

STATE OF MICHIGAN
COURT OF APPEALS

DONALD S. DREYFUSS and ELISA S.
DREYFUSS,

UNPUBLISHED
February 19, 2013

Plaintiffs-Appellants,

v

CHEVY CHASE BANK a/k/a CAPITAL ONE
BANK,

No. 307888
Oakland Circuit Court
LC No. 2010-114100-CH

Defendant-Appellee.

Before: MURPHY, C.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

Plaintiffs Donald and Elisa Dreyfuss appeal as of right the trial court's order granting summary disposition in favor of defendant Chevy Chase Bank (the bank) with respect to various claims alleged by plaintiffs that challenged the bank's conduct in proceeding with a sheriff's sale and a subsequent eviction action after the bank had foreclosed by advertisement on a mortgage that encumbered plaintiffs' home and served as security on a promissory note, which was executed by the parties in a refinancing transaction. We affirm.

In January 2009, the bank provided notice to plaintiffs that they were in default of the mortgage and that a sheriff's sale was scheduled for February 17, 2009. Plaintiffs, through counsel, negotiated with the bank in an effort to work out a deferment or loan modification plan, and the scheduled foreclosure sale was postponed. A rescheduled sheriff's sale set for March 18, 2009, was also postponed until March 24 per an agreement, as plaintiffs gathered requested financial documents and negotiations continued. There was evidence in the form of email communications sent on March 23, 2009, that the bank would postpone the sheriff's sale scheduled the next day on March 24 while the bank awaited further financial information from plaintiffs. Despite the bank's representation that the sale would be postponed, a sheriff's sale was conducted on March 24, 2009, and the bank purchased plaintiffs' home at the sale. The sheriff's deed was recorded on August 6, 2009.¹ As reflected in emails and bank log notes

¹ We note that MCL 600.3232 provides that a sheriff's "deed . . . shall, as soon as practicable, and within 20 days after such sale, be deposited with the register of deeds of the county in which

relative to plaintiffs' account, the bank and plaintiffs continued to negotiate a loan modification agreement even after the sale, with said evidence indicating that plaintiffs' counsel and bank personnel involved in the communications were unaware that the sheriff's sale had occurred. Indeed, there was evidence of further agreed upon postponements despite the sale having already taken place. There is no evidence that plaintiffs participated in negotiations with the bank from May 2009 forward. Bank log notes from July 2009 indicated that the employee who entered the account information recognized that the sale had transpired. Other log notes from July 2009 contained a suggestion that the foreclosure be taken off hold status for failure to comply, as plaintiffs had not "sent anything in."

Bank log notes for January, February, and March 2010 provided that the bank had sent a financial modification package to plaintiffs in mid January, suggesting that the bank was still prepared to work out some type of a repayment plan, but plaintiffs failed to prepare the paperwork contained in the package and failed to respond to multiple attempts by the bank to contact plaintiffs. Plaintiffs did not present any evidence to the contrary. Consistent with past miscues by the bank, log notes from March 24, 2010, indicated that the sheriff's sale was "today," even though it had actually taken place exactly one year earlier. The redemption period expired, and on October 1, 2010, the bank initiated a summary proceedings action in district court, seeking to evict plaintiffs from the home.² The district court complaint for termination of tenancy filed by the bank referenced the sheriff's sale on March 24, 2009, and the recording of the sheriff's deed on August 6, 2009. On October 12, 2010, plaintiffs filed the instant action in the trial court, alleging counts sounding in quiet title, unjust enrichment, innocent-negligent misrepresentation, constructive trust, wrongful eviction, and "deceptive act and/or an unfair practice." Plaintiffs requested legal title to the property and money damages. The central theme of the complaint was that the bank was fully aware that plaintiffs were attempting to negotiate a deferment or loan modification relative to the mortgage in order to keep possession of their home, yet the bank proceeded with the sheriff's sale after falsely representing to plaintiffs that the sale would be postponed so that loan modification negotiations could continue.

the land therein described is situated[.]” The bank did not timely record the deed; however, plaintiffs have not raised the issue and our Supreme Court has stated that the recording provision in the statute is “directory” and that an untimely recorded sheriff's deed generally remains valid absent a showing of material harm or prejudice. *Mills v Jirasek*, 267 Mich 609, 614-615; 255 NW 402 (1934) (noting that the redemption period did not begin to run until the deed was recorded and finding that the former property owner was estopped from questioning the validity of the deed where he never made any attempt to redeem).

² The lower court record is unclear whether a six-month or one-year redemption period was utilized. MCL 600.3240(8), which provides for a six-month redemption period, appears to be applicable, where it pertains to mortgages executed after January 1, 1965, on residential property not exceeding 4 units if the amount owing on a given mortgage at the time of the foreclosure notice is “more than 66-2/3 of the original indebtedness secured by the mortgage[.]” Regardless, more than one year since the sheriff's deed was recorded had passed by the time the eviction proceedings were commenced.

The trial court granted summary disposition in favor of the bank under MCR 2.116(C)(10). The trial court found that plaintiffs failed to show that any misrepresentation by the bank regarding the date of the foreclosure sale worsened plaintiffs' position or resulted in damage to plaintiffs. The trial court also ruled that plaintiffs' claims failed given that matters in a request for admissions served by the bank were deemed admitted and conclusively established under MCR 2.312(B)(1) and (D)(1) when plaintiffs failed to timely reply to the request, thereby negating the elements of the claims based on the nature of the admissions.³ Next, the trial court found that plaintiffs failed to establish fraud; therefore, they were not entitled to an order setting aside the foreclosure sale and they lacked standing, considering that plaintiffs filed suit after the redemption period expired. The trial court also ruled that plaintiffs failed to show that the bank was unjustly enriched. Plaintiffs' motion for reconsideration was denied.

This Court reviews de novo a ruling on a motion for summary disposition, *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006),⁴ the proper construction and application of a statute, *Adair v Michigan*, 486 Mich 468, 477; 785 NW2d 119 (2010), the interpretation of a court rule, *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008), and questions of law generally, *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998), including the issue of a party's standing to bring suit, *Mich Citizens for Water Conservation v Nestle Waters North America Inc*, 479 Mich 280, 291; 737 NW2d 447 (2007), overruled in part on other grounds in *Lansing Schs Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 378; 792 NW2d 686 (2010).

³ The trial court rejected plaintiffs' arguments that a stipulated order provided plaintiffs with a time extension to answer and that plaintiffs complied with the order by serving an answer within the stipulated timeframe that denied the matters in the request for admissions.

⁴ In general, MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's claim. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The trial court is not permitted to assess credibility, to weigh the evidence, or to resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). *Skinner*, 445 Mich at 161; *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

We decline to rule on whether plaintiffs had standing to file suit and whether the trial court erred in treating the matters in the request for admissions as being admitted and conclusively established. Rather, for purposes of this opinion, we shall proceed on the assumption that plaintiffs had standing and that plaintiffs' denials of the matters covered by the request for admissions were acceptable given the stipulated order.

Plaintiffs argue that there was sufficient evidence to establish their claims of misrepresentation, including innocent misrepresentation, fraud – silent or otherwise, and unjust enrichment. Given plaintiffs' failure to raise arguments regarding the other causes of action alleged in their complaint, a challenge of the trial court's order summarily dismissing those claims is waived and the order is affirmed to that extent. Actionable fraud, also known as fraudulent misrepresentation, requires proof that a defendant made a material representation, that the representation was false, that the defendant knew it was false when made, or made it recklessly absent knowledge of its truth and as a positive assertion, that the false representation was made with the intent that the plaintiff act upon it, that the plaintiff indeed acted in reliance on the misrepresentation, and that the plaintiff thereby suffered injury. *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012). In regard to innocent misrepresentation, a cause of action arises when a misrepresentation is made, although made innocently, if its deceptive influence was effective and the consequences to the plaintiff were as serious as though the misrepresentation had been made with a vicious purpose. *Id.* at 556. The doctrine of silent fraud provides that when there is a legal or equitable duty to disclose, a fraud arises from the suppression of the truth if there was an intent to defraud. *Id.* at 557.⁵

The gist of plaintiffs' misrepresentation and fraud claims is that the bank falsely indicated in email communications dated March 23, 2009, that the sheriff's sale scheduled for March 24 would be postponed, yet the bank instead proceeded with the sale on March 24. We conclude that plaintiffs' fraud and misrepresentation claims fail as a matter of law, where plaintiffs have simply not created a genuine issue of material fact on the requisite elements of causation and injury or harm, assuming that the other elements of the claims were supported by sufficient documentary evidence. Plaintiffs repeatedly argue that had they known that the sheriff's sale would be conducted on March 24, 2009, they would have either filed for a temporary restraining order (TRO) or filed for Chapter 13 bankruptcy protection. Plaintiffs also maintain that the sheriff's sale stripped them of their legal interest in the property, leaving them only an equitable interest, which made it practically impossible to obtain a new loan or mortgage.

With respect to the TRO argument, plaintiffs fail to provide any elaboration whatsoever. They do not explain the legal basis that would have entitled them to a TRO to stop the

⁵ To the extent that the bank's representations to plaintiffs' counsel about a sale postponement regarded future promises and not existing facts, which are ordinarily not actionable, *Forge v Smith*, 458 Mich 198, 212; 580 NW2d 876 (1998), Michigan also recognizes fraud in the inducement "where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon[.]" *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639-640; 534 NW2d 217 (1995).

foreclosure sale. In *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998), our Supreme Court stated:

“It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.” [Citation omitted.]

We cannot conceive of a legally sound reason for a court to have halted or postponed the March 24 sheriff’s sale pursuant to a TRO. Plaintiffs do not cite any authority for the proposition that they were entitled or had a right to a deferment or loan modification such that the sale could have been enjoined.⁶ There is no dispute that the bank had complied with the various statutory hurdles relative to a foreclosure by advertisement.

With respect to the bankruptcy argument, plaintiffs again fail to provide any elaboration or analysis. We initially note that plaintiffs failed to submit any documentary evidence, not even easily-obtainable affidavits, to support their contention that they would have filed for Chapter 13 protection, and we are addressing a (C)(10) motion. “Chapter 13 authorizes an individual with regular income to obtain a discharge after the successful completion of a payment plan approved by the bankruptcy court.” *Marrama v Citizens Bank of Massachusetts*, 549 US 365, 367; 127 S Ct 1105; 166 L Ed 2d 956 (2007). Chapter 13 allows a relatively small debtor to retain property and reschedule payment obligations to creditors. *In re Glance*, 487 F3d 317, 319 (CA 6, 2007). The filing of a Chapter 13 petition gives rise to an automatic stay under 11 USC 362(a). *Young v United States*, 535 US 43, 50; 122 S Ct 1036; 152 L Ed 2d 79 (2002). “The purpose of the automatic stay is to give the debtor a breathing spell from his creditors, [and] to stop all collection efforts, harassment and foreclosure actions.” *In re Roach*, 660 F2d 1316, 1318 (CA 9, 1981).

For purposes of Chapter 13 bankruptcy, “a default with respect to, or that gave rise to, a lien on the debtor’s principal residence may be cured . . . until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law[.]” 11 USC 1322(c)(1). A default on a residential mortgage cannot be “cured” by filing a Chapter 13 bankruptcy petition and plan *after* a foreclosure sale and before the state-law redemption period expires. *In re Cain*, 423 F3d 617, 619 (CA 6, 2005). “When Congress empowered Chapter 13 debtors to cure defaults, . . . Congress intended to allow mortgagors to de-accelerate their mortgages and reinstate [their] original payment schedule.” *In re Taddeo*, 685 F2d 24, 26 (CA 2,

⁶ We do note that pursuant to 2009 PA 29-31, the Legislature enacted various provisions that gave certain rights to mortgagors in regard to loan modification negotiations, proceedings, and meetings with lenders in the context of foreclosure by advertisement. MCL 600.3205a through MCL 600.3205d, repealed effective December 31, 2012, MCL 600.3205e. These provisions, however, did not become effective until July 5, 2009, which date fell after the sheriff’s sale in the case at bar.

1982). A default can trigger certain consequences such as the acceleration of a mortgage, and curing a default “means taking care of the triggering event and returning to pre-default conditions,” thereby nullifying the consequences of the default. *Id.* at 26-27.

Accordingly, as a general observation, if a mortgagor is truly prepared to file for Chapter 13 bankruptcy protection and seek to cure a mortgage default, he or she must do so prior to a foreclosure sale, and there would be an injury to some degree caused by a mortgagee if the mortgagor missed the opportunity to file for bankruptcy before the sale because of a misrepresentation by the mortgagee, assuming the bankruptcy payment plan would have been approved and no relief from an automatic stay was available. The problem here is that, once again, plaintiffs did not submit any documentary evidence indicating that they would have actually filed for bankruptcy, or were prepared to do so, nor was any documentary evidence submitted showing that plaintiffs even satisfied the criteria to qualify for and receive Chapter 13 protection. 11 USC 109(e) currently provides:

Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than \$360,475 and noncontingent, liquidated, secured debts of less than \$1,081,400, or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than \$360,475 and noncontingent, liquidated, secured debts of less than \$1,081,400 may be a debtor under chapter 13 of this title.

This provision was the same in March 2009, except for some slightly lower dollar amounts that have since been adjusted upward. See Historical and Statutory Notes to 11 USC 109. The dollar limitations reflected in the eligibility criteria of 11 USC 109(e) were put in place “[t]o ensure that only relatively small debtors invoke the protections of Chapter 13.” *Glance*, 487 F3d at 319-320. Plaintiffs do not argue on appeal, nor did they argue below, that they satisfied any of the requirements of 11 USC 109(e), and no proofs on the matter were ever presented. We note that the mortgage debt, as accelerated under the default, likely exceeded \$1,081,400, where the bank paid approximately \$1.5 million for the home at the sheriff’s sale. A mortgage lien constitutes a noncontingent, liquidated secured debt for purposes of assessing eligibility for Chapter 13 relief under 11 USC 109(e). *Glance*, 487 F3d at 320-322.

Additionally, “[s]o long as [a] bankruptcy petition is pending before the bankruptcy court, a creditor must apply for and obtain relief from the stay before it can proceed with the sale on the date certain.” *Taylor v Slick*, 178 F3d 698, 702 (CA 3, 1999). A bankruptcy court must grant relief from a stay upon request “with respect to a stay of an act against property . . . if (A) the debtor does not have an equity in such property; and (B) such property is not necessary to an effective reorganization[.]” 11 USC 362(d)(2). Again, plaintiffs present no argument or evidence showing that they would have been able to avoid a request by the bank for relief from an automatic stay, which is exactly what the bank argues it would have sought had a bankruptcy petition been filed.

With respect to plaintiffs’ argument that the sheriff’s sale made it practically impossible to obtain a new loan or mortgage, there is no documentary evidence indicating that plaintiffs ever

intended or attempted to obtain a new loan or mortgage, let alone evidence that such attempts were made and rejected because of the sale. On March 23, 2009, the day before the foreclosure sale, plaintiffs initially did not know whether the scheduled sale would take place the very next day on the 24th, yet there is no argument or evidence that plaintiffs even made inquiries regarding a new loan or mortgage at that late stage. Plaintiffs even stopped negotiating and working with the bank itself on a loan modification plan despite the bank's continued interest in doing so.

In regard to whether the nature of the alleged misrepresentation or fraud necessarily requires the setting aside of the sheriff's sale, plaintiffs do not really present an appellate argument on the matter outside of the TRO, bankruptcy, and new loan arguments addressed above. In the context of a situation where there has been a defect in the required statutory notice under MCL 600.3208 and MCL 600.3212 relative to publication and posting, this Court in *Jackson Investment Corp v Pittsfield Prods, Inc*, 162 Mich App 750, 755-756; 413 NW2d 99 (1987), stated:

MCL 600.3208 and MCL 600.3212 set forth the requirements of notice. The failure to properly observe any of these requirements provides a host of potential defects which could occur. By holding that a defect renders a foreclosure sale voidable, rather than void, more security is given to the title of real property. Such a holding also allows for an examination of whether any harm was caused by the defect. In situations where it is evident that no harm was suffered, in that the mortgagor would have been in no better position had notice been fully proper and the mortgagor lost no potential opportunity to preserve some or any portion of his interest in the property, we see little merit in the rule of law which Jackson advocates.

By analogy, we fail to see the harm to plaintiffs here caused by any misrepresentation that resulted in a lack of notice or knowledge that the sale would occur on March 24, 2009. Had the sale been postponed as promised, it would certainly still have taken place at a later date given that plaintiffs failed to follow through with submitting the required paperwork for a loan modification and considering that plaintiffs failed to even respond to the bank's efforts to make contact in early 2010, both of which matters are uncontested as reflected in the documentary evidence. And even though the sheriff's sale took place contrary to the bank's promise, the bank was still willing to work out a loan modification with plaintiffs, but the bank's efforts were ultimately ignored or rebuffed by plaintiffs. Stated otherwise, the sheriff's sale did not take the bank away from the bargaining table; plaintiffs did that on their own. We note that the affidavit of posting provided that any sale that transpired could be "rescinded by the foreclosing mortgagee."⁷ Plaintiffs do not argue that the sheriff's sale should be set aside on the basis that the lack of knowledge concerning the sale and the running of the redemption period, as caused by the misrepresentation, precluded them from exercising their statutory right to redeem, which

⁷ We can only presume that this language solely contemplated a scenario in which the bank was the purchaser at the foreclosure sale, which is typical.

they would have exercised and which right and opportunity should be resurrected by way of a new sheriff's sale. Moreover, plaintiffs failed to submit documentary evidence indicating that they had the ability to redeem the property and would have done so but for the lack of knowledge that the redemption period was running.

With respect to the claim of unjust enrichment, plaintiffs were required to show (1) the receipt of a benefit by the bank from plaintiffs and (2) an inequity resulting to plaintiffs because of the retention of the benefit by the bank. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). When the elements of unjust enrichment have been shown, "the law operates to imply a contract in order to prevent unjust enrichment." *Id.* Plaintiffs argue that the benefit received by the bank was free and clear title to the property and that the inequity to plaintiffs is "obvious," as they no longer have title and may be forced to move. Although the bank obtained title to the property, it can hardly be called a "benefit" unless the bank can sell it, minimally, for an amount that allows the bank to recoup the outstanding loan balance and all of the costs associated with the foreclosure. Furthermore, we fail to see how plaintiffs suffered an inequity, where they did not make their mortgage payments for quite some time and failed, ultimately, to respond to the bank's efforts to work out a loan modification plan. To rule to the contrary would essentially mean that any foreclosure sale conducted pursuant to a power-of-sale clause in a mortgage results in unjust enrichment.

In sum, plaintiffs' claims of misrepresentation, fraud, and unjust enrichment fail as a matter of law.

Affirmed. Having fully prevailed on appeal, the bank is awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher