STATE OF MICHIGAN

COURT OF APPEALS

JOHN W. MCREYNOLDS and ELAINE C. MCREYNOLDS, Plaintiffs-Appellants,	UNPUBLISHED May 23, 2013
v	No. 307362 Oakland Circuit Court
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Defendant-Appellee.	LC No. 2011-116430-CZ

Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendant in this foreclosure action. Because the trial court properly determined that no modification of plaintiffs' mortgage loan occurred, we affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On February 17, 2005, plaintiffs executed a mortgage in favor of defendant, as nominee for IndyMac Bank, F.S.B. (IndyMac). The mortgage secured a note in the amount of $500,000 for the purchase of real property in Farmington Hills. At some point, plaintiffs fell behind in their mortgage payments. On or about August 11, 2009, IndyMac sent plaintiffs a loan modification agreement, which plaintiff John McReynolds signed on August 19, 2009. The agreement indicated that, if plaintiffs qualify for a modification, their payment would be $1,231.26 for five years and would increase thereafter. According to defendant, on October 6, 2009, IndyMac sent McReynolds a denial letter that stated, "[b]ased on the information submitted in your financial package, the present status of your loan and/or other specific criteria regarding your loan, we cannot accommodate your request for a loan modification." McReynolds denied receiving the letter and claimed that IndyMac accepted his payments made in accordance with the modified loan for more than one year before he received a September 8, 2010, letter from IndyMac's parent company thanking him for his efforts to settle his account but returning his monthly payment because "the amount received [did] not represent the total amount due at [that] time."

According to defendant, on or about November 26, 2009, IndyMac sent McReynolds a second loan modification application in accordance with the federal Home Affordable

Modification Program (HAMP). The application indicated that plaintiffs' monthly payments would be $2,339.62. McReynolds signed the application on December 20, 2009. Thereafter, IndyMac sent McReynolds two letters requesting information necessary to review plaintiffs' eligibility for a permanent loan modification. On July 22, 2010, IndyMac denied the modification, stating "[w]e are unable to offer you a Home Affordable Modification because you did not provide us with the documents requested." Plaintiffs deny that they sought a HAMP loan modification after they learned that their monthly payments would increase by more than $1,000.

On January 24, 2011, plaintiffs filed a complaint against defendant, as nominee for IndyMac, seeking specific performance of the first loan modification agreement. Plaintiffs alleged that they performed under the agreement by paying $1,231.26 each month and were willing to continue paying that amount. Plaintiffs also sought a temporary restraining order enjoining the foreclosure sale of the property, which the trial court granted.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10) arguing that plaintiffs were never provided a loan modification and that the first loan modification agreement specifically stated that it was not binding unless the note holder or IndyMac verified that plaintiffs qualified for the modification. Defendant also argued that IndyMac never executed and returned the modification agreement, a condition that was necessary for the agreement to take effect. Defendant maintained that IndyMac accepted plaintiffs' monthly payments pursuant to the temporary payment plan set forth in the HAMP application while their HAMP application was being reviewed to determine if they qualified for a permanent loan modification.

In response, plaintiffs argued that IndyMac accepted their payments notwithstanding its purported loan modification denial letter, which they never received. Plaintiffs denied that they sought to process the HAMP application after they realized that their monthly payment would increase by more than $1,000. Plaintiffs argued that defendant was estopped from denying the validity and enforceability of the first loan modification agreement given IndyMac's acceptance of their payments for more than one year.

The trial court recognized that the first loan modification agreement clearly stated that if plaintiffs qualified for a loan modification, IndyMac would sign and return the agreement, and the modification would take effect on the date that IndyMac signed the agreement. The court determined that defendant was entitled to summary disposition because there was no evidence that IndyMac signed the agreement.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). In reviewing a motion pursuant to MCR 2.116(C)(10), this Court considers "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Id*. "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*.

III. LEGAL ANALYSIS

Plaintiffs argue that defendant should be estopped from denying the enforceability of the first loan modification agreement after IndyMac accepted their monthly payments for more than one year. Plaintiffs rely on the theories of equitable estoppel and promissory estoppel. "Equitable estoppel arises where a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and the other party will be prejudiced if the first party is allowed to deny the existence of those facts." *Soltis v First of America Bank-Muskegon*, 203 Mich App 435, 444; 513 NW2d 148 (1994).

Plaintiffs' admissions establish that they did not believe that their loan had been modified pursuant to the first loan modification agreement and that they did not rely or act on such a belief. Plaintiffs admit that they made two monthly payments in the amount of $1,231.26, which was the amount specified in the first loan modification agreement. On December 20, 2009, McReynolds signed the HAMP application. Plaintiffs admit that in December 2009, they began making payments in the amount of $2,339.62, which was the amount specified in the HAMP application as due under the "trial period plan" while plaintiffs' eligibility for a permanent loan modification was being reviewed. According to plaintiffs, they made payments in the amount of $2,339.62, and such payments were accepted until September 8, 2010, when their payment was returned because it did not "represent the total amount due[.]" IndyMac denied plaintiffs' HAMP application on July 22, 2010. Thus, plaintiffs' admissions indicate that they were not making their monthly payments in the amount of $2,339.62 in reliance on the first loan modification agreement, which specified a much lower monthly payment in the amount of $1,231.26. Rather, plaintiffs were attempting to obtain a HAMP loan modification and were making the necessary payments under the "trial period plan" while their eligibility for a permanent modification was being reviewed. Accordingly, plaintiffs' reliance on the theory of equitable estoppel is unavailing.

Plaintiffs also rely on the theory of promissory estoppel.

> The elements of promissory estoppel are (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided. [*Novak v Nationwide Mut Ins Co,* 235 Mich App 675, 686-687; 599 NW2d 546 (1999).]

Plaintiffs fail to establish the first element. A review of the first loan modification agreement reveals that there was no promise of a loan modification. The agreement stated:

> 1. This Agreement is not binding on Note Holder, unless and until Note Holder, or servicing agent, IndyMac Mortgage Services, a division of OneWest Bank, FSB ("IndyMac"), verifies that you qualify for this modification offer. You will promptly provide IndyMac acceptable information to permit verification of your income, and make the payments shown in the payment schedule in paragraph 6 of this Agreement, while IndyMac verifies your information. If you qualify, IndyMac, will sign and return this Agreement to you, and it will be effective on the date it is signed by IndyMac. If you do not make all payments

> when due while we verify that you qualify, or if you do not qualify, your Note will not be modified. IndyMac will apply any payments you made to the amounts you owe.

Thus, the agreement clearly indicated that plaintiffs' loan would be modified only if IndyMac determined that plaintiffs qualified for a modification. The agreement did not promise that a modification would be granted. Further, the agreement provided that, if plaintiffs qualified, IndyMac would sign and return the agreement to plaintiffs, and the modification would take effect on the date that IndyMac signed the agreement. Plaintiffs have not presented any evidence that IndyMac signed the agreement and do not argue that IndyMac in fact signed the agreement. Thus, pursuant to the terms of the agreement, no loan modification occurred. Accordingly, plaintiffs' promissory estoppel argument fails, and the trial court properly granted summary disposition for defendant.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Donald S. Owens