

STATE OF MICHIGAN
COURT OF APPEALS

UNITED FEDERAL CREDIT UNION,
Plaintiff-Appellee,

UNPUBLISHED
February 14, 2013

v

No. 309356
Berrien Circuit Court
LC No. 2011-000342-CZ

HUGH O. TAPP,

Defendant,

and

KATHERINE M. TAPP,

Defendant-Appellant

Before: BECKERING, P.J., and STEPHENS and BOONSTRA, JJ.

PER CURIAM.

Defendant, Katherine Tapp,¹ appeals by right an order granting summary disposition to plaintiff, United Federal Credit Union, and dismissing her counterclaims in this mortgage foreclosure action. For the reasons set forth below, we affirm.

As an initial matter, we note that plaintiff foreclosed upon and sought to evict defendant from two properties owned by defendant: 1614 Kay Drive in Benton Harbor, and 418 Butternut Street, in Watervliet. The lower court proceedings with regard to each property were assigned different case numbers, and when the trial court granted summary disposition to plaintiff regarding each property, it did so in separate orders. Defendant only filed a claim of appeal with regard to the Kay Drive property, yet argues in her appellate brief that the foreclosures regarding both properties were invalid. However, because defendant only appealed the foreclosure proceeding with regard to the Kay Drive property, we decline to consider her arguments with regard to the Butternut Street property.

¹ Defendant Hugh O. Tapp died prior to this litigation. Accordingly, we refer to defendant Katherine Tapp as “defendant,” and to defendant Hugh O. Tapp as “Hugh.”

I. SUMMARY DISPOSITION

After foreclosing by advertisement on the Kay Drive property, and after the expiration of the statutory redemption period and sheriff's sale at which plaintiff was the sole bidder, plaintiff filed a complaint for eviction. Defendant's first issue on appeal appears to contain three distinct arguments. Specifically, defendant appears to argue that 1) the trial court failed to consider the claims raised in her counterclaim, and summary disposition in favor of plaintiff was premature 2) the notice of the foreclosure was improper, and 3) plaintiff was required to open an estate for Hugh as a condition precedent of initiating foreclosure proceedings. We will address each argument in turn, and ultimately conclude that each is meritless.

Appellate courts review "the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. In making this determination, the Court reviews the entire record to determine whether defendant was entitled to summary disposition." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Summary disposition under MCR 2.116(C)(5) is appropriate where "the party asserting the claim lacks the legal capacity to sue." *Id.* "In reviewing a motion for summary disposition pursuant to MCR 2.116(C)(5), this Court must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties." *Aichele v Hodge*, 259 Mich App 146, 152; 673 NW2d 452 (2003).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings.

* * *

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden*, 461 Mich at 119-20 (citations and quotations omitted).]

A. Summary Disposition Was Not Premature

Defendant first argues that summary disposition was premature. We disagree.

First, defendant's assertion that the trial court "ignored [defendant's] counter complaint" is inaccurate. The order granting possession and summary disposition to plaintiff states explicitly that the trial court was "dismissing with prejudice . . . all of the counterclaims and defenses filed by Katherine M. Tapp in this action" for the reasons stated in plaintiff's summary

disposition motion. The order also noted that “the counterclaims and defenses were raised in Defendant Katherine M. Tapp’s Verified Complaint dated October 20, 2011.” Accordingly, the trial court dismissed defendant’s counterclaims when it granted summary disposition to plaintiff.

Defendant claims that the trial court’s grant of summary disposition was premature because no discovery had been conducted. This Court has held that “summary disposition may be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party’s position.” *Comerica Bank v Cohen*, 291 Mich App 40, 54; 805 NW2d 544 (2010) (citations and quotations omitted). Here, there was no reasonable chance of discovery uncovering factual support for defendant’s position because she lacked standing to challenge the foreclosure. MCL 600.3236 provides, in pertinent part, with respect to a deed issued after foreclosure by advertisement:

Unless the premises described in such deed shall be redeemed within the time limited for such redemption as hereinafter provided, such deed shall thereupon become operative, and shall vest in the grantee therein named, his heirs or assigns, all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter, . . . but no person having any valid subsisting lien upon the mortgaged premises, or any part thereof, created before the lien of such mortgage took effect, shall be prejudiced by any such sale, nor shall his rights or interests be in any way affected thereby.

In other words, once the redemption period on a foreclosed property expires and a sheriff’s sale is held, the foreclosed-upon party loses all rights to the property. The redemption period had expired by the time defendant filed her counterclaim. Accordingly, by the time she filed her complaint, she no longer had an ownership interest in the property, and therefore lacked standing to challenge the foreclosure. MCL 600.3236; see also *Schulthies v Barron*, 16 Mich App 246, 247-248; 167 NW2d 784 (1969).

B. The Foreclosure Notice Was Proper

Defendant next argues that plaintiff failed to provide proper notice of the foreclosure. Again, we disagree.

At the time of the foreclosure in the instant case, there were four notice requirements by statute that a foreclosing entity must satisfy prior to foreclosing by advertisement. The first two requirements are not factually disputed by the defendant. First, a copy of the notice of foreclosure sale must be published in a newspaper where the property is located for four consecutive weeks. MCL 600.3208. This requirement was satisfied on January 12, 2011, when plaintiff published a copy of the notice of the foreclosure sale in the *Journal Era*, a Berrien County newspaper, for five weeks. Second, “in every case within 15 days after the first publication of the notice, a true copy shall be posted in a conspicuous place upon any part of the premises described in the notice.” MCL 600.3208. Notice of the foreclosure was posted on the property on January 18, 2011, within 15 days of the first publication.

The third notice requirement in effect at the time of foreclosure was that a foreclosing mortgagee must mail the mortgagor with notice of the mortgagor’s right to have a loan

modification meeting. MCL 600.3204(4), MCL 600.3205a(3).² Here, it is undisputed that plaintiff sent this notice to defendant. Defendant claimed she did not see the letter when it was delivered; in the lower court she asserted that her grandson signed for the letter and she was unaware of it for months. This argument is without merit. First, plaintiff attached to its summary disposition motion a copy of the certified mail receipt accompanying its notice letter. That receipt bears what appears to be defendant's signature, but which defendant claims is not her signature. However, whether it is in fact defendant's signature on the receipt is ultimately irrelevant—the statute only requires that the foreclosing mortgagee mail the notice letter. See MCL 600.3205a(3). Here, plaintiff did mail the letter; moreover it is undisputed that it was delivered to the proper address, because someone at defendant's home signed for the letter. Accordingly, defendant's argument is without legal merit. Plaintiff complied with this requirement.

The fourth requirement in effect at the time of the foreclosure was that the foreclosing mortgagee publish a loan modification notice at least one time in the local newspaper. MCL 600.3205a(4). Here, plaintiff published such a notice in the local paper on October 6, 2010. Accordingly, plaintiff complied with this requirement.

Defendant asserts, despite the above, that the notice with which she was provided was somehow constitutionally deficient. Defendant fails to explain how foreclosure by advertisement is unconstitutional, and has therefore abandoned this argument. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-27; 750 NW2d 228 (2008) (“An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue.”) (citations and quotations omitted). In any event, the Supreme Court has previously held that foreclosure by advertisement is constitutional, and accordingly defendant's argument is without merit. *Cramer v Metro Sav & L Ass'n*, 401 Mich 252, 259-260; 258 NW2d 20 (1977).

C. Plaintiff Was Not Required to Open an Estate for Hugh

Defendant asserts in her appellate brief that plaintiff, as a condition precedent of initiating foreclosure proceedings, was required to open an estate for Hugh, her deceased husband. This argument is meritless. Defendant fails to support this argument with any supporting authority of any kind and has, therefore, abandoned this issue. *Woods*, 277 Mich App at 626-27 (citations and quotations omitted).

II. APPOINTED COUNSEL

Next, defendant argues that the trial court erred by not appointing an attorney for her *sua sponte*. We disagree.

² We note that MCL 600.3205a was repealed by the legislature, effective December 31, 2012. Nonetheless, because the statute was in effect during the time of this foreclosure, we will analyze the issue under it.

Whether a civil litigant in a foreclosure case is entitled to appointed counsel raises issues of law, and this Court reviews de novo issues of law. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). Here, the trial court did not err by declining to sua sponte appoint an attorney for defendant. She has offered no authority for this position and it is abandoned. *Woods*, 277 Mich App at 626-27. Moreover, generally, a civil litigant has no right to appointed counsel. See *Sword v Sword*, 399 Mich 367, 379-384; 249 NW2d 88 (1976), *overruled on other grounds Mead v Batchlor*, 435 Mich 480 (1990). Although courts and the legislature have carved exceptions to this general rule for specific civil matters,³ plaintiff does not identify, and we are unable to locate, any authority that a party in a foreclosure case is entitled to appointed counsel.

Affirmed.

/s/ Jane M. Beckering
/s/ Cynthia Diane Stephens
/s/ Mark T. Boonstra

³ Generally, these exceptions arise in the context of family law matters involving children, not ordinary civil actions such as foreclosure proceedings. For example, by statute, parties in parentage actions are entitled to appointed counsel if they meet certain indigency conditions, MCL 722.714(4), and in child protection proceedings, an indigent “respondent has the right to a court appointed attorney.” MCR 3.915(B)(1)(a)(i).