STATE OF MICHIGAN

COURT OF APPEALS

HAROLD SMITH and PHYLLIS SMITH, Plaintiffs-Appellants, v HOUSEHOLD FINANCE CORPORATIONS III, Defendant-Appellee.	UNPUBLISHED September 20, 2011 No. 298645 Wayne Circuit Court LC No. 09-024894-CH

Before: MURPHY, C.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

In this action to recover alleged surplus proceeds from a home foreclosure sale, Harold and Phyllis Smith (hereinafter "the Smiths") challenge the trial court's order granting Household Finance Corporations III's (hereinafter "Household") motion for summary disposition. We affirm.

The pertinent facts are not in dispute. Household as the lender for the Smiths' second mortgage loan paid off the first mortgage loan to Countrywide Home Loans ("Countrywide") in 2005. The Smiths unsuccessfully sued Household for having paid off the first mortgage in an earlier legal action. Household later foreclosed on the second mortgage and purchased the property at a sheriff's sale. The Smiths did not redeem the property. In this action, the Smiths alleged that the amount that Household remitted to pay off the first mortgage loan was an "expense[] of foreclose[ure]" that Household was statutorily[1] required to tax in circuit court and that Household's failure to do so resulted in a surplus of approximately $90,000 from the foreclosure sale to which the Smiths were entitled. Household filed a motion seeking summary disposition and argued that the payoff amount to Countrywide, which occurred two years before the foreclosure action was brought, was not an "expense" of foreclosure in accordance with the relevant statutory provision[2], but instead became part of the mortgage obligation itself. Household further contended that, in light of the judgment in the 2006 action, the Smiths' present claims were barred by res judicata. The trial court granted Household's motion.

[1] MCL 600.2431.

[2] *Id.*

This Court reviews a trial court's decision on a motion for summary disposition de novo.[3] Summary disposition may be granted when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law."[4] We agree that summary disposition was appropriate in this case because the material facts are not in dispute and the Smiths' attempt to equate the prior Countrywide loan payoff as an expense of foreclosure under the referenced statutory provision[5] fails as a matter of law.

The Smiths contend that Household was required to "tax" the amount that it paid to Countrywide when paying off Countrywide's first mortgage and that the failure to do so resulted in a "surplus" from the sheriff's sale.[6] The statutory provision relied on by the Smiths states:

> The 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.[7]

We disagree with the premise of the Smiths' argument that Household's payoff of the Countrywide mortgage should be treated as an "expense[] of foreclosing" the second mortgage.

A separate statutory provision[8] addresses surplus proceeds of a sale in a foreclosure by advertisement and specifically states:

> If after any sale of real estate, made as herein prescribed, there shall remain in the hands of the officer or other person making the sale, any surplus money after satisfying *the mortgage on which the real estate was sold, and payment of the costs and expenses of the foreclosure and sale*, the surplus shall be paid over by the officer or other person on demand, to the mortgagor, his legal representatives or assigns, unless at the time of the sale, or before the surplus shall be so paid over, some claimant or claimants, shall file with the person so making the sale, a claim or claims . . . .[9]

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[3] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[4] MCR 2.116(C)(10).

[5] MCL 600.2431(1).

[6] Citing MCL 600.2431(1).

[7] MCL 600.2431(1).

[8] MCL 600.3252(1).

[9] *Id*. (emphasis added).

In describing this process for making a claim against the alleged surplus of a foreclosure sale, the statute distinguishes "the mortgage on which the real estate was sold," and "the costs and expenses of the foreclosure and sale."[10]

When Household paid off the Countrywide mortgage in 2005, that amount became indebtedness secured by the second mortgage. Household's mortgage agreement with the Smiths states, in relevant part:

> If Borrower fails to perform the covenants and agreements contained in this Mortgage, or if any action or proceeding is commenced which materially affects Lender's interest in the Property, then Lender, at Lender's option, upon notice to Borrower, may . . . disburse such sums . . . and take such action as is necessary to protect Lender's interest. . . . [¶] *Any amounts disbursed by Lender pursuant to this paragraph 7, with interest thereon, at the Contract Rate, shall become additional indebtedness of Borrower secured by the Mortgage*. Unless Borrower and Lender agree to other terms of payment, such amounts shall be payable upon notice from Lender to Borrower requesting payment thereof. Nothing contained in paragraph 7 shall require Lender to incur any expense or take any action hereunder.[11]

The trial court correctly rejected the Smiths' argument that Household's payment to Countrywide was an "expense[] of foreclosing" on the second mortgage.[12] The disbursed amount became "additional indebtedness . . . secured by the Mortgage." The statutory provision relied on by the Smiths applies only to "expenses of foreclosing."[13] The amount of the mortgage on which the real estate was sold is distinct from the expenses of foreclosure.[14] As a result, the statutory provision cited and relied on by the Smiths does not apply to the amount that Household previously paid to Countrywide in satisfaction of the Countrywide loan.[15]

Whether Household acted properly in making the 2005 payment is a contractual matter, which the Smiths challenged in the earlier 2006 action that was dismissed. The Smiths do not claim in this appeal that the payment was improper. The Smiths instead argue against Household's reliance on language from the mortgage agreement for purposes of this action by contending that there was no evidence that Household "request[ed] payment thereof."[16] The Smiths characterize this as a "condition precedent," and claim that Household's failure to request

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[10] *Id*.

[11] Paragraph 7 (emphasis added).

[12] MCL 600.2431(1).

[13] *Id*.

[14] See MCL 600.3252(1).

[15] MCL 600.2431(1).

[16] Paragraph 7.

payment means that Household cannot rely on the language of the mortgage agreement.[17] The phrase "requesting payment thereof" does not concern Household's disbursement or the addition to the indebtedness. The phrase is immaterial to a determination whether the amount Household paid Countrywide was an expense of foreclosing the second mortgage.

The Smiths emphasize that in a September 29, 2005, letter, Household stated, "Paying off a senior lien is part of our foreclosure process in order to protect our interest in the property." This statement does not govern whether the payment is an "expense[] of foreclosing" for statutory purposes.[18]

Because the premise of the Smiths' argument that a surplus existed following the foreclosure sale is faulty, their claim of entitlement to a surplus necessarily fails. The trial court did not err in granting Household's motion for summary disposition.

Based on our determination that summary disposition was properly granted; we find it unnecessary to consider whether collateral estoppel or res judicata also barred the Smiths' claim.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

[17] *Id*.

[18] MCL 600.2431(1).