# STATE OF MICHIGAN

# COURT OF APPEALS

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| DANIEL WALLACE,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>September 29, 2011 |
| v | No. 299984<br>Wayne Circuit Court |
| CHASE HOME FINANCE LLC ,<br><br>Defendant-Appellee. | LC No. 2009-029290-CH |

Before: SERVITTO, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting summary disposition in defendant's favor. We affirm.

Plaintiff owned a condominium in Wayne County and granted a mortgage on the premises to First Federal of Michigan in 2001. On October 30, 2009, defendant commenced foreclosure proceedings on plaintiff's condominium pursuant to the Foreclosure of Mortgages by Advertisement Act, MCL 600.3201 et seq. Plaintiff initiated an action against defendant on December 1, 2009, seeking to enjoin the foreclosure based upon defendant's alleged non-compliance with applicable statutory foreclosure provisions. Plaintiff also asserted in his complaint that defendant violated the Michigan Consumer Protection Act, MCL 445.901 et seq. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10) asserting, among other things, that there was no question of material fact that it complied with all statutory provisions necessary to move forward with the foreclosure, and that the Consumer Protection Act was inapplicable as a matter of law. The trial court agreed, and, after reviewing arguments raised by plaintiff concerning the mortgage documents, granted summary disposition in defendant's favor. This appeal followed.

We review a trial court's decision to grant or deny summary disposition de novo. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A trial court may properly grant summary disposition under MCR 2.116(C)(8) where the opposing party has failed to state a claim on which relief can be granted. *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 42; 672 NW2d 884 (2003). Motions brought pursuant to MCR 2.116(C)(8) test the legal sufficiency of a claim based solely upon the pleadings, and when deciding such a motion, courts must accept all well-pleaded factual allegations as true and construe them in the

light most favorable to the non-moving parties. *Adair v State of Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004).

A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of the plaintiff's complaint. *Robinson v Ford Motor Co*, 277 Mich App 146, 150; 744 NW2d 363 (2007). When reviewing a motion under subrule (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). Summary disposition is appropriate if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Robinson*, 277 Mich App at 150-151. "Questions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

On appeal, plaintiff first contends that defendant should have been enjoined from proceeding with foreclosure by advertisement because the subject mortgage does not contain a power of sale provision. We disagree.

The goal of contract interpretation is to read the document as a whole and to apply the plain language used in order to honor the intent of the parties. *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). A written contract must be interpreted according to its plain and ordinary meaning. *Woodington v Shokoohi*, 288 Mich App 352, 373–374; 792 NW2d 63 (2010). If the language is clear and unambiguous, the contract must be and enforced as written. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999).

The mortgage at issue contains the following relevant provision:

> 22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property . . . . If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law . . . .
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> If Lender invokes the power of sale, Lender shall give notice of sale to Borrower in the manner provided in Section 15. Lender shall publish and post the notice of sale, and the Property shall be sold in the manner prescribed by Applicable Law . . . .

According to plaintiff, while the above *refers* to a power of sale, it does not actually *grant* a power of sale. The distinction is one without difference, however, and fails to appreciate the effect of plaintiff's signature on the mortgage.

Plaintiff undeniably signed the mortgage which states that if a default (which plaintiff does not dispute occurred) is not cured, the lender may "invoke" the power of sale. "Invoke" means "to resort to; use or apply." *The American Heritage Dictionary of the English Language, 4th Ed.* By signing the mortgage, plaintiff was expressly agreeing that the mortgagor may use or apply the power of sale in the event of a default on his part. The mortgage then explains how the plaintiff is to be notified of the sale and requires that the property be sold in accordance with applicable law. Thus, that the property may be sold upon default is not merely a passing reference, but a condition referenced repeatedly and in some detail. Contrary to plaintiff's assertion otherwise, then, he is put on notice that in the event of default, the lender may sell his property and is, indeed, agreeing to the same. The mortgage plainly and unambiguously contains a power of sale.

Plaintiff next contends that even if the mortgage contained a valid power of sale, defendant failed to comply with the requisite notice provision contained in the mortgage. We disagree.

Plaintiff directs us to section 22 of the mortgage which requires the Lender, if invoking the power of sale, to "give notice of sale to Borrower in the manner provided in Section 15." Section 15 provides:

> All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means . . . .

Plaintiff acknowledges receiving a letter from defendant dated September 1, 2009 concerning his default on the subject mortgage, but claims that the letter did not give notice of the specific sale in compliance with the terms of the mortgage contract.

The letter advised plaintiff that he was in default because he had failed to pay the required monthly installments "commencing with the payment due 07/01/2009." The letter further advised that the past due amount totaled $4,842.00, that plaintiff must pay that amount within 32 days from the date of the notice to cure the default, and that if plaintiff failed to cure the default within 32 days, defendant "will accelerate the maturity of the Loan . . . declare all sums secured by the Mortgage immediately due and payable, and commence foreclosure proceedings, all without further notice to you." The letter unequivocally advised plaintiff that if the default were not cured, foreclosure proceedings, which were spelled out in the mortgage to include sale, would occur. While the letter did not, in fact, notify plaintiff of the sale date and no later personal correspondence advised plaintiff of the December 2, 2009 sale date, it could be argued that the last sentence of section 15 of the mortgage negates any requirement of personal notice of the sale date: "If any notice required by this Security Instrument is also required under Applicable Law, the Applicable law requirement will satisfy the corresponding requirement

under this Security Agreement." Notice of a sale by advertisement is required by applicable law, specifically MCL 600.3208. Under that statute, "notice that the mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, shall be given by publishing the same for 4 successive weeks at least once in each week, in a newspaper published in the county where the premises included in the mortgage and intended to be sold, or some part of them, are situated." Because notice of the sale required by the security agreement is also required by law, the applicable law requirement (i.e., publication) satisfies the corresponding personal notice requirement under the security agreement. Defendant thus complied with the notice requirement in the mortgage.

Plaintiff also asserts that defendant is precluded from foreclosing because it did not acquire the debt in a timely manner. We disagree.

MCL 600.3204 provides:

> (1) Subject to subsection (4), a party may foreclose a mortgage by advertisement if all of the following circumstances exist:
> (a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.
> (b) An action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage; or, if an action or proceeding has been instituted, the action or proceeding has been discontinued; or an execution on a judgment rendered in an action or proceeding has been returned unsatisfied, in whole or in part.
> (c) The mortgage containing the power of sale has been properly recorded.
> (d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage.
> (2) If a mortgage is given to secure the payment of money by installments, each of the installments mentioned in the mortgage after the first shall be treated as a separate and independent mortgage. The mortgage for each of the installments may be foreclosed in the same manner and with the same effect as if a separate mortgage were given for each subsequent installment. A redemption of a sale by the mortgagor has the same effect as if the sale for the installment had been made upon an independent prior mortgage.
> (3) If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale under section 3216 evidencing the assignment of the mortgage to the party foreclosing the mortgage.

An affidavit of publication indicates that notice of foreclosure on the subject property was published on October 30, November 6, November 13 and November 20, 2009 and was scheduled for December 2, 2009. Defendant has asserted that it was the servicing agent of the mortgage on the subject property and provided evidence of the same via its September 1, 2009 letter to plaintiff indicating that it was accepting the overdue installment payments on the mortgage. Defendant has not refuted this assertion, nor provided any evidence to the contrary.

As indicated in MCL 600.3204(1)(d) the servicing agent of a mortgage has the authority to foreclose the mortgage by advertisement. Thus, so long as defendant was the servicing agent of the mortgage as of September 1, 2009, it had the authority to foreclose on the mortgage after that date.

And, MCL 600.3204(3) provides:

> If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale under section 3216 evidencing the assignment of the mortgage to the party foreclosing the mortgage.

Plaintiff was assigned the mortgage through a signed, notarized "Assignment of Mortgage" executed by JPMorgan Chase Bank on October 28, 2009. Thus, when defendant published its first notice of foreclosure on October 30, 2009, it had an interest in the indebtedness. The assignment was recorded November 10, 2009, and the sale of the property was scheduled to take place on December 2, 2009 (it has not yet taken place). As of the date scheduled for sale of the property, a record chain of title existed concerning the property, such that defendant complied with the statutory requirements for foreclosure by advertisement.

Finally, plaintiff asserts that defendant is subject to Michigan's Consumer Protection Act (MCPA). Plaintiff asserts that defendant is not a bank, and is unlicensed and unregulated, such that it is not exempt from the Michigan Consumer Protection Act. Plaintiff's claim is nothing but a bare assertion without any supporting facts. Furthermore, plaintiff did not specify in what manner defendant allegedly violated the MCPA. However, we find plaintiff's claim without merit for other reasons.

The MCPA provides protection to Michigan's consumers by prohibiting various methods, acts, and practices in trade or commerce. *Slobin v Henry Ford Health Care*, 469 Mich 211, 215; 666 NW2d 632 (2003). There are, however, categories of transactions that are exempt from the MCPA. Relevant to the instant matter, MCL 445.904(1) provides that the MCPA does not apply to "(a) A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States."

Here, the assignor of the mortgage to plaintiff was JPMorgan Chase Bank, NA which is listed on an Office of the Comptroller of Currency (OCC) website (helpwithmybank.gov) as a national bank. Defendant is listed as a subsidiary of JPMorgan Chase Bank NA. According to the same website, subsidiaries are companies owned or controlled by a national bank and they are regulated by the OCC. The OCC is an office of the US Department of Treasury charged with chartering, regulating, and supervising all national banks and federal savings associations.

In *Newton v West*, 262 Mich App 434, 440; 686 NW2d 491 (2004), a panel of this Court noted that under 12 USC 1464, a federal savings bank is specifically authorized to make residential mortgage loans under laws administered and regulated by an office of the Department of Treasury. The Court thus found that residential mortgage loan transactions made by federal savings banks fall squarely within the exemption specified in MCL 445.904(1)(a). Similarly,

under 12 USC § 371, any national banking association may "make, arrange, purchase, or sell loans or extensions or credit secured by liens on interests in real estate, subject to . . . such restrictions and requirements as the Comptroller of Currency may prescribe by regulation or order." As a national bank is empowered to make mortgage loan transactions and a subsidiary of a national bank is, according to the OCC owned or controlled by a national bank and regulated by the OCC, it would follow that a subsidiary such as defendant is authorized to conduct the business of its parent company. See, *Patterson v CitiFinancial Mtg. Corp*, 288 Mich App 526; 794 NW2d 634 (2010) (the focus is generally on the exercise of the power granted by federal law, even if the power was exercised by one other than the bank, in furtherance of that power). Plaintiff has not supported its claim that defendant was subject to the MCPA or refuted defendant's claim that it was not. Summary disposition was thus appropriate on this claim in defendant's favor.

Affirmed.

/s/ Deborah A. Servitto
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly