.5(a) are:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability for the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

In order to aid appellate review, the trial court should briefly address its view of each of the factors on the record. *Smith*, 481 Mich at 529 n 14. When a trial court fails to consider a "vast majority of the pertinent factors" on the record, an abuse of discretion occurs. *Kennedy*, __ Mich App at __; slip op at 14

Before reviewing the factors outlined above, *Smith* mandates that "a trial court should begin its analysis [of calculating a reasonable attorney fee] by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a)." *Smith*, 481 Mich at 530-531. Next, the court should multiply the customary fee by the "reasonable number of hours expended in the case (factor 1 under MRPC 1.5(a) and factor 2 under *Wood*)." *Id*. The product of these numbers is to serve as the starting point for calculating a reasonable attorney fee. *Id*. at 531. Only after determining the appropriate starting point is the trial court to consider the remaining *Wood*/MRPC factors to determine whether an upward or downward adjustment is appropriate. *Id*.

We hold that the trial court abused its discretion when it awarded defendant $16,992.24 in attorney fees. The trial court merely stated that it was not "persuaded that the attorneys' fees and cost in the total amount of 64,372.51 [was] reasonable." In a conclusory fashion, the trial court then stated that one third of the judgment plus costs was a reasonable amount. On this record, the trial court only considered one of the factors set forth in *Wood* and MRPC 1.5(a), the factor regarding the amount involved and the results achieved. Clearly, by only considering one of the *Smith*/MRPC factors, the trial court failed to consider a "vast majority of the pertinent factors." *Kennedy*, __ Mich App at __; slip op at 14. As such, we are compelled to vacate the trial court's award of attorney fees and to remand for the trial court to employ the proper procedure set forth in *Smith*. *Id*.

VIII. CONCLUSION

For the reasons stated herein, we affirm the trial court's orders granting summary disposition, but vacate in part the trial court's order awarding attorney fees to defendant and remand with directions for the trial court to follow the framework established in *Smith*.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs as neither party fully prevailed on appeal. MCR 7.219(A).

/s/ Mark T. Boonstra
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray