STATE OF MICHIGAN

COURT OF APPEALS

STATE FARM FIRE & CASUALTY COMPANY,

Plaintiff,

v

AUDREY RANDLE,

Defendant-Appellee,

and

WELLS FARGO BANK, N.A.,

Defendant-Appellant.

UNPUBLISHED
December 20, 2011

No. 301550
Kalamazoo Circuit Court
LC No. 2010-000118-CK

STATE FARM FIRE & CASUALTY COMPANY,

Plaintiff,

v

AUDREY RANDLE,

Defendant-Appellant,

and

WELLS FARGO BANK, N.A.,

Defendant-Appellee.

No. 303117
Kalamazoo Circuit Court
LC No. 2010-000118-CK

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

Two cases involving the same parties were consolidated for appeal. In docket number 301550, an insurance proceeds case, defendant Wells Fargo appeals as of right the trial court's

order granting summary disposition in favor of defendant Audrey Randle. In docket number 303117, Randle appeals as of right the trial court's order denying her motion for actual costs and attorney fees. For the reasons stated in this opinion, we affirm both cases.

I. FACTS & PROCEEDINGS

Plaintiff, State Farm Fire & Casualty Company (State Farm), issued a homeowners insurance policy to Randle. The policy insured Randle's real and personal property located in Kalamazoo, Michigan from May 31, 2008 to May 31, 2009. Randle's property was subject to a mortgage held by Wells Fargo or its predecessor in interest. On December 6, 2008, Randle's property was damaged by a fire, and as a result of the fire, Randle submitted a claim for insurance proceeds to State Farm.

Randle's payments on her mortgage with Wells Fargo became delinquent about the time of the fire. Wells Fargo commenced foreclosure by advertisement upon Randle's property, and on May 21, 2009, a sheriff's sale occurred. Wells Fargo purchased the property; it made a credit bid for $64,414.24, an amount equal to the outstanding indebtedness of Randle. The property was not redeemed. Wells Fargo's purchase of the property at the sheriff's sale extinguished its mortgage on the property.

Wells Fargo's purchase of the property was after an insurance claim was made by Randle, but before any payments were disbursed. Wells Fargo made a claim for the insurance proceeds on May 26, 2009, after it purchased the property at the sheriff's sale. State Farm issued a check for $38,358.66 jointly payable to Randle and Wells Fargo. On February 19, 2010, State Farm filed an interpleader complaint requesting that the trial court join both Randle and Wells Fargo as defendants in order to determine which party was entitled to the insurance proceeds. State Farm deposited insurance policy proceeds of $38,358.66 into the trial court's escrow account and was dismissed as a party.

On September 3, 2010, Randle moved the trial court for summary disposition pursuant to MCR 2.116(C)(10). Randle argued that because Wells Fargo's purchase of the property extinguished the entire mortgage indebtedness owed by Randle to Wells Fargo, it also extinguished any claim Wells Fargo might have had to the insurance proceeds. On October 28, 2010, the trial court granted summary disposition in favor of Randle because it agreed with Randle's position and found that Wells Fargo was not entitled to the insurance proceeds as a matter of law.

On January 13, 2011, Randle moved for an award of actual costs and attorney fees. Randle argued that Wells Fargo's legal position was devoid of arguable legal merit and was accordingly frivolous. A hearing regarding Randle's motion was held on January 24, 2011, and after hearing arguments from both parties the trial court found that Wells Fargo's position was not frivolous. The trial court denied Randle's requests for other costs and attorney fees.

II. THE INSURANCE PROCEEDS

On appeal, Wells Fargo argues that it is entitled to the insurance proceeds as an assignee pursuant to the plain language of the mortgage contract. It maintains that the caselaw supporting

distribution of the insurance proceeds to Randle can be distinguished. Accordingly, Wells Fargo maintains that the trial court erred when it granted summary disposition in favor of Randle.

We review a trial court's decision to grant summary disposition de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim based on the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Id.* The evidence is viewed in the light most favorable to the nonmoving party. *Id.* at 567-568. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to a judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The proper interpretation of a contract is also a question of law that we review de novo. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

The mortgage contract at issue requires the borrower, Randle, to insure the property, and provides that the insurance "shall be carried with companies approved by Lender [Wells Fargo]. The insurance policies and any renewals shall be held by Lender and shall include loss payable clauses in favor of, and in a form acceptable to, Lender." The mortgage then provides in pertinent part:

> In the event of loss, Borrower shall give Lender immediate notice by mail. Lender may make proof of loss if not made promptly by Borrower. Each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Lender, instead of to Borrower and to Lender jointly. All or any part of the insurance proceeds may be applied by Lender, at its option, either (a) to the reduction of the indebtedness under the note and this Security Instrument, first to any delinquent amounts applied in the order in paragraph 3, and then to prepayment of principal, or (b) to the restoration or repair of the damaged Property. Any application of the proceeds to the principal shall not extend or postpone the due date of the monthly payments which are referred to in paragraph 2, or change the amount of such payments. Any excess insurance proceeds over an amount required to pay all outstanding indebtedness under the Note and this Security Instrument shall be paid to the entity legally entitled thereto.
>
> In the event of foreclosure of this Security Instrument or other transfer of title to the Property that extinguishes the indebtedness, all right, title and interest of Borrower in and to insurance policies in force shall pass to the purchaser.

The Michigan Supreme Court has previously considered the interpretation of similar mortgage language. In *Smith v Gen Mtg Corp*, 402 Mich 125, 128; 261 NW2d 710 (1978), the Court determined that "when the loss occurs before a foreclosure sale in which the mortgagee purchases the property for a bid which extinguishes the mortgage debt, the mortgagee is not entitled to the insurance proceeds." Like the mortgage contract at issue in this case, the mortgage contract in *Smith* provided that in the event of loss, any insurance payment was to be sent to the mortgagee to be applied to reduce the mortgage debt or to repair the property. *Id.* at 126-127. Accordingly, although distinguishable because Wells Fargo claims it is entitled to the

insurance proceeds as an assignee, the holding in *Smith* supports the trial court's decision that Wells Fargo was not entitled to the insurance proceeds as a mortgagee.

More on point in this case is *Emmons v Lake States Ins Co*, 193 Mich App 460, 464; 484 NW2d 712 (1992). In *Emmons*, this Court considered whether a mortgagee was entitled to insurance proceeds as an assignee pursuant to an assignment clause in a mortgage contract that was very similar to the assignment clause in this case. The *Emmons* Court determined that the mortgagee was not entitled to insurance proceeds as an assignee. In *Emmons*, the property was damaged by a fire, and after the fire, the mortgagee foreclosed on the property and purchased it for an amount equal to the amount due on the mortgage, thereby satisfying the mortgage debt. *Id.* at 463.

The assignment clause in *Emmons* provided: "If under paragraph 19 the Property is acquired by Lender, Borrower's right to any insurance policies and proceeds resulting from damage to the Property prior to the acquisition shall pass to Lender to the extent of the sums secured by this Security Instrument immediately prior to the acquisition." *Id.* at 464. This Court held in *Emmons* that the mortgagee lost its claim to the insurance proceeds once it foreclosed on the mortgage. *Id.* at 463. The Court explained that while the bank's interest as an assignee in the insurance proceeds vested at the time of the fire, that interest expired upon satisfaction of the debt at the foreclosure sale because the assignment was collateral security for the mortgage debt. *Id.* at 464. The *Emmons* Court stated:

> An assignment made as collateral security for a debt gives the assignee only a qualified interest in the assigned chose, commensurate with the debt or liability secured. This is true even though the assignment is absolute on its face. After the debt secured has been paid, the right to hold the assigned collateral ceases, and the assignee has no interest in the collateral.
>
> We find that, although the assignment survived foreclosure, the debt did not. The assignment, therefore, secured nothing. Since the purchase price at the foreclosure sale was equal to the full amount of the debt, there was no deficiency. If there is no deficiency, there can be no valid claim against any additional collateral. The insurance was an alternative source of payment. Once the debt was paid by other means, any right to the insurance proceeds was extinguished. [*Id.* at 464-465 (citations omitted).]

We find that *Emmons* is controlling in this case. The mortgage in this case used language similar to the language used in the mortgage construed in *Emmons*, and both mortgages assigned the right to insurance proceeds to the mortgagee. In both cases, the mortgagee foreclosed on the property and extinguished the mortgage debt after the property was damaged but before any insurance proceeds were disbursed. As the *Emmons* Court explained, after the mortgage debt is extinguished, the assignment does not secure anything and any right the mortgagee had to insurance proceeds under the mortgage contract is extinguished. *Id.*

Wells Fargo maintains that *Emmons* is not controlling in this case because it is distinguishable. Specifically, Wells Fargo argues that the mortgage in *Emmons* did not assign the proceeds at the time of the loss, and therefore, it created an assignment of a future right.

Wells Fargo maintains that the mortgage contract at issue in this case transferred full rights to the insurance proceeds at the time of the fire. Wells Fargo also maintains that *Emmons* is distinguishable because the *Emmons* mortgage only provided for application of the insurance proceeds to the mortgage debt where the mortgage in this case allows for application of the proceeds to the mortgage debt or to the repair of the dwelling. Even assuming that Wells Fargo is correct about the distinctions between the mortgage at issue in this case and the mortgage interpreted by this Court in *Emmons*, we find that the distinctions cited by Wells Fargo have no significance to the application of the controlling principle set forth in *Emmons*. *Emmons* clearly holds that an assignment of insurance proceeds does not survive when the mortgagee purchases the property and extinguishes the mortgage debt. *Id.* The lender in *Emmons* and Wells Fargo were in the same position; both lenders foreclosed on property damaged by fire and extinguished the mortgage debt, and each was not thereafter entitled to insurance proceeds assigned in the mortgage. The holding in *Emmons* did not rely on the facts that Wells Fargo argues are distinguishable in the instant case. Wells Fargo does not argue that it is entitled to the proceeds as anything other than an assignee, and it does not dispute that the debt was extinguished at the foreclosure sale.[1]

Further, Wells Fargo's citation to decisions from other state courts in support of its argument that it is entitled to the insurance proceeds is not persuasive in this case. Judicial decisions from foreign jurisdictions are not binding on Michigan courts, but may be persuasive. *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006). We do not find the cases cited by Wells Fargo persuasive because binding Michigan authority has already addressed this issue.

Wells Fargo also argues that distribution of the insurance proceeds to it is supported by equitable principles. We disagree. Wells Fargo had an obligation to make an informed bid at the appropriate time in light of the fire damage to the property and the uncertainty of recovering the insurance proceeds. See *New Freedom Mtg Corp v Globe Mtg Corp*, 281 Mich App 63, 73-74; 761 NW2d 832 (2008). "A mortgagee purchases subject to the condition of the property, and the rule of *caveat emptor* applies." *Id.* at 74. Mortgagees stand in the same position as any other purchaser at a foreclosure sale. *Id.* Mortgagees are not permitted to bid more than a foreclosed property is worth at the time of the sale in order to cut off or discourage lower bidders and to defeat the equity of redemption and then claim that the property was worth less than what the mortgagee paid. *Id.* Accordingly, equity does not require that Wells Fargo be awarded the insurance proceeds because Wells Fargo should not have bid more for the property than it was

[1] Wells Fargo's reliance on *Heritage Fed Savings Bank v Cincinnati Ins Co*, 180 Mich App 720, 725-726; 448 NW2d 39 (1989) is misplaced because this Court in *Emmons* declared the language favorable to Wells Fargo's position in *Heritage* was dicta. The *Emmons* Court stated that in "*Heritage*, we specifically declined to decide the question at issue in the instant case: whether the mortgagee was entitled to insurance proceeds under the assignment clause. In *Heritage*, the mortgagor was not entitled to the proceeds, because the fire had been deliberately set. We decline to follow any dicta in *Heritage* which may be contrary to this opinion." *Emmons*, 193 Mich App at 465 (citation omitted).

worth at the time of the sheriff's sale. Under the circumstances, principles of equity do not support Wells Fargo's claim to the insurance proceeds.

III. ATTORNEY FEES AND COSTS

Randle challenges the trial court's order denying her motion for attorney fees and costs. Specifically, Randle argues that Wells Fargo's position was frivolous under MCL 600.2591, and that she was accordingly entitled to fees and costs pursuant to the statute and MCR 2.114(F).

We review a trial court's determination regarding whether an action is frivolous for clear error. *BJ's & Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 405; 700 NW2d 432 (2005). "A decision is clearly erroneous when, although there may be evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008).

The trial court considered whether sanctions were appropriate pursuant to MCL 600.2591 and MCR 2.114(F). MCL 600.2591 provides that "if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action." The statute states that an action is "frivolous" if "[t]he party's legal position was devoid of arguable legal merit." MCL 600.2591(3)(a)(iii). MCR 2.114(F) provides that a party pleading a frivolous claim or defense is also subject to costs as provided in MCR 2.625(A)(2), which provides that "if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591."

In this case, the trial court declined to award sanctions to Randle. The trial court found that Wells Fargo's position was not frivolous because it was not "devoid of arguable legal merit." The trial court explained that while in its opinion the case law was clear, the mortgage involved in this case did use slightly different language than the language previously interpreted in the relevant authority. It also noted that the stakeholder, State Farm, was uncertain regarding who was entitled to the proceeds. Lastly, the trial court acknowledged that "it was not an illogical view of the matter that based on the document signed that the insurance basically would flow with title," even though the trial court found that it "did not in this case."

We find that the trial court did not clearly err in its determination not to award Randle sanctions because we are not "left with a definite and firm conviction that a mistake has been made" in regard to the trial court's conclusion that the legal position advanced by Wells Fargo was not frivolous. *Guerrero*, 280 Mich App at 677. Randle's argument that the decision in *Emmons* essentially rendered Wells Fargo's reliance on *Heritage* frivolous is misplaced because *Emmons* did not overrule *Heritage* and only declined to follow any "dicta" set forth in the *Heritage* opinion. Further, as Wells Fargo points out, and the trial court recognized, the mortgage language in this case was arguably distinguishable because it was not identical to the language previously considered by this Court. While Wells Fargo did not have a strong legal position, we cannot conclude that the trial court clearly erred when it determined that Wells Fargo's position was not "devoid of arguable legal merit." MCL 600.2591(3)(a)(iii).

Affirmed. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering