

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA L. SPENCER,

Plaintiff-Appellant,

v

PNC MORTGAGE,

Defendant-Appellee.

UNPUBLISHED
February 26, 2013

No. 307925
Oakland Circuit Court
LC No. 2010-108232-CK

Before: MURRAY, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order that granted summary disposition for defendant pursuant to MCR 2.116(C)(10) (no genuine issue of material fact), thereby dismissing plaintiff's claims for promissory estoppel, intentional infliction of emotional distress, and quiet title. We affirm.

Plaintiff mortgaged her property to National City Mortgage, a division of National City Bank, and its successors and assigns in exchange for a \$1 million loan. National City Mortgage had previously entered into an agreement with Goldman Sachs Mortgage Company, whereby National City Mortgage agreed to sell Goldman Sachs residential adjustable rate mortgage loans. Plaintiff's loan was sold and transferred pursuant to that agreement, but National City Mortgage remained the servicer. Subsequently, National City Bank merged with PNC Bank, and defendant maintains that it now retains the right to service plaintiff's loan as a division of PNC Bank. Plaintiff sought a loan modification from defendant after she no longer could afford her monthly payments due to a decrease in her annual income. However, plaintiff filed the above claims against defendant after receiving a written loan modification from defendant that was allegedly different from what the parties orally discussed. Specifically, the loan modification contained three terms that plaintiff did not agree to: a capitalization amount, closing costs, and the addition of her husband as a party to the loan. Plaintiff asserts that pursuant to defendant's advice, she stopped making her mortgage payments to obtain the modification, which turned out to be inaccurate, and now she is in jeopardy of losing her home. Plaintiff raises three issues on appeal.

First, plaintiff argues that the trial court erred by granting summary disposition for defendant because there was a genuine issue of material fact as to whether plaintiff had superior title to the property. We disagree. We review a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817, reh den 461 Mich

1205 (1999). “A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.” *BC Tile & Marble Co, Inc v Multi Building Co, Inc*, 288 Mich App 576, 582-583; 794 NW2d 76 (2010). All documentary evidence supporting a motion under (C)(10) must be viewed in a light most favorable to the nonmoving party. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 278; 769 NW2d 234 (2009). When reviewing a motion pursuant to MCR 2.116(C)(10), summary disposition may be granted if the evidence establishes that “there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law.” MCR 2.116(C)(10). “There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in a light most favorable to the nonmoving party.” *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

MCL 600.2932(1) allows a plaintiff to bring an action in the circuit court to claim title to property. The plaintiff in a quiet-title action has the burden of establishing a prima facie case of title. *Special Property VI, LLC v Woodruff*, 273 Mich App 586, 590; 730 NW2d 753 (2007). In addition, the plaintiff must allege facts in the complaint that establish the superiority of the plaintiff’s claim. MCR 3.411(B)(2)(c). The plaintiff is required to establish title to the property by admissible evidence. *Special Property VI, LLC*, 273 Mich App at 590. If the plaintiff fails to carry this burden, summary disposition for the defendant is appropriate. *Id.*

Plaintiff argues that she is entitled to clear title to the property because defendant does not own the mortgage and cannot prove that it is the loan servicer. However, plaintiff failed to allege facts that establish her superior title, and she failed to support her quiet-title claim with admissible evidence. Plaintiff acknowledged that defendant has a recorded lien on her property, but continues to allege that defendant does not own the mortgage and cannot prove who does. She also alleges that defendant does not have the right to service the loan. Further, plaintiff admits that she was sending her loan payments to defendant and had worked out an oral loan modification with defendant. The only documentation that plaintiff provided to the trial court to support her claim was the loan modification that defendant sent to plaintiff. Nevertheless, she now asserts that defendant does not have an interest in the property. However, all of the above facts actually indicate that defendant does have an interest in the property, particularly because plaintiff admits that defendant has a recorded lien on the property, she was sending mortgage payments to defendant, and she negotiated a loan modification with defendant. Moreover, these facts do not establish that plaintiff has superior title because plaintiff admits to having a mortgage on her house and has not provided evidence to prove that defendant does not have an interest in the property. Thus, because plaintiff failed to meet her burden of establishing a prima facie case of superior title, the trial court properly granted summary disposition for defendant.

Next, plaintiff argues that the trial court erred by granting summary disposition for defendant because there was a genuine issue of material fact as to whether plaintiff established a prima facie case of promissory estoppel. We disagree. The statute of frauds requires certain agreements, such as mortgages, to be in writing and signed by the party to be charged; otherwise, the agreement is void. MCL 566.132(1). We have held that there are circumstances where the common-law doctrine of promissory estoppel can bar the statute of frauds if “it would be inequitable to apply the statute of frauds.” *Lovely v Dierkes*, 132 Mich App 485, 489; 347 NW2d 752 (1984). However, in 1992, the Legislature amended the statute of frauds to prevent the use of promissory estoppel against financial institutions. See MCL 566.132(2); *Crown*

Technology Park v D & N Bank, FSB, 242 Mich App 538, 549; 619 NW2d 66 (2000). MCL 566.132(2) provides,

An action shall not be brought against a financial institution to enforce any of the following promises or commitments of the financial institution unless the promise or commitment is in writing and signed with an authorized signature by the financial institution:

(a) A promise or commitment to lend money, grant or extend credit, or make any other financial accommodation.

(b) A promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation.

(c) A promise or commitment to waive a provision of a loan, extension of credit, or other financial accommodation.

The statute defines “financial institution” as “a state or national chartered bank, a state or federal chartered savings bank or savings and loan association, a state or federal chartered credit union, a person licensed or registered under the mortgage brokers, lenders, and servicers licensing act, . . . or an affiliate or subsidiary thereof.” MCL 566.132(3). We have stated that the amendment’s unambiguous language precludes a party from bringing an action against a financial institution to enforce an oral promise. *Crown Technology Park*, 242 Mich App at 550.

Plaintiff seeks to enforce an oral loan modification that defendant allegedly made because it was different from the written loan modification she received. However, MCL 566.132(2)(b), does not permit plaintiff to bring an action against defendant, a financial institution, to enforce an oral promise to modify a loan. Thus, the trial court properly granted summary disposition for defendant.

Finally, plaintiff argues that the trial court erred by granting summary disposition for defendant because there was a genuine issue of material fact as to whether plaintiff established a prima facie case of intentional infliction of emotional distress. We disagree. “To establish a prima facie claim of intentional infliction of emotional distress, the plaintiff must present evidence of (1) the defendant’s extreme and outrageous conduct, (2) the defendant’s intent or recklessness, (3) causation, and (4) the severe emotional distress of the plaintiff.” *Walsh v Taylor*, 263 Mich App 618, 634; 689 NW2d 506 (2004). The defendant’s conduct must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.” *Graham v Ford*, 237 Mich App 670, 674; 604 NW2d 713 (1999).

Plaintiff failed to present evidence to establish that defendant’s conduct was extreme and outrageous. Plaintiff alleged that defendant’s repeated, harassing phone calls demanding that she pay her mortgage debt placed her in fear of losing her home and caused her to suffer humiliation and stress. However, defendant’s actions amount to nothing more than demands or annoyances, which do not qualify as extreme and outrageous conduct. See *Graham*, 237 Mich App at 674. To be extreme and outrageous, the conduct has to arouse resentment for defendant. *Id.* at 675. A

creditor demanding payment on a defaulted loan is a common occurrence that does not arouse resentment or go beyond all bounds of decency. Further, plaintiff did not provide phone records to prove those calls even occurred. Thus, because plaintiff failed to meet her burden of establishing a prima facie case of intentional infliction of emotional distress, the trial court properly granted summary disposition for defendant.

Affirmed.

/s/ Christopher M. Murray

/s/ Kurtis T. Wilder

/s/ Donald S. Owens