STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY and MARCI COMMAND, Plaintiffs-Appellants,	UNPUBLISHED April 26, 2012
v	No. 304438 Kent Circuit Court
MACATAWA BANK, Defendant-Appellee.	LC No. 2011-001894-CH

Before: METER, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendant and dismissing plaintiffs' complaint in its entirety. We affirm.

On June 17, 2004, plaintiffs borrowed money from defendant, securing the loan with a mortgage on their home. In 2010, the parties entered into a loan modification agreement, whereby plaintiffs acknowledged that they had defaulted on the loan. According to a January 14, 2010, payment letter, the new loan would be an interest-only home equity line of credit with a monthly payment amount that would vary from month to month "depending on number of days in the cycle, any principal reductions, or actual date of payment." The first date of payment was set as January 31, 2010.

In January 2011, defendant noticed foreclosure proceedings on plaintiffs' home due to a default on the modified loan. Plaintiffs initiated the instant action in March 2011 asserting that they were not in default on the loan and alleging various theories of recovery against defendant including breach of contract, conversion, extortion, mail fraud, and violation of the statutory foreclosure procedure. Plaintiffs also sought a temporary restraining order to halt the foreclosure proceeding, which was denied.[1] In lieu of answering plaintiffs' complaint, defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10) setting forth grounds for dismissing each of the 15 counts contained in plaintiffs' complaint. The trial court granted the motion and plaintiffs now appeal that decision.

[1] Defendant did, however, voluntarily withdraw the foreclosure proceeding after the lawsuit was filed.

We review de novo a trial court's decision on a motion for summary disposition. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). A motion brought under MCR 2.116 (C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. *Dalley v Dykema Gossett*, 287 Mich App 296, 304; 788 NW2d 679 (2010). "A court may grant summary disposition under MCR 2.116(C)(8) if the opposing party has failed to state a claim on which relief can be granted." *Id.* When deciding a motion under (C)(8), the trial court must accept all well-pleaded factual allegations as true, construing them in a light most favorable to the nonmoving party. *Cummins v Robinson Twp*, 283 Mich App 677, 689; 770 NW2d 421 (2009).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of the plaintiff's claim and should be granted when no genuine issue of any material fact exists to warrant a trial. *Spiek v Mich Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). The party moving for summary disposition is required to specifically identify the issues as to which there are no genuine issues of material fact and provide support for the motion in the form of affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(4); *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). "When a motion under subrule (C)(10) is made and supported as provided in [the] rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in [the] rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4); see also *Maiden*, 461 Mich at 120–121. In reviewing a motion under subrule (C)(10), the court considers the pleadings, affidavits, depositions, admissions and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

Plaintiffs first assert that the trial court erred in granting summary disposition in defendant's favor on their claim of illegal violation of statutory foreclosure procedure. In support of this argument, plaintiffs simply state that the foreclosure was initiated based upon manufactured misrepresentations by defendant. Plaintiffs' brief does not, however, provide citation to any relevant authority in support of this argument and, thus, does not conform to the requirements of MCR 7.212(C)(7). "It is not enough for an appellant to simply announce a position or assert an error in his or her brief and then leave it up to this Court to discover and rationalize the basis for the claims, or unravel and elaborate the appellant's arguments, and then search for authority either to sustain or reject the appellant's position." *DeGeorge v Warheit*, 276 Mich App 587, 594-595; 741 NW2d 384 (2007) (citation omitted). While we typically afford a degree of leniency to litigants engaged in self representation, plaintiff's "[a]ppearance in pro per does not excuse all application of court rules." *Bachor v Detroit*, 49 Mich App 507, 512; 212 NW2d 302 (1973).

We do note that plaintiffs' general argument is that a factual dispute remains as to whether they were in default on their payments and thus whether foreclosure was inappropriate. However, the letter attached to the parties' modification agreement indicated that a payment would be due on the last day of each month in a varying amount. It appears from the documents attached to plaintiffs' response to defendant's motion for summary disposition, submitted after an August 18, 2010, payment "catching up" past due payments, another payment was not made on the account until October 1, 2010, in the amount of $690.91. Plaintiffs have not disputed that there was no payment made on the account for September 2010. They have also submitted no

affidavit attesting to the claim of a lack of default on their part, despite the fact that defendant provided the affidavit of its authorized representative swearing that plaintiffs have failed to make payments on the account when due and have failed to pay in the correct amount. And, while plaintiffs contend that they have made the "quoted payment due" of $1153.83 every month since December 31, 2010, in a timely manner, there has been submitted no documentary evidence that this amount is the accurate and owed monthly amount, given that the amount due was previously represented to fluctuate on a monthly basis. Given the lack of documentary evidence provided by plaintiffs in response to the affidavit and other documentary evidence provided by defendant in support of their claim of default, the trial court did not err in granting summary disposition in defendant's favor on this claim.

Plaintiffs next assert that summary disposition was inappropriate with respect to their claims of honest services fraud and mail fraud. Again, plaintiffs provide no citation to any relevant authority in support of their argument and their brief lacks coherent explanation of the basis for their claims. MCR 7.212(C)(7); *DeGeorge v Warheit*, 276 Mich App at 594-595. Giving this issue cursory review in any event, count V of plaintiffs' complaint is entitled "Honest Services Fraud" but specifically references violations of the Fair Debt Collection Practices Act. This federal act, found at 15 USC § 1692 *et seq*., sets forth as its intended purpose, "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 USC § 1692(e). The term "debt collector" is specifically defined in the act to mean "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 USC § 1692a(6). The term specifically excludes from definition, however, "any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor." 15 USC § 1692a(6)(A). Thus, any "debt collection" activities of the creditor itself are not subject to the Fair Debt Collection Practices Act. See, e.g., *Walker v Michael W. Colton Trust*, 33 F Supp 2d 585, 593 (ED Mich, 1999). Here, defendant was plaintiffs' creditor and initiated debt collection activities on its own behalf. It is thus not subject to the Fair Debt Collection Practices Act and summary disposition was appropriate on this count.

Count XII of plaintiffs' complaint sets forth a claim of mail fraud. 18 US § 1341 provides a criminal penalty for, "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses . . . [and] for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . ." In this matter, defendant provided an affidavit and documentary evidence establishing that plaintiffs were late on and/or submitted insufficient payments owing on a loan owed to defendant. Plaintiffs did not counter with a contradictory affidavit and, in fact, their documentary evidence confirmed that they were, in fact, late on

and/or submitted insufficient payments. Summary disposition was therefore appropriate on this count. [2]

Finally, plaintiffs claim that the trial court's grant of summary disposition in defendant's favor violated their right to equal protection under the 14th Amendment of the United States Constitution. In their complaint, plaintiffs claimed that defendant violated various amendments of the United States Constitution, including the 14th Amendment right to Equal Protection. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v Cleburne Living Ctr, Inc*, 473 US 432, 439; 105 S Ct 3249; 87 L Ed 2d 313 (1985). As correctly pointed out by the trial court, however, the 14th Amendment affords protection only against state action and no state action was alleged by plaintiffs. "Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendmen[t] . . . , and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be." *Georgia v McCollum*, 505 US 42, 63; 112 S Ct 2348 (1992), quoting *National Collegiate Athletic Assn v Tarkanian*, 488 US 179, 191; 109 S Ct 454; 102 L Ed 2d 469 (1988).

Plaintiffs' argument on this issue now appears to be that the *trial court* violated their equal protection rights because it considered defendant's evidence in its entirety, but did not adequately consider the evidence submitted by plaintiffs which, they argue, sufficiently created questions of fact. Plaintiffs thus appear to argue that defendant, and its evidence, was given preferential treatment. Again noting plaintiffs' lack of citation to authority, the problem appears to be plaintiffs' difficulty understanding the Michigan court rules. Defendant submitted an affidavit of its agent attesting to plaintiffs' delinquency, coupled with documentary evidence showing plaintiffs' payment history through December 2010. Plaintiffs submitted letters they had sent to defendant questioning the amount they owed, a payment history showing the exact payment history defendant submitted, and no affidavit contradicting plaintiffs' sworn statement that plaintiffs had defaulted on the loan. The trial court held both parties to the same evidentiary standard under the Michigan court rules and ruled appropriately based upon the evidence before it. We find no error.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens

[2] Plaintiffs repeatedly point to their allegations that defendant's agent is untruthful or acted in a deceitful manner as creating questions of fact. However, absent sworn statements in the form of an affidavit or deposition testimony, the allegations are just that. As previously stated, MCR 2.116(G)(4), requires that when a motion is made and supported under subrule (C)(10), an adverse party may not rest upon mere allegations but must, by affidavits or otherwise set forth specific facts showing there is a genuine issue for trial.