STATE OF MICHIGAN

COURT OF APPEALS

MELAINE CLAXTON and RALPH CLAXTON, Plaintiffs-Appellants, v ORLANS ASSOCIATES, P.C., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. and BAC HOME LOANS SERVICING, L.P., Defendants-Appellees.	UNPUBLISHED March 20, 2012 No. 300151 Wayne Circuit Court LC No. 10-003923-CZ
FEDERAL NATIONAL MORTGAGE ASSOCIATION, Plaintiff-Appellee, v RALPH CLAXTON and MELAINE CLAXTON, Defendants-Appellants.	No. 303855 Wayne Circuit Court LC No. 10-007833-AV

Before: STEPHENS, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

In Docket No. 300151, plaintiffs, Melaine and Ralph Claxton, appeal the trial court's order that granted summary disposition to defendants, Mortgage Electronic Registration Systems, Inc. (MERS), BAC Home Loans Servicing, L.P. (BAC) and Orlans Associates, P.C. (Orlans). In Docket No. 303855, the Claxtons appeal by leave granted,[1] the trial court's order

[1] *Fed Nat'l Mtg Ass'n v Ralph Claxton*, unpublished order of the Court of Appeals, entered June 7, 2011 (Docket No. 303855). This order also served to consolidate Docket No. 303855 with Docket No. 300151.

that affirmed the district court's grant of a judgment of possession to plaintiff, Federal National Mortgage Association (FNMA). For the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS

Mrs. Claxton obtained a loan from Universal Savings Bank, F.A. secured by the Claxtons' residence. In pertinent part, the mortgage provided:

> Borrower does hereby mortgage, warrant, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, with power of sale, the following described property. . . .
>
> Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender, including, but not limited to, releasing and canceling this Security Instrument.

It is undisputed that BAC was designated as the "servicer" for the loan. The Claxtons defaulted on the loan when they failed to make the required monthly payments. When the Claxtons failed to cure the default, BAC initiated foreclosure proceedings.

The Claxtons filed a complaint to set aside the property foreclosure and they also sought an award of damages. MERS and BAC sought removal of the action to the United States District Court for the Eastern District of Michigan, and the federal court issued a notice of partial remand to the Wayne Circuit Court of the Claxtons' claims for slander of title and their allegations involving MERS.

In the circuit court, MERS, BAC and Orlans moved for summary disposition. The trial court granted Orlans' motion and dismissed the Claxtons' slander of title claim and it also granted BAC and MERS' motion for summary disposition, finding in relevant part:

> [G]iven the facts here on this state claim . . . that you haven't stated a cause of action against Bank of America and MERS. Bank of America foreclosed. They have the right under the statute to foreclose. MERS did not foreclose and MERS didn't slander your title.

When the Claxtons failed to redeem their property, FNMA commenced summary eviction proceedings in the 36th District Court. The district court judge "found no triable issue of fact" and granted FNMA a judgment of possession. The Claxtons appealed this ruling to the Wayne Circuit Court, which affirmed the judgment of possession.

II. DISCUSSION

A. FORECLOSURE BY ADVERTISEMENT

The trial court correctly granted summary disposition to BAC and MERS. This Court reviews a trial court's decision on a motion for summary disposition de novo. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). A motion brought pursuant to MCR 2.116(C)(8) "tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

The Claxtons argue that MERS and BAC did not comply with MCL 600.3204 and, therefore, were not authorized to initiate foreclosure proceedings by advertisement. The statute governing foreclosure of mortgage by advertisement provides, in relevant part:

> (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. [MCL 600.3204.[2]]

The parties do not dispute that the mortgage was in default, that no other proceeding had been initiated for collection and that the mortgage had been recorded consistent with the requirements of MCL 600.3204(1)(a), (b), and (c). Rather, the Claxtons focus on MCL 600.3204(1)(d), arguing that neither MERS nor BAC were the owner of the indebtedness and that this precluded their authority to foreclose by advertisement on the property in accordance with MCL 600.3204(3), which states:

> 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.

As determined by the circuit court, MERS did not initiate the foreclosure by advertisement. Rather, BAC initiated the foreclosure as set forth in the initial affidavit of

[2] The statute has since been amended. 2011 PA 301.

publication. MCL 600.3204(1)(d) permits "[t]he party foreclosing the mortgage [to be] either the owner of the indebtedness or [to have] an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage." It is undisputed that BAC was the servicing agent of the mortgage. To construe section (3) of MCL 600.3204 to preclude the servicer of the mortgage from initiating foreclosure would be in direct contradiction of language contained in section (1)(d) of the same statutory provision that permits "the servicing agent of the mortgage" to "foreclose a mortgage by advertisement." In addition, our Supreme Court has recently discussed the relevant statutory provision, stating:

> [T]he Legislature's use of the phrase "interest in the indebtedness" to denote a category of parties entitled to foreclose by advertisement indicates the intent to include mortgagees of record among the parties entitled to foreclose by advertisement, along with parties who "own[] the indebtedness" and parties who act as "the servicing agent of the mortgage." MCL 600.3204(1)(d). [*Residential Funding Co, LLC v Saurman*, 490 Mich 909, 910; 805 NW2d 183 (2011) (slip op at 2).]

Because BAC was authorized by the clear and unambiguous language of MCL 600.3204(1)(d) to foreclose by advertisement on the property, the trial court correctly granted summary disposition in favor of BAC and MERS on this claim.

B. SLANDER OF TITLE CLAIM

The Claxtons also challenge the trial court's grant of summary disposition to Orlans on their slander of title claim.

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999) (internal citations omitted).]

The Claxtons alleged statutory slander of title under MCL 565.108, which requires a showing of falsity, malice and special damages. *Sullivan v Thomas Org, PC*, 88 Mich App 77, 82; 276 NW2d 522 (1979); *GKC Mich Theaters, Inc v Grand Mall*, 222 Mich App 294, 301; 564 NW2d 117 (1997). "Malice cannot be inferred merely from the filing of an invalid lien. To sustain a claim of slander of title, the plaintiff must show that the defendant knowingly filed an invalid lien with the intent to cause the plaintiff injury." *Stanton v Dachille*, 186 Mich App 247, 262; 463 NW2d 479 (1990).

The Claxtons failed to present evidence of malice by Orlans. The Claxtons assert that the statement contained in the affidavit of publication of July 1, 2009, indicating, "Said mortgage is now held by BAC Home Loans Servicing, LP by assignment" was false, rendering the entire foreclosure proceeding invalid. As the servicing agent of the mortgage, BAC was authorized to

initiate foreclosure proceedings in accordance with MCL 600.3204(1)(d). The affidavit of publication properly identified Universal Savings Bank, F.A. as the "mortgagee." Thus, even if the indication that BAC held the mortgage "by assignment" is construed to be erroneous, there is no indication or demonstration of the requisite element of malice necessary to establish a slander of title claim.

C. COMPLIANCE WITH MCL 600.3208

We also reject the Claxtons' assertion that the sheriff's deed is invalid on the ground that Orlans failed to comply with the requirements of MCL 600.3208. It was undisputed that notice of the foreclosure was first published on July 1, 2009. An affidavit of posting demonstrated that notice of the sale was posted on the property on July 6, 2009, meeting the 15 day requirement of MCL 600.3208. Publication of the sale was also demonstrated by placement of notice in the *Detroit Legal News* on July 8, July 15, and July 22, 2009, meeting the four successive week requirement for publication. Therefore, recordation of the sheriff's deed complied with MCL 600.3232. Because Orlans complied with the statutory requirements for publication, MCL 600.3208, and recordation, MCL 600.3232, there is no basis to invalidate the sheriff's deed.

D. FEDERAL LAW CLAIMS

The Claxtons attempt to resurrect their federal law claims pursuant to the FDCPA, 15 USC 1692 *et seq.*, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USC 1961 to 1962. The United States District Court summarily dismissed these claims in an unpublished opinion in which it ruled that "Orlans is entitled to summary judgment because it is not a debt collector under the FDCPA." *Claxton v Orlans Assoc, PC, et al*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued August 26, 2010 (Docket No. 10-11813) (slip op at 3-4). The federal court later dismissed the Claxtons' RICO claims, granting summary disposition in favor of Orlans and finding that any amendment of the Claxtons' complaint would be "FUTILE." *Claxton v Orlans Assoc, PC, et al*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued January 25, 2011 (Docket No. 10-11813) (slip op at 1). As recognized by this Court, "because the federal court considered and decided the merits of plaintiff's federal claims, its decision is final and binding. That decision is therefore res judicata and bars relitigation of plaintiff's federal claims." *Bell v Fox*, 206 Mich App 522, 526; 522 NW2d 869 (1994) (citation omitted).

The Claxtons' assertion that Orlans did not respond to their July 7, 2009, notice of dispute is irrelevant. Based on the information provided directly by BAC as the creditor represented by Orlans to the Claxtons, the Claxtons' dispute of the debt was adequately addressed and the debt was verified. Because the Claxtons' allegations on this issue fall within the federal law claims raised pursuant to the RESPA, 12 USC 2601 *et seq.*, which were dismissed by the United States District Court in favor of Orlans, again, relitigation is precluded. *Bell*, 206 Mich App at 526.

E. JURISDICTION

The Claxtons claim that the trial court's order is void due to lack of subject-matter jurisdiction premised on fraud and the absence of an assignment to MERS or BAC. A court's

subject-matter jurisdiction over an action involves a question of law that we review de novo. *Harris v Vernier*, 242 Mich App 306, 309; 617 NW2d 764 (2000).

Because the Claxtons' argument on this issue is dependent on a determination that the foreclosure proceedings were improper, there is no merit to this claim. Moreover, the circuit court had subject-matter jurisdiction. In Michigan, circuit courts are deemed to be courts of general jurisdiction, which are vested with "original jurisdiction to hear and determine all civil claims" unless precluded by the constitution or statutes. MCL 600.605; MCL 600.601; Const 1963, art 6, §§ 1, 13. In their complaint, the Claxtons averred that jurisdiction and venue were proper in the circuit court and alleged slander of title pursuant to MCL 565.108; violation of publication and posting requirements for foreclosure proceedings in accordance with MCL 600.3208; and violation of foreclosure proceedings under MCL 600.3204, and they sought equitable relief. Such claims were properly within the subject-matter jurisdiction of the circuit court. Whether any defense or evidence presented by various defendants was true or false is irrelevant for purposes of establishing jurisdiction. "[B]ecause subject-matter jurisdiction does not depend on whether the claim is true or false, but instead on the allegations pleaded . . . the circuit court had subject-matter jurisdiction." *Trost v Buckstop Lure Co*, 249 Mich App 580, 587-588; 644 NW2d 54 (2002). In other words, to determine the propriety of the court's exercise of subject-matter jurisdiction, "the focus is on whether the . . . court had a legal right to hear a particular case." *Id.* at 588. In addition, the circuit court was the proper court for the Claxtons to appeal the district court ruling for purposes of jurisdiction. MCR 7.101(A).

F. ALLEGATION OF BIAS BY THE TRIAL JUDGE

The Claxtons also make a conclusory statement that the trial judge "conspired" with various defendants to deprive the Claxtons of their legal rights, implying bias and wrongdoing. However, the Claxtons fail to cite any facts within the lower court record or legal authority to substantiate such a claim. There is no indication in the record that the Claxtons sought to disqualify the trial judge. MCR 2.003. "[T]his Court will not search for authority to support a party's position, and the failure to cite authority in support of an issue results in its being deemed abandoned on appeal." *Flint City Council v Mich*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2002).

G. ORDER OF POSSESSION

The Claxtons claim that the circuit court erred by affirming the district court's order of possession in favor of FNMA. Based on the court's decision to affirm the district court ruling that there existed "no triable issue of fact," review of this issue is consistent with the review of a grant or denial of summary disposition pursuant to MCR 2.116(C)(10), which is de novo. *Terrien v Zwit*, 467 Mich 56, 61; 648 NW2d 602 (2002). Whether to set aside a mortgage foreclosure sale involves a question "resting largely in the discretion of the court," which should not be disturbed on appeal "unless it satisfactorily appears that such discretion has been misused." *Nugent v Nugent*, 54 Mich 557, 559-560; 20 NW 584 (1884).

The Claxtons premised their appeal of the district court's judgment of possession to the circuit court on compliance with the publication and posting requirements for foreclosure. In the district court, evidence showed that Orlans complied with MCL 600.3208, resulting in "no

triable issue of fact" and the court issued a judgment of possession. On appeal to the circuit court, the Claxtons failed to present evidence to demonstrate a lack of compliance with MCL 600.3208, other than to suggest that the various notices published contained inaccurate or false information regarding the status of BAC and MERS precluding their authority to initiate foreclosure proceedings. The circuit court ruled that "no triable issue" existed as "[t]he mortgagor [sic] complied with the strict requirements of the foreclosure statute," which required "the court . . . to enter the possession judgment." Because the Claxtons failed to present any evidence to contradict documentation demonstrating conformity with the notice and publication provisions for foreclosure, the circuit court did not err when it affirmed the district court's judgment of possession.

On appeal to the circuit court, the Claxtons also alleged that MERS lacked authority to initiate foreclosure proceedings. Despite the circuit court's finding that this issue was unpreserved, the court referred to the separate action initiated by the Claxtons, noting "the Claxtons filed a cause of action against Bank of America, MERS and Orlans in the Circuit Court seeking to quiet title. . . . That action was assigned to this court and MERS, BAC and Orlans' motions for summary disposition were granted on issues identical to those being raised in this appeal. This court's prior rulings are *res judicata* on the issues being raised in this appeal." "Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical." *Eaton Co Bd of Rd Comm'rs v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994). Because the circuit court's ruling on the Claxtons' allegations regarding the authority of BAC and MERS to initiate foreclosure proceedings barred relitigation of that issue, there is no basis to assert error by the circuit court in affirming the judgment of possession. Further, the period for the Claxtons to redeem the property had expired, extinguishing their rights to the property. Because FNMA had obtained possession of legal title to the property and the Claxtons failed to demonstrate any fraud, irregularity, or statutory violation in the foreclosure proceedings, the judgment of possession was properly entered by the district court and subsequently affirmed by the circuit court.

H. PLEADINGS

For the first time on appeal, the Claxtons argue that if their pleadings were somehow deficient in the lower courts, as pro se litigants, they should not have been held to the same standards applied to attorneys. Although some case law implies that the pleadings of pro se litigations are "to be liberally construed" and are held to "less stringent standards" than those prepared by attorneys, *Estelle v Gamble*, 429 US 97, 106; 97 S Ct 285; 50 L Ed 2d 251 (1976) (citation omitted), any technical leniency in no way suggests that pro se litigants may ignore or fail to follow the court rules or that their claims should be sustained despite the absence of factual support, evidence, or legal authority. Again, "[a] party may not leave it to this Court to search for a factual basis to sustain or reject its position." *Great Lakes Div of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 424; 576 NW2d 667 (1998).

I. SHERIFF'S SALE

The Claxtons also claim for the first time on appeal that the individual conducting the sheriff's sale was not properly authorized to do so. "Issues raised for the first time on appeal are not ordinarily subject to review." *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444

Mich 211, 234; 507 NW2d 422 (1993). Because the Claxtons failed to develop any reviewable record in the lower court and did not preserve this issue for review, we decline to review the issue on appeal. *Id*.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Henry William Saad