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STATE OF MICHIGAN
COURT OF APPEALS

21ST MORTGAGE CORPORATION,

Plaintiff/Counterdefendant-Appellant,

v

GUARDIAN & ASSOCIATES, INC. and JIM’S
PRAVDA, LLC,

Defendants/Counterplaintiffs-
Appellees.

UNPUBLISHED

June 17, 2021

No. 353735

Wayne Probate Court

LC No. 2019-852050-CZ

Before: BOONSTRA, P.J., and CAVANAGH and GADOLA, JJ.

PER CURIAM.

Plaintiff/counterdefendant, 21st Mortgage Corporation (21st Mortgage) appeals as of right the order awarding defendant/counterplaintiff Jim’s Pravda LLC (Jim’s Pravda) \$6,348.19 in attorney fees and costs, and awarding defendant/counterplaintiff Guardian & Associates, Inc. (Guardian) \$3,500 in attorney fees. We vacate the trial court’s order.

This case arises from 21st Mortgage’s failure to cancel a foreclosure sale. Quicken Loans issued Frankie L. James a loan for the purchase of a house in Detroit, Michigan. The loan was secured by a mortgage, which Quicken Loans assigned to Mortgage Electronic Registration Systems (MERS). The loan was eventually assigned to 21st Mortgage. In February of 2019, James’s health had declined, she became incapacitated, and stopped paying her mortgage. Because she was incapacitated, a court appointed Guardian as conservator of James’s estate.

Not knowing of James’s incapacity and Guardian’s appointment as conservator, 21st Mortgage published a notice of foreclosure for the property on July 17, 2019.¹ The notice stated that a foreclosure sale would be held on August 29, 2019. The next day, Guardian notified 21st Mortgage of James’s incapacity and of its standing as conservator. After further communication,

¹ The mortgage contained a power of sale clause, allowing foreclosure by advertisement under MCL 600.3201.

21st Mortgage quoted Guardian a reinstatement amount of \$5,765.92 to cancel the foreclosure sale.

A little more than a day before the foreclosure sale was to occur, Guardian shipped overnight a cashier's check for the reinstatement amount to 21st Mortgage's offices in Knoxville, Tennessee. 21st Mortgage received the check the next morning at 9:23 a.m., about 24 hours in advance of the foreclosure sale. Nonetheless, 21st Mortgage did not cancel the foreclosure sale. Apparently, 21st Mortgage's employee, who was responsible for reinstating mortgages and canceling sales, was absent from work on the day the check was delivered. The sale went ahead as planned, and Jim's Pravda purchased the property at the sale. Afterwards, the Wayne County Sheriff issued a sheriff's deed conveying James's property to Jim's Pravda subject to redemption.

On September 5, 2019, 21st Mortgage sent Guardian a letter rejecting Guardian's cashier's check, claiming that 21st Mortgage had not received the check until after the foreclosure sale. Guardian's lawyer contacted 21st Mortgage, and 21st Mortgage conceded it had erred; Guardian's check had indeed arrived before the deadline. To set aside the sale and reinstate the mortgage, 21st Mortgage told Guardian that it would file a complaint with the trial court seeking to set aside the sale. According to Jim's Pravda, 21st Mortgage said nothing to it about the foreclosure sale being invalid. Thus, Jim's Pravda purchased insurance for the property and brought a summary proceeding in district court to accelerate the redemption period under MCL 600.3238.

At the end of September of 2019, 21st Mortgage filed a complaint asking the trial court to set aside the sheriff's deed and reinstate the mortgage. In its complaint, 21st Mortgage conceded that it had erred, and that Guardian had submitted the reinstatement amount before the foreclosure sale. In the complaint, 21st Mortgage named Guardian and Jim's Pravda as defendants.

According to Guardian, because it was the aggrieved party, it believed that 21st Mortgage should not have named it as a defendant. Thus, to ensure it was a plaintiff in this action, Guardian filed a counterclaim against 21st Mortgage. Guardian's counterclaim set forth essentially the same facts as 21st Mortgage's complaint and asked for essentially the same relief: Guardian requested that the trial court expunge the foreclosure sale. Jim's Pravda also filed a counterclaim against 21st Mortgage.²

Guardian later filed a petition for declaratory judgment to quiet title to James's estate. Again, Guardian reiterated the trial court should expunge the sheriff's deed, but also asked the trial court to make 21st Mortgage pay its attorney fees. Guardian contended that 21st Mortgage and Jim's Pravda had unnecessarily prolonged this matter and, therefore, Guardian should not have to bear the cost of litigation. A few days later, Jim's Pravda answered Guardian's petition for declaratory judgment, arguing that it too was entitled to attorney fees and expenses from 21st Mortgage. Essentially, Jim's Pravda argued that 21st Mortgage should pay its costs and attorney fees because it would not have incurred those fees but for 21st Mortgage's error in failing to cancel the foreclosure sale.

² A copy of Jim's Pravda's counterclaim was not provided to this Court as part of the lower court record.

Given that no party disputed that Guardian had furnished the reinstatement amount before the foreclosure sale, the trial court entered an order expunging Jim's Pravda's sheriff's deed. But because the parties disputed whether 21st Mortgage should have to pay opposing counsel's attorney fees, the trial court scheduled a hearing to resolve the issue of damages.

As proof of its attorney fees, Guardian submitted an invoice billed by its lawyer. The total on that invoice was \$9,275, which is the amount Guardian was requesting that 21st Mortgage pay. As proof of its attorney fees and costs, Jim's Pravda attached an affidavit signed by its managing member, Vladislav Safir. In the affidavit, Safir attested that Jim's Pravda paid \$1,170.49 in property insurance for the foreclosed property, \$105.20 to record the sheriff's deed and insurance affidavit, \$860 in court fees from its district court case, and \$4,375 in attorney fees.

At the hearing, 21st Mortgage argued that it had no obligation to pay Guardian's attorney fees or Jim's Pravda's costs and attorney fees. It noted that litigants are generally responsible for their own attorney fees unless a statute or court rule says otherwise, or the parties have a contract that says otherwise. And even if Guardian and Jim's Pravda were entitled to attorney fees and costs, the amounts sought by Guardian and Jim's Pravda were unreasonable because they could have avoided most of the expenses they were claiming.

After the trial court reviewed the parties' filings and the prior hearing transcripts, it awarded Guardian \$3,500 in attorney fees and awarded Jim's Pravda both \$4,500 in attorney fees and \$2,335.69 in costs—a total of \$6,835.69. With little explanation for its decision, the trial court briefly noted that it believed its award was fair:

But without getting into all the particulars, I feel that the numbers that I'm putting on the table today, granting today, is a moderation of the various concerns presented here; that it results not as a derivative of the inability of 21st Mortgage to do what it had stated it would do in a timely fashion, and everything else kind of flows from there.

On appeal, 21st Mortgage argues the trial court abused its discretion in awarding attorney fees to Guardian and attorney fees and costs to Jim's Pravda. Specifically, 21st Mortgage argues the trial court had no legal basis to grant these fees and costs. We agree.

We review a trial court's findings of fact underlying an award of attorney fees for clear error, *Brown v Home Owners Ins Co*, 298 Mich App 678, 690; 828 NW2d 400 (2012), and we review de novo underlying questions of law. *Loutts v Loutts*, 298 Mich App 21, 24; 826 NW2d 152 (2012). We review the trial court's decision to award attorney fees and its determination of whether those fees are reasonable for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). Although a trial court has considerable discretion in selecting an outcome appropriate to the circumstances, it necessarily abuses its discretion when it premises its decision on an error of law. See *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257 (2016). In this case, we find the trial court premised its decision to award attorney fees and costs on an error of law.

When it comes to attorney fees, Michigan applies the "American rule." *Smith*, 481 Mich at 526. Under that rule, attorney fees are not recoverable as an element of costs or damages unless

expressly allowed by statute, court rule, judicial exception, common-law exception, or contract. *Id.* A trial court may not award attorney fees based solely on general equitable principles. *In re Adams Estate*, 257 Mich App 230, 237; 667 NW2d 904 (2003). When it comes to costs generally, under MCR 2.625, a trial court may award costs to a litigant only if the litigant was a “prevailing party” in the case. *Fansler v Richardson*, 266 Mich App 123, 127-128; 698 NW2d 916 (2005). To be a prevailing party, at minimum, a party must show that the litigation improved its position. *Id.* at 127, citing *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 81; 577 NW2d 150 (1998). Applying these rules, we find that the trial court lacked a legal basis for awarding costs and attorney fees to Jim's Pravda and attorney fees to Guardian.

First, the trial court had no legal basis for awarding Jim's Pravda attorney fees or costs because Jim's Pravda was not a prevailing party. Guardian and 21st Mortgage asked the trial court to expunge Jim's Pravda's sheriff's deed to the property, and the trial court obliged. Jim's Pravda lost the property; Guardian gained it. In no way was Jim's Pravda's position improved by this litigation, so it was not entitled to attorney fees or costs.

Second, the trial court had no legal basis to award Guardian attorney fees because no exception to the American rule applied here. Indeed, the trial court appears to have awarded attorney fees—to both Guardian and Jim's Pravda—solely on the basis of general equitable principles. In justifying its award, the trial court briefly mentioned that it believed the award to be fair, but elaborated no further. The trial court never acknowledged the American rule and never considered whether an exception to that rule applied. The trial court seems to have taken for granted its power to award attorney fees and costs. Even giving the trial court the benefit of the doubt, we can find no statute, court rule, judicial exception, common-law exception, or contract that would have allowed the trial court to award attorney fees in this case.

MCL 600.2431 discusses attorney fees and costs as they relate to foreclosures by advertisement, but that statute entitles a mortgagee to collect attorney fees—not the mortgagor or a third-party purchaser of the mortgage.³ MCL 600.2591 allows a court to sanction a party that brings a frivolous suit or raises a frivolous defense, but 21st Mortgage did not bring a frivolous suit, nor did it raise a frivolous defense. See *BJ's & Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 404; 700 NW2d 432 (2005). The complaint initiated by 21st Mortgage was successful because the trial court granted 21st Mortgage the relief it sought. Similarly, MCR 1.109(E) allows a court to sanction a party that files a document lacking a basis in fact or law, but 21st Mortgage did not file anything lacking a basis in fact or law. See *New Covert Generating Co, LLC v Twp of*

³ MCL 600.2431(1) states that “[t]he expenses of foreclosing any mortgage by advertisement shall be taxed in the circuit court as in civil actions upon the request of any person paying the expenses thereof, and upon such party liable to pay the same.” MCL 600.2431(2) then states that “[w]here an attorney is employed to foreclose a mortgage by advertisement, an attorney's fee, not to exceed any amount which may be provided for in the mortgage, may be included as a part of the expenses in the amount bid upon such sale for principal and interest due thereon in the following amounts”

Covert, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 348721), slip op at 31-32 (noting that MCR 1.109(E) authorizes a court to sanction an attorney who makes a claim lacking a basis in law or fact).

There is also nothing in the contractual provisions—in the promissory note, mortgage instrument, sheriff’s deed, or notice of foreclosure, that states a third-party buyer or mortgagor would be entitled to attorney’s fees. The mortgage instrument mentions attorney’s fees once, but this is in regards to the *mortgagee*’s right to collect attorney’s fees. And the notice of foreclosure specifically says that “[t]his sale may be rescinded or set aside by the foreclosing mortgagee. In such event, your damages, if any shall be limited solely to a return or refund of the bid amount tendered at such sale, together with interest at the rate set forth herein.”

Because the trial court lacked a legal basis upon which to award attorney fees or costs in this case, we vacate the trial court’s order. Accordingly, we need not address the additional issue 21st Mortgage raises concerning the reasonableness of the fees awarded.

Award of costs and fees vacated. We do not retain jurisdiction.

/s/ Mark T. Boonstra

/s/ Mark J. Cavanagh

/s/ Michael F. Gadola