

STATE OF MICHIGAN
COURT OF APPEALS

PAUL SCHWENDENER III, ROBERT
SCHWENDENER, and PAUL SCHWENDENER
JR.,

UNPUBLISHED
November 8, 2011

Plaintiffs-Appellants/Cross-
Appellees,

v

No. 295756
Leelanau Circuit Court
LC No. 07-007534-CH

MIDWEST BANK & TRUST COMPANY,

Defendant-Appellee/Cross-
Appellee,

and

MICHAEL S. SCHWENDENER,

Defendant-Appellee/Cross-
Appellant.

Before: Markey, P.J., and SAAD and GLEICHER, JJ.

PER CURIAM.

This appeal arises out of defendant Midwest Bank and Trust Company's (the bank or Midwest) foreclosure by advertisement of a multi-million dollar property situated in Leelanau County, Michigan. Plaintiffs Paul Schwendener Jr., Robert Schwendener and Paul Schwendener III, (plaintiffs or the family), attempt to appeal by right two rulings by the trial court: (1) that the foreclosure did not violate the one-action rule, MCL 600.3204(1)(b), and (2) that the bank was a good faith purchaser under MCL 565.29 with rights superior to plaintiffs' claimed trust interest in the property. Defendant-cross-appellant Michael S. Schwendener (Michael), sole legal title holder of the property and mortgagor, raises only the one-action rule. We affirm.

I. FACTS AND PROCEEDINGS

Because Michael and the family have previously appealed the same issues asserted in this case and also in a district court action the bank initiated for possession, extended discussion of the facts and proceedings is warranted.

Midwest, an Illinois bank, foreclosed by advertisement on the property, valued at about \$7,000,000, after Michael, sole title holder and mortgagor, defaulted on his note for \$16,186,754. The mortgage also secured other business loans and guarantees of Michael, the president of an Illinois construction company, Paul H. Schwendener, Inc. (PHSI). Michael's retired father, plaintiff Paul Schwendener Jr., and Michael's two brothers, plaintiffs Robert Schwendener and Paul Schwendener III, claim that Michael held the Michigan property in trust for the family, although no trust documents were ever created much less recorded. The gist of the alleged trust was that all family members enjoyed the right to use the Michigan property. The family contends that the bank was or should have been aware of the family's interest in the property from various statements Michael and other family members made to bank employees and that a bank inspection would have shown family members "in possession" of the property. The family also relies on property insurance certificates for the property that were provided the bank that named family members in addition to Michael as insured parties. Thus, the family claims that under Michigan's race-notice statute, MCL 565.29, the bank was not a good faith purchaser of Michael's mortgage with rights superior to plaintiffs' interest in the property.

The family and Michael also claim that because the bank was simultaneously pursuing legal action in Illinois on Michael's and PHSI's business debt in that state, which was secured at least in part by the Michigan mortgage, it should have known of their interest. Plaintiffs and Michael therefore argue that the bank's foreclosure proceedings violated the so-called one-action rule of MCL 600.3204(1)(b), rendering the foreclosure proceeding void. The bank does not dispute that the mortgage on the Michigan property secured more than one of Michael's debts but asserts that the only basis for foreclosing the mortgage on the Michigan property was Michael's default on the 16 million dollar note, which it was not pursuing in any other legal action.

On July 6, 2007, hours before the sheriff's sale of the property, plaintiffs commenced this action in circuit court against the bank and Michael seeking the imposition of a constructive trust and seeking a preliminary injunction on the grounds of the two claims raised in this appeal. The trial court denied injunctive relief that same day, and the bank purchased the property at the sheriff's sale. Later, the parties moved for summary disposition. The trial court granted the bank's motion and denied plaintiffs' motion.

With respect to the claim that the bank was not a good faith or bona fide purchaser, the trial court noted that the interest in the property the family claimed was a "somewhat vague" "user rights arrangement" that "might be classified as a license." But the court ultimately focused on whether there was sufficient evidence to create a question of fact regarding the bank's knowledge of the family's claimed interest in the property. The trial court reasoned that the insurance certificates "tell very little to a banker" and are simply placed in a file to verify that in the event of fire the bank will be made whole. The court ruled that it would be unreasonable for bank employees to be concerned if the insurance certificates verified that the property was, in fact, insured. The court therefore ruled the insurance certificates did not provide notice to the bank of the family's claimed interest. The trial court also ruled, accepting as true that Michael told a bank officer that he owned the property with other family members while at the same time saying that he was the sole title holder, that this evidence was insufficient to create a question of fact regarding whether the bank was a bona fide purchaser.

The trial court also denied plaintiffs' motion for summary disposition on the basis of the one-action rule. First, the trial court ruled that because collection of the 16 million dollar note was not being pursued in any of the Illinois actions, the one-action rule was not violated. In doing so, the court cited and relied on *Cooper v Bresler*, 9 Mich 534 (1862). The trial court also ruled that because the family had not proved that they held an ownership interest in property, they lacked standing to challenge the foreclosure proceedings on the basis of one-action rule.

The court's order with respect to its summary disposition rulings was entered February 11, 2008, but it was not a final order because Michael remained a defendant with respect to plaintiffs' claims. Plaintiffs applied for leave to appeal in this Court, asserting the same issues raised in this appeal: (1) the one-action rule and (2) whether the bank was a bona fide purchaser under MCL 565.29. Plaintiffs application for leave was denied for failure to persuade this Court of the need for immediate review.¹

On July 9, 2008, after the redemption period expired, the bank initiated a summary proceeding in the district court to recover possession of the mortgaged property. The bank joined Michael and all other occupants as defendants in the summary proceeding. Michael and the family filed answers asserting among other defenses the same two issues raised in this appeal. The bank filed a motion for summary disposition against all defendants, requesting that the district court enter a judgment of possession in its favor. On September 5, 2008, the district court granted the bank's motion on the merits and entered judgment for possession in favor of the bank and against all defendants, including Michael and the family. The district court ruled that "the one action rule has not been violated where there was a note and the only action relating to that note is in Leelanau County." The circuit court subsequently affirmed the district court on January 28, 2009. Both Michael (Docket No. 290393) and the family (Docket No. 290401) filed an application for leave to appeal in this Court on February 17, 2009.

While the district court judgment was pending appeal, on November 17, 2008, the circuit court dismissed without prejudice plaintiffs' original action against Michael after plaintiffs failed to appear for a final settlement conference. The order stated that it was the final resolution of the last pending claim. Plaintiffs filed a claim of appeal, but this Court dismissed the appeal for lack of jurisdiction because an order dismissing a claim without prejudice is not a final order under MCR 7.202(6)(a)(i).² Plaintiffs also filed an application for leave to appeal the circuit court's

¹ *Schwendener v Midwest Bank & Trust Co*, unpublished order of the Court of Appeals, entered July 2, 2008 (Docket No. 284304).

² *Paul Schwendener III v Midwest Bank & Trust Co*, unpublished order of the Court of Appeals, entered December 19, 2008 (Docket No. 289306), lv den 483 Mich 1113; 766 NW2d 855 (Docket No. 138498, June 23, 2009).

November 17, 2008 order, asserting the same two issues as in the instant appeal. This Court denied plaintiffs' application for leave to appeal "for lack of merit in the grounds presented."³

As noted already, both Michael (Docket No. 290393) and the family (Docket No. 290401), applied for leave to appeal the circuit court's order affirming the district court's judgment granting the bank judgment of possession. Among the issues Michael's application raised was that the bank violated the one-action rule. The family's application also raised the same claims asserted in the instant appeal: (1) that the bank violated the one-action rule, and (2) that the bank was not a bona fide purchaser with an interest superior to the family's claimed trust interest in the Michigan property. This Court, "for lack of merit in the grounds presented," denied Michael and plaintiffs' applications for leave to appeal the January 28, 2009 circuit order affirming the September 5, 2008 district court judgment in favor of the bank for possession.⁴

After the district and the circuit courts adversely decided their claims and this Court and our Supreme Court denied leave to appeal, the family and Michael returned to the circuit court in an attempt to revive their original claims. On November 5, 2009, the family filed a motion in circuit court seeking relief from the November 17, 2008, judgment dismissing the family's claims against Michael without prejudice by amending the order to a dismissal with prejudice. The purpose of the motion was to permit plaintiffs to claim an appeal of the circuit court's original February 11, 2008, ruling granting summary disposition to the bank on the family's assertions that the one-action rule was violated and that the bank was not a bona fide purchaser under MCL 565.29. The circuit court held a hearing on the motion on December 7, 2009, which was attended by counsel for the family, Michael's counsel, and the bank's counsel. At the hearing, plaintiffs' counsel suggested that the only reason this Court denied the family's application for leave to appeal was because the family's claim against Michael was without prejudice. The circuit court judge observed that it had dismissed the family's claims against Michael without prejudice "so that the Schwendeners could come back on Michael here or in another court, should they be serious about pursuing it." The court also reasoned that it was inclined not to change its order simply to afford the family another opportunity to appeal and denied plaintiffs' motion from the bench. The judge signed an order on December 29, 2009, denying plaintiffs' motion "for the reasons stated on the record." This order was filed on December 30, 2009.

Despite the circuit court's ruling from the bench on plaintiffs' motion for relief from the November 17, 2008 judgment, counsel for family and Michael signed a stipulation on December

³ *Paul Schwendener III v Midwest Bank & Trust Co*, unpublished order of the Court of Appeals, entered May 20, 2009 (Docket No. 289303), lv den 485 Mich 977; 774 NW2d 892 (Docket No. 139177, November 23, 2009).

⁴ See *Midwest Bank & Trust Co v Michael S. Schwendener*, unpublished order of the Court of Appeals, entered May 20, 2009 (Docket No. 290393), lv den 485 Mich 978; 774 NW2d 875 (Docket No. 139520, November 23, 2009), and *Midwest Bank & Trust Co v Michael S. Schwendener*, unpublished order of the Court of Appeals, entered May 20, 2009 (Docket No. 290401), lv den 485 Mich 977; 774 NW2d 891 (Docket No. 139179, November 23, 2009).

9, 2009 to reopen the circuit court case to dismiss the family's claims against Michael with prejudice. The circuit court signed the stipulated order on December 12, 2009, and it was filed on December 18, 2009. On this order the family filed the present claim of appeal on December 22, 2009. The appeal does not assert any error with respect to the December 18, 2009 stipulated order; it only raises the same two issues that the circuit court and the district decided adversely and that this Court has declined to review "for lack of merit in the grounds presented."⁵

After the instant clam of appeal was filed, Michael filed a motion in the district court seeking a stay of the possession judgment that had become final after our Supreme Court denied leave to appeal. The family joined in Michael's motion. The district court denied the motion in an order dated January 8, 2010, for lack of jurisdiction because there was no appeal pending from the district court. The district court entered an order of eviction on February 1, 2010. Michael and the family sought relief in circuit court by filing a claim of appeal, applying for leave to appeal and seeking a writ of superintending control. The circuit court entered its orders denying relief on February 22, 2010 (Docket No. 2010-008224-AV). Michael applied for leave to appeal on February 24, 2010, which this Court denied "for lack of merit in the grounds presented." *Midwest Bank & Trust Co v Michael S Schwendener*, unpublished order of the Court of Appeals, entered March 1, 2010 (Docket No. 296611).

II. STANDARD OF REVIEW

This Court reviews de novo a circuit court's decision on a motion for summary disposition. *Davenport v HSBC Bank USA*, 275 Mich App 344, 345; 739 NW2d 383 (2007). We also review de novo questions question of law, including statutory interpretation and the applicability of legal doctrines of preclusion such res judicata or collateral estoppel. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007).

III. ANALYSIS

We affirm the circuit court on any one of a number of independent bases. First, we conclude that neither the family nor Michael is an "aggrieved party" under MCR 7.203(A) as to the stipulated order of December 18, 2009; consequently, this Court must dismiss the family's claim of appeal for lack jurisdiction. Second, because the district court judgment has become final, the doctrines of res judicata or collateral estoppel bar further litigation in circuit court of plaintiffs' and Michael's claims. This appeal is therefore moot. Moreover, we conclude, as previously determined, that the issues asserted in this appeal lack merit.

A. LEGAL BARS TO APPELLATE RELIEF

The bank argues that the doctrines of res judicata or collateral estoppel bar the claims of both Michael and the family because the same issues were raised in the district court, and the adverse judgment in that court became final before entry of the stipulated order of December 18, 2009. The bank contends the district court's ruling is res judicata as to the family and Michael's

⁵ See n 3 and n 4.

effort to revive the two claims in this appeal. Res judicata “bars a subsequent action between the same parties when the evidence or essential facts are identical.” *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). The bank asserts that the elements of res judicata are satisfied here: (1) the prior district court action was decided on the merits; (2) the issues raised in the second action were resolved in the first action; and (3) both actions involved the same parties or their privies. *Id.* In addition, collateral estoppel or issue preclusion also precludes relitigation of the same issues in circuit court because the district court action was between the same parties, culminated in a valid final judgment, and the issues plaintiffs and Michael raise in this case were actually and necessarily determined in the prior proceeding. *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001).

With respect to the timing, the district court judgment is the first action for purposes of claim and issue preclusion because it became final when our Supreme Court denied the family and Michael’s application for leave to appeal on November 23, 2009.⁶ The stipulated order of December 18, 2010, is the second action. The bank correctly argues that it makes no difference that the circuit court action was filed first since the district court action resulted in an earlier final judgment based on the same issues. *Brownridge v Mich Mut Ins Co*, 115 Mich App 745, 750-751; 321 NW2d 798 (1982). We conclude that the bank’s argument has merit: further litigation in the circuit court of the issues presented in this appeal by either Michael or the family is barred by the doctrines of res judicata or collateral estoppel.

We note that the bank did not specifically preserve this argument below as the stipulated order was entered without the bank’s input or approval. The bank, however, did object to plaintiffs’ motion for the entry of an order to same effect as the stipulated order, which objection the trial court accepted and which resulted in the entry of an order on December 30, 2009, denying plaintiffs’ motion “for the reasons stated on the record.” Also, the bank did not file a motion in this Court to dismiss this appeal, MCR 7.211(C)(2), or file a cross-appeal, MCR 7.207(A). But this would not preclude the bank from arguing a meritorious alternative basis for affirming the circuit court’s original ruling of February 11, 2008, granting the bank summary disposition. See *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994). Also, appellate review of an unpreserved issue is proper if it is necessary to a proper determination of the case or if the question is one of law concerning which the necessary facts have been presented. *Klooster v Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011).

We find that the bank’s res judicata argument has merit because the district court ruled in the bank’s favor on the two issues plaintiffs assert on appeal. The district court’s judgment has preclusive effect because (1) the district court action was decided on the merits; (2) the district court judgment is a final decision; (3) both the district court action and the circuit court action involved the same parties or their privies, and (4) the issues in the circuit court case were resolved in the district court case. *Ditmore*, 244 Mich App at 576. Similarly, collateral estoppel precludes plaintiffs and Michael from re-litigating in the circuit court the same two issues that were decided in the bank’s favor in the district court proceeding. “Collateral estoppel, or issue

⁶ See n 4.

preclusion, precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding.” *Id.* at 577.

Plaintiffs and Michael’s argument that the district court judgment is not final for purposes of res judicata and collateral estoppel is without merit. A decision is final when all appeals have been exhausted, or the time available for an appeal has expired. *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006). The fact that the district court might have been influenced by the circuit court’s ruling granting summary disposition in the bank’s favor on the same two issues does not negate that the elements of res judicata and collateral estoppel are satisfied. Nor is it unfair to apply either claim or issue preclusion to prevent continued litigation of these issues because plaintiffs and Michael have had several appellate opportunities already to convince this Court and our Supreme Court that the issues they raise require further review. Indeed, the doctrines of preclusion serve the salutary purposes of putting an end to litigation, eliminating costly repetition, conserving judicial resources, and easing fears of protracted never-ending litigation. See *Richards v Tibaldi*, 272 Mich App 522, 530; 726 NW2d 770 (2006), and *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 33; 620 NW2d 657 (2000).

Moreover, we conclude that plaintiffs are not “aggrieved parties” with respect to the stipulated order of December 18, 2009, so it does not provide plaintiffs an appeal of right, and, consequently, it does not provide Michael the ability under MCR 7.207 to cross-appeal. Generally, when an aggrieved party has claimed an appeal from a final order, the aggrieved party is also free to assert error with respect to other non-final orders in the case. *Green v Ziegelman*, 282 Mich App 292, 301 n 6; 767 NW2d 660 (2009); *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). Here, plaintiffs claim an appeal from the December 18, 2009 stipulated order but only raise issues related to the circuit court’s original order granting summary disposition of February 11, 2008.

Appeals by right are governed by MCR 7.203(A)(1)(a), which provides:

The court has jurisdiction of an appeal of right filed by an aggrieved party from the following: (1) A final judgment or final order of the circuit court, or court of claims, as defined in MCR 7.202(6), except a judgment or order of the circuit court (a) on appeal from any other court or tribunal.

MCR 7.202(6)(a) defines “final judgment” or “final order” in a civil case as “(i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order[.]” Here, plaintiffs assert the stipulated order of December 18, 2009 is a final order under MCR 7.202(6)(a)(i), which permits an appeal of right. But to satisfy MCR 7.203(A)(1)(a), an appellant must also be an “aggrieved party.” *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008); *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006). Michael clearly is not an aggrieved party with respect to the stipulated order that dismissed the family’s claims against him with prejudice. And, plaintiffs are not “aggrieved parties” as to the December 18, 2009, order. Indeed, they agreed to it.

“It is elementary that one cannot appeal from a consent judgment, order or decree[.]” *Dora v Lesinski*, 351 Mich 579, 582; 88 NW2d 592 (1958). “Simply put, this Court has jurisdiction only over appeals filed by an ‘aggrieved party.’” *Reddam v Consumer Mortgage Corp*, 182 Mich App 754, 757; 452 NW2d 908 (1990), overruled in part by *Cam Constr v Lake Edgewood Condo Ass’n*, 465 Mich 549, 557; 640 NW2d 256 (2002). The stipulated order is, in essence, a consent judgment, to which plaintiffs are not “aggrieved parties” who may claim an appeal under MCR 7.203(A)(1)(a). *Id.* at 756-757. As a result, plaintiffs may not claim an appeal from the December 2009 stipulated order, and Michael may not cross-appeal under MCR 7.207. Plaintiffs and Michael may not through their stipulated order create a new appeal of the circuit court’s February 11, 2008, order granting the bank summary disposition.

In sum, plaintiffs’ appeal and Michael’s cross-appeal raise issues for which further litigation is barred by the doctrines of res judicata or collateral estoppel. Consequently, this appeal is moot. “An issue becomes moot when a subsequent event renders it impossible for the appellate court to fashion a remedy.” *Kieta v Thomas M Cooley Law School*, 290 Mich App 144, 147; 799 NW2d 579 (2010). Moreover, neither the family nor Michael is “aggrieved” by the December 2009 stipulated order, so this Court without jurisdiction. MCR 7.203(A)(1)(a); *Kieta*, 290 Mich App at 147; *Reddam*, 182 Mich App at 757.

B. PLAINTIFFS’ CLAIMS LACK MERIT

Alternatively, we briefly address the merits of plaintiffs’ and Michael’s claims and conclude this Court’s prior evaluation was correct.

1. THE ONE-ACTION RULE

Plaintiffs and Michael argue that the bank violated the one-action rule, MCL 600.3204(1)(b), when it foreclosed the mortgage by advertisement even though the mortgage also secured other debts that the bank was then legally pursuing in Illinois courts. Plaintiffs and Michael contend that this violated the one-action rule because, emphasizing the italicized part of the statutory language, the bank had instituted legal action “to recover the debt secured by the mortgage or *any part of the mortgage*.” MCL 600.3204(1)(b). Plaintiffs and Michael also assert the bank’s failure to comply with the statute renders its foreclosure void *ab initio*, citing *Davenport v HSBC Bank USA*, 275 Mich App 344, 347-348; 739 NW2d 383 (2007), which found a structural defect in a violation of MCL 600.3204(1)(d). The bank does not dispute that the mortgage at issue secured other debts that were pursued in Illinois courts. It argues that the one-action rule was not violated because the debt in default that formed the basis for the foreclosure at issue was not among the debts litigated in Illinois. In light of the plain language of MCL 600.3204(1)(b), we find the bank’s argument more persuasive.

The statute allows foreclosure by advertisement where “[a]n action or proceeding has not been instituted, at law, to recover *the* debt secured by the mortgage or any part of the mortgage” MCL 600.3204(1)(b)(emphasis added). We conclude the statute focuses on the debt, not the mortgage that secures the debt, and that it is the debt that must not be the subject of simultaneous legal action and a foreclosure proceeding on mortgaged property that secures the debt. The Legislature intended “to prevent proceedings, at the same time to prosecute the personal liability of the mortgagor and pursue the land.” *Lee v Clary*, 38 Mich 223, 227 (1878).

Properly read, the statute precludes foreclosure by advertisement when there is an on-going legal action to collect on “the debt” that is secured by “by the mortgage or any part of the mortgage,” MCL 600.3204(1)(b), that is being foreclosed by advertisement.

Had the statute been worded to allow foreclosure by advertisement only where no action has been instituted to recover “any debt” or “a debt” secured by the mortgage, or any part of the mortgage, we might agree with plaintiffs and Michael’s interpretation. But, since “the debt” at issue in this case is not “the debt” the bank was pursuing in the Illinois legal actions, we conclude that the bank did not violate MCL 600.3204(1)(b). The trial court did not err in ruling the bank’s foreclosure proceeding was not subject to attack on the basis of the one-action rule.

Our reading of the state is reinforced by *Church & Church, Inc v A-1 Carpentry*, 281 Mich App 330; 766 NW2d 30 (2008), vacated in part and aff’d in part on other grounds 483 Mich 885; 759 NW2d 877 (2009). In that case, the parties had competing mortgage and construction lien claims. The plaintiff asserted that a foreclosure by advertisement should have been voided because a judicial foreclosure was already pending on the property. The Court rejected the plaintiff’s argument, finding that foreclosures by advertisement are matters of contract, authorized by the mortgagor. *Id.* at 339. The Court rejected the plaintiff’s argument that the purpose of the statute was to force an election of remedies involving foreclosures of the same property. Quoting *Lee*, 38 Mich at 227, and *United States v Leslie*, 421 F2d 763, 766 (CA 6, 1970), the Court noted that the object of the statute was to prevent simultaneous proceedings to prosecute the personal liability of the mortgagor and to pursue the land. The Court determined “the intention of the Legislature with respect to the foreclosure statutes was to force an election of remedies by a mortgagee concerning a single debt; i.e., the same mortgagee cannot simultaneously entertain a lawsuit for judicial foreclosure and a foreclosure by advertisement, as it would allow for double recovery on the same debt.” *Church & Church Inc*, 281 Mich App at 341. This reading of the Legislature’s intent regarding MCL 600.3204(1)(b) is the same as we discern from its plain language.

Plaintiffs’ and Michael’s reading § 3204(1)(b) would change “*the* debt secured by the mortgage” in the statute to read “*any* debt secured by the mortgage.” And, although a debt and a mortgage that secures it are separate legal contracts, plaintiffs’ and Michael’s reading § 3204(1)(b) would change “or any part of the *mortgage*” to read “or any part of the *debt*.” It is an axiomatic principle of statutory construction that nothing will be read into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself. See *McJunkin v Cellasto Plastic Corp*, 461 Mich 590, 598; 608 NW2d 57 (2000); *Booker v Shannon*, 285 Mich App 573, 578; 776 NW2d 411 (2009).

Consequently, on the merits of this issue, we would affirm the circuit court’s grant of summary disposition to the bank because the one-action rule of § 3204(1)(b) was not violated.

2. MCL 565.29: GOOD FAITH PURCHASER

Plaintiffs assert that the trial court erred by ruling that the bank was a good faith or bona fide purchaser under MCL 565.29. Plaintiffs also argue that the circuit court erred by not concluding that genuine issues of material fact remained regarding the bank’s notice of plaintiffs’ claimed interest in the property. We disagree.

Plaintiffs' argument is two-fold: (1) a constructive trust should be imposed against Michael and in favor of plaintiffs, and (2) plaintiffs' interest in that constructive trust is superior to that of the bank's mortgage interest. Plaintiffs' argument focuses on the second step of the argument, that is, the bank should have been on notice of plaintiffs' constructive trust interest against Michael. Plaintiffs make no argument that a constructive trust should be imposed, and further, have now forever waived any claim in that regard against Michael. Plaintiffs may not simply announce their position, and then leave it up to this Court to discover and rationalize a basis for their claim. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Therefore, for this reason alone, the premise of plaintiffs' argument fails.

Furthermore, a constructive trust never existed. A constructive trust is imposed when property has been acquired under such circumstances that the holder of legal title may not, in good conscience, retain the beneficial interest. *Kent v Klein*, 352 Mich 652, 656; 91 NW2d 11 (1958). Constructive trusts do not arise by agreement or from intention, but by operation of law; fraud, active or constructive, is the essential element to their creation. *Hewelt v Hewelt*, 245 Mich 108, 110; 222 NW 119 (1928). In other words, a constructive trust is an equitable remedy that arises independently of any actual or presumed intention of the parties to create a trust. *Potter v Lindsay*, 337 Mich 404, 411; 60 NW2d 133 (1953). The party seeking to have a constructive trust imposed has the burden to establish fraud, misrepresentation, concealment, undue influence, duress, or similar circumstance that would make it inequitable for the legal title holder to retain and enjoy the property. *Kammer Asphalt v East China Twp*, 443 Mich 176, 188; 504 NW2d 635 (1993).

In this case, plaintiffs offer no argument to support a finding that a constructive trust should be imposed. And, in any event, even if a basis for imposing a constructive trust existed, a constructive trust is an equitable remedy that arises by operation of law. Therefore, even assuming plaintiffs and Michael intended to create a constructive trust, or that equity requires imposing a constructive trust, until such a trust is actually created by a court of law, it does not exist. As a result, since a constructive trust was never judicially created in this case, plaintiffs do not have a constructive trust interest in the property to which the bank's mortgage interest must cede. Thus, even assuming the bank had notice of plaintiffs' possession of the property so as to trigger further inquiry as to plaintiffs' interest in the property, the failure to make such an inquiry is moot as, ultimately, plaintiffs' claimed constructive trust interest does not actually exist.

Additionally, the undisputed facts establish that plaintiffs never possessed any other cognizable interest in the Michigan property superior to the bank's mortgage. At best, plaintiffs possessed an inchoate expectation of the ability to use the Michigan property with Michael's permission. This expectation, however, never developed into a cognizable interest such as a written trust agreement or a constructive trust imposed by operation of law. Michigan law requires that any trust interest in real property must be in writing. MCL 566.106; *Troff v Boeve*, 354 Mich 593, 598; 93 NW2d 311 (1958). And, even if plaintiffs could have convinced a court of equity that Michael committed fraud sufficient to impose a constructive trust, plaintiffs only brought an action against Michael for the imposition of a constructive trust long after Michael had mortgaged the property to the bank and the bank had commenced foreclosure. Also, by dismissing their complaint against Michael with prejudice, plaintiffs have forever waived any such claim. Plaintiffs have never possessed a cognizable interest in the property superior to the

bank's mortgage. Consequently, any argument that the bank had notice or should have had notice of plaintiffs' inchoate claims is irrelevant.⁷

Similarly, plaintiffs cannot prevail under MCL 565.29, which provides in pertinent part:

Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded.

A "conveyance" for purposes of MCL 565.29 is defined as "every instrument in writing, by which any estate or interest in real estate is created, aliened, mortgaged or assigned; or by which the title to any real estate may be affected in law or equity" MCL 565.35.

Thus, pertinent to plaintiffs' claims under MCL 565.29, because they had no written trust interest in the property, plaintiffs had no unrecorded "conveyance" that could be superior to the bank's mortgage. Simply stated, because plaintiffs never possessed an unrecorded "conveyance," they could not have rights superior to the bank's recorded mortgage. Consequently, plaintiffs' claims under MCL 565.29 are meritless.

Finally, plaintiffs' claim that the circuit court prematurely granted summary disposition also lacks merit. Generally, summary disposition is premature if granted before discovery on a disputed fact issue is complete. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009). But when further discovery does not present a fair likelihood of uncovering factual support for the opposing party's position, entry of summary disposition is proper. *Liparoto Constr Co v Gen Shale Brick, Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009). Here, plaintiffs intended further discovery to serve as a fishing expedition for evidence of notice to the bank of plaintiffs' purported interest in the Michigan property. But further discovery would have been futile because plaintiffs possessed no cognizable interest in the property for the bank to notice. At best, plaintiffs possessed an inchoate expectation of continued use of the property in the future with Michael's permission. While plaintiffs might have possessed a claim against Michael for the imposition of a

⁷ Moreover, plaintiffs rely on evidence that does not give notice of a cognizable interest in the property. Possession with permission of the fee owner cannot ripen into ownership. *Canjar v Cole*, 283 Mich App 723, 731-732; 770 NW2d 723 (2009). In addition, "title acquired by adverse possession is neither record title nor marketable title until the adverse possessor files a lawsuit and obtains a judicial decree." *Beach v Lima Twp*, 489 Mich 99, 107; 802 NW2d 1 (2011). The bank also cites authority that possession by family members of the fee holder, without more, is insufficient to place prospective purchasers on notice of further inquiry. *Atwood v Bearss*, 47 Mich 72, 73-74; 10 NW 112 (1881); *Nagelspach v Shaw*, 146 Mich 493, 496; 109 NW 843 (1906). With respect to a certificate of homeowners' property insurance, it cannot create an ownership or trust interest in the property insured. Many reasons exist for being named an insured, including protection against liability claims and loss of personal property.

constructive trust, an action to do so was not commenced until after the foreclosure proceedings were well underway. Plaintiffs have now forever waived any such claim.

In sum, plaintiffs never had more than an inchoate expectation—not a cognizable property interest as would be necessary to affect the bank’s bona fide or good faith purchaser status under MCL 565.29—even if the bank had notice. Under these circumstances, further discovery would have been futile; summary disposition was proper.

For all of the foregoing reasons, we conclude that the circuit court properly granted summary disposition in favor of the bank.

We affirm. Defendant Midwest Bank and Trust Company as the prevailing party may tax costs under MCR 7.219.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Elizabeth L. Gleicher