# STATE OF MICHIGAN

# COURT OF APPEALS

PHH MORTGAGE CORPORATION,

Plaintiff/Counter-Defendant/Appellant,

v

JANET ELAINE O'NEAL and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC,

Defendants,

and

C PLUS CAPITAL, LLC, a/k/a UNION CAPITAL,

Defendant-Appellee,[1]

and

REALTYVOLUTION LLC,

Defendant/Counter-Plaintiff/Appellee.

UNPUBLISHED
June 18, 2013

No. 311233
Roscommon Circuit Court
LC No. 11-729546-CH

Before: OWENS, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

In this mortgage foreclosure dispute, PHH Mortgage Corporation appeals as of right the trial court's order granting summary disposition to defendants RealtyVolution LLC and C Plus Capital, LLC. For the reasons below, we affirm.

[1] Although listed as an appellee, C Plus Capital has not filed a brief on appeal. Presumably, its position would be identical to, or at least consistent with, that of RealtyVolution.

The property at issue in this case is 111 Pocahontas Trail, Prudenville, Michigan, which is located in Roscommon County. Defendant Janet O'Neal purchased the property in June 2003 and financed the purchase with a purchase money mortgage that was ultimately assigned to PHH in 2010. O'Neal obtained a second mortgage with Mortgage Electronic Registration Systems, Inc (MERS) in 2007. PHH initiated foreclosure by advertisement proceedings and the property was scheduled for sale on November 4, 2011 at 11:00 a.m. PHH's local counsel, Trott & Trott, PC, sent bidding instructions to the Roscommon County Sheriff regarding the sale which provided, "Please begin the bid at **$100.00**. Should competitive bidding start on the above captioned case, please bid at **$1,000.00** increments to a maximum bid of **$79,089.69**" (Emphasis in original]). The memo then set forth the principal, interest, and other costs and fees that totaled $79,089.69. Mark Chapman, a lieutenant with the Roscommon County Sheriff's Department, handled the sale. He confirmed receipt of the bidding instructions from Trott & Trott and received a deed prepared by Trott & Trott that expressly included the bid amount of $100.

On November 4, 2011, James Lengemann, manager of RealtyVolution, and Jim Spaak, who had an interest in C Plus, attended the sheriff's sale for the property. Lengemann inquired of Chapman regarding the bidding instructions Chapman had received. Chapman disclosed the instructions to both Lengemann and Spaak. Lengemann challenged these instructions and, prior to the sale being conducted, Chapman had his secretary call Trott & Trott "on at least 2 occasions to clarify matters raised by the bidders." Chapman personally spoke with at least two different people, went over the instructions, and confirmed that the instructions were accurate.

Pursuant to the instructions, Chapman began the sale with a bid of $100, Lengemann bid $101, Chapman responded with a bid $1,000, and no further bids were made. At the conclusion of the sale, Chapman had his secretary amend the submitted sheriff's deed to change the sale price from $100 to the winning bid of $1,000 and returned the deed to Trott & Trott "per normal procedure." The sheriff's deed was filed on November 14, 2011.

On December 8, 2011, O'Neal signed a quit claim deed, transferring her interest in the property to C Plus, operating under the assumed name Union Capital. The deed was filed on December 9, 2011. Also on December 9, 2011, Jessica Rice of Trott & Trott signed an affidavit on behalf of PHH "pursuant to MCL 565.451a," seeking to expunge the sheriff's deed. Before the affidavit was filed, Rice wrote to Union Capital (C Plus), advising that PHH had "rescinded the foreclosure sale involving this property" and that "redemption is no longer applicable in connection with the foreclosure sale that occurred on November 4, 2011." Rice's affidavit was filed on December 15, 2011.

On December 22, 2011, PHH filed a two-count complaint seeking to quiet title in the property and to set aside the sheriff's deed on the mortgage foreclosure. The first sought to set aside the foreclosure sale and sheriff's deed based on an alleged "clerical error since the Mortgage, and the balance owed, and the value of the Property all greatly exceeded the amount on said Sheriff's Deed." The second sought, in the alternative, "reformation" of the sheriff's deed, alleging a "scrivener's error or clerical mistake" in the $1,000 bid amount included on the deed, and sought to have it changed to $80,139.09.

Subsequently, RealtyVolution obtained an assignment of mortgage from MERS for the second mortgage on the property, which assignment was filed January 3, 2012. It attempted to

obtain redemption information from Trott & Trott and "was told that no redemption amount would be furnished as the sale had been rescinded by your office." PHH then filed an amended complaint that included RealtyVolution as a defendant, but otherwise contained the same allegations as the original complaint.

C Plus and RealtyVolution both moved for summary disposition against PHH under both MCR 2.116(C)(8) and (10). C Plus attached an affidavit from Chapman regarding his actions with respect to the foreclosure sale. Chapman averred that "Neither I nor my office committed any clerical error or procedural deficiency in conducting this sale. Normal protocol was followed and, as noted, bid instructions were even confirmed by me over the phone with the mortgagee's legal counsel." PHH responded to both motions and also requested summary disposition in its favor. Attached to the motion were affidavits from an attorney for Trott & Trott and a representative of PHH. According to the affidavits, PHH had outsourced its foreclosure duties and a third-party had subcontracted with another third-party to prepare the bidding instructions, which erroneously instructed to start the bidding at $100, rather than "the total debt," which PHH contended was "$80,139.09." Trott & Trott averred that the bidding instructions conveyed to Chapman were erroneous, but also that it was "implicit, and the very nature of a Competitive Bid" that the strategy in the bidding instructions not be disclosed to other potential third-party bidders.

The parties argued their motions and the trial court granted summary disposition in favor of C Plus and RealtyVolution under both (C)(8) and (C)(10). PHH then requested the opportunity to amend its complaint. The trial court agreed, but struggled with how PHH could amend the complaint such that amendment would be justified and requested "some idea why I should even consider—what—what possible way could you amend to fix the ruling I made?" Counsel did not answer the question. The trial court reiterated, "On the issue of (C)(8), if you can figure a theory—understand this: . . . you give me a regurgitation, and I grant the motion again, I will assess costs." Subsequently, PHH objected to the proposed order. At the hearing on the objections, PHH again requested the opportunity to amend. The trial court indicated that PHH could exercise its rights under MCR 2.116(I)(5) and file a motion requesting leave to amend with an affidavit explaining how the complaint is different, and the amended complaint attached to the affidavit. However, no provision regarding the ability to file a motion to amend was included in the order signed by the trial court. PHH did not file a motion with the trial court and, instead, filed the instant appeal.

> This Court reviews de novo the grant or denial of a summary disposition motion. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). Matters of statutory interpretation are also reviewed de novo. *Id.* Defendants moved for summary disposition under MCR 2.116(C)(8) and (10). A motion under MCR 2.116(C)(8) should be granted if the pleadings fail to state a claim as a matter of law, and no factual development could justify recovery. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) should be granted if the evidence submitted by the parties "fails to establish a genuine issue regarding any material fact, [and] the moving party is entitled to judgment as a matter of law." *Id.* at 120; see also 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 the light most favorable to the nonmoving party. [*Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424-425; 751 NW2d 8 (2008).]

In addition, questions of whether equitable relief is proper under the facts of a case are also reviewed de novo on appeal. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

PHH first argues on appeal that the trial court erroneously granted summary disposition to C Plus and RealtyVolution, that it was entitled to summary disposition, and that the trial court's order violated other principles of law. We disagree on all three counts.

We first consider PHH's argument that it was entitled to seek equity.

> Foreclosure sales by advertisement are defined and regulated by statute. Once the mortgagee elects to foreclose a mortgage by this method, the statute governs the prerequisites of the sale, notice of foreclosure and publication, mechanisms of the sale, and redemption. Upon a foreclosure sale, the mortgage debt is considered paid and the mortgage lien discharged. If the mortgagee purchases the property at the sale, it stands in the position of an ordinary purchaser and obtains an ownership interest in the land, subject to the mortgagor's opportunity of redemption. [*Senters v Ottawa Savings Bank, FSB*, 443 Mich 45, 50; 503 NW2d 639 (1993).]

After such a foreclosure sale, "the rights of the parties are fixed by statute." *Id.* at 52. If a party elects to proceed to a foreclosure suit in equity, it might be able to raise equitable defenses; however, "one who seeks the statutory remedy in preference to resort to the equitable proceeding is bound to comply with the statute." *Id.* at 56.

> Courts of equity, . . . as well as law, must apply legislative enactments in accordance with the plain intent and language used by the legislature. Where, as in the present case, a statute is applicable to the circumstances and dictates the requirements for relief by one party, equity will not interfere. [*Id.* at 55-56 (quotation marks and citation omitted).]

Thus, absent "fraud, accident, or mistake," the clear language of the statute must control. *Id.* at 57. These exceptions stem from *Carlisle v Dunlap*, 203 Mich 602; 169 NW 936 (1918), in which our Supreme Court held:

> "Courts of equity have large powers for relief against the consequences of inevitable accident in private dealings, and may doubtless control their own process and decrees to that end. *But we think there is no such power to relieve against statutory forfeitures.* Where a valid legislative act has determined the conditions on which rights shall vest or be forfeited, *and there has been no fraud in conducting the legal measures,* no court can interpose conditions or qualifications in violation of the statute. The parties have a right to stand upon the terms of the law. This principle has not been open to controversy, and is familiar and elementary." [*Id.* at 606, quoting *Cameron v Adams*, 31 Mich 426, 428 (1875) (emphasis added).]

Thus, the law is clear that only a few, limited circumstances permit equity to be invoked where foreclosure had occurred by statute. The question before the trial court was whether, as a matter of law, PHH had established the existence of, or at least a factual dispute regarding the existence of, one of these circumstances.

Looking first at the counts as alleged in the complaint, both counts are based on a claim of a clerical or scrivener's error. However, the record is clear, indeed PHH conceded, that the only error in this case was of its own making. Its agents drafted, sent, and confirmed the allegedly erroneous bidding instructions, and the sheriff's deed accurately reflects the winning bid of $1,000. Thus, because both claims rested on a claim of clerical or scrivener's error, and the undisputed facts proved that there was no such error, summary disposition was appropriate. *Maiden*, 461 Mich at 120.

The arguments made at the summary disposition hearing and in the brief on appeal are somewhat different than those contained in the complaint. There, PHH argues that multiple factors occurred that should permit rescission of the foreclosure sale: mistake in the form of erroneous bidding instruction; the inadequacy of the sale price; irregularity in the form of disclosure of the bidding instructions; and "constructive fraud."

Looking first at the claim of constructive fraud, PHH has failed to cite any facts or law to show that constructive fraud occurred. The fact that the principals of the companies who subsequently obtained interests in the property were present as bidders does not even raise the specter of fraud. O'Neal, herself, could have been present and would have been entitled to redeem for the $1,000 sale price. Furthermore, there is no claim of fraud in the original or amended complaint, no argument at the motion hearing, and no substantive argument in the brief on appeal. Accordingly, this issue is abandoned. *Peterson Novelties v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

The inadequacy of price argument is also meritless. It is long-settled that "inadequacy of price cannot vitiate such a [foreclosure] sale, if otherwise fair and regular." *Carlisle*, 203 Mich at 605. See also *Macklem v Warren Constr Co*, 343 Mich 334, 339 (1952) ("[I]nadequacy of price alone will not vitiate an otherwise fair and regular statutory foreclosure sale.").

Turning to PHH's allegation of mistake, assuming that a mistake could rise to a level sufficient to invoke equity and set aside a statutory foreclosure sale, this is not such a case. The mistake was the alleged erroneous bidding instructions being sent to the sheriff. However, PHH's agent drafted and sent the instructions; the sheriff, as another of PHH's agents, confirmed with Trott & Trott, another agent of PHH, that the instructions were accurate; and the sheriff, relying on that information, completed the sale in accordance with those instructions. Thus, the alleged mistake is unilateral and the law has consistently held that unilateral mistakes are insufficient to entitle a party to relief. See, e.g., *Genesee Foods Serv v Meadowbrook, Inc*, 279 Mich App 649, 660; 760 NW2d 259 (2008) (unilateral mistake by a party is an insufficient basis to modify a settlement); *Casey v Auto Owners Ins Co*, 273 Mich App 388, 398; 729 NW2d 277 (2006) ("[U]nilateral mistake is not sufficient to warrant reformation."). "We think it insufficient to invoke equity to save the mortgagee from its own mistake, particularly where the mortgagee is a sophisticated commercial lender." *Townsend v Chase Manhattan Mortgage Corp*, 254 Mich App 133, 139-140; 657 NW2d 741 (2002). Where PHH is a sophisticated

mortgage lender, Trott & Trott is a sophisticated law firm specializing in foreclosure, and the sheriff had extensive experience with foreclosure sales, there is simply no basis to invoke equity to save PHH from its own mistake.

PHH's final claim rests on an allegation of irregularity. There is no dispute that Michigan courts have recognized irregularity as a basis to set aside a foreclosure by advertisement. See, e.g., *Calaveras Timber Co v Michigan Trust Co*, 278 Mich 445, 450; 270 NW 743 (1936) ("We will not, in the absence of fraud or irregularity, interfere with a statutory foreclosure." Although no caselaw has defined what constitutes an irregularity, some cases imply that is must relate to the foreclosure process itself. See *Freeman v Wozniak*, 241 Mich App 633, 637-638; 617 NW2d 46 (2000) ("Plaintiff cannot argue that there was fraud, accident, or mistake because plaintiff readily conceded that the foreclosure process was technically proper.").

In addition, "'[t]he Michigan Supreme Court has held that it would require a strong case of fraud or irregularity, or some peculiar exigency, to warrant setting a foreclosure sale aside.'" *Sweet Air Inv, Inc v Kenney*, 275 Mich App 492, 497; 739 NW2d 656 (2007), quoting *United States v Garno*, 974 F Supp 628, 633 (ED Mich, 1997). Thus, the simple existence of an irregularity is insufficient; it must rise to a particular level before a foreclosure sale will be set aside. *Garno*, 974 F Supp at 633.

Based on the record, we conclude that plaintiff has either failed to establish an irregularity, or has failed to establish an irregularity that rises to the level sufficient to require rescission of the foreclosure sale. There is no contention that the statutory requirements were not followed in this case. Thus, to the extent that caselaw requires the irregularity to occur from the process itself, the agent's disclosure of the bidding instructions does not satisfy that requirement. To the extent that caselaw does not require the irregularity to stem from the process itself, its mere existence does not entitle PHH to relief.[2] Rather the irregularity must be particularly strong.

Here, the record is clear that, had there been no bidders, the sale price would have been $900 lower than it actually was. In addition, there is no evidence or allegation that Chapman violated any direct instruction not to disclose and, even if he had, this would be an irregularity created by the experienced agent of the winning bidder. We can find no basis or reason to conclude that an irregularity created by a unilateral mistake on the part of the winning bidder entitles that bidder to rescind the sale. Such circumstances do not rise to the level of what is necessary to void a foreclosure sale. *Sweet Air Inv, Inc*, 275 Mich App at 497.

[2] We have not decided whether the disclosure of the bidding instructions constitutes an irregularity. Rather, relying on the affidavit provided by PHH, we have viewed the facts in the light most favorable to PHH and assumed that it constituted an irregularity. However, if caselaw does require that the irregularity stem from the statutory process, then we conclude that the agent's disclosure of the bidding instructions was not an irregularity as a matter of law.

Thus, caselaw is clear that equity does not apply to cases of foreclosure by advertisement in the absence of fraud or irregularity and, potentially, mistake and accident. PHH failed, as a matter of law, to establish that any of these conditions occurred in this case. Accordingly, the trial court properly granted summary disposition to C Plus and RealtyVolution.

PHH next asserts that the trial court abused its discretion when it granted summary disposition without first allowing PHH to amend its complaint. However, the record is clear, even as PHH cites it, that the trial court twice acknowledged and granted PHH the right to amend its complaint. Even assuming that there was some question given the trial court's statements at the March 5 hearing, the trial court explicitly outlined the steps PHH should take in order to amend its complaint at the June 19 hearing. PHH never attempted to avail itself of either of these opportunities. Instead, PHH has alternatively claimed that 1) there was insufficient time to amend after entry of the June 19 order, so it filed this appeal and 2) the trial court's failure to include the right to amend in its final order constituted error. The argument that there was insufficient time and that the request to amend could be denied suggests that PHH made a reasoned decision to forego the opportunity to amend, not that it was denied one. Furthermore, PHH has failed to provide any law that says the failure to include the right to amend in an order constitutes reversible error. Rather, all of the caselaw it provides says the failure to permit amendment *without justifying the denial* is grounds for reversal. See, e.g., *Sharp v City of Lansing*, 238 Mich App 515, 522-523; 606 NW2d 424 (1999), rev'd in part on other grounds 464 Mich 792 (2001) ("The trial court must specify its reasons for denying the motion"). Where the record is clear that the trial court did not deny PHH the right to seek amendment, the cases cited are inapplicable.

Moreover, PHH did not request leave to amend until after the trial court had verbally granted summary disposition to C Plus and RealtyVolution. When a litigant's request to amend is made after summary disposition has been granted, amendment is only permitted by leave of the court and, therefore, requires a motion for leave to amend. *Schimmer v Wolverine Ins Co*, 54 Mich App 291, 298-299; 220 NW2d 772 (1974). This is precisely what the trial court ordered PHH to do if it wanted to amend its complaint. However, instead, PHH elected not to file the motion. Where the trial court twice acknowledged PHH's right to amend and explicitly informed it of the proper procedure to do so, and PHH never filed a motion for leave to amend to avail itself of the opportunity, we find no error.

Affirmed.

/s/ Donald S. Owens
/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens