STATE OF MICHIGAN

COURT OF APPEALS

DENEEN DUMAS,

Plaintiff-Appellant,

v

MIDLAND MORTGAGE COMPANY,

Defendant-Appellee.

UNPUBLISHED
September 18, 2012

No. 304470
Oakland Circuit Court
LC No. 2009-102428-CH

Before: FORT HOOD, P.J., and METER and MURRAY, JJ.

PER CURIAM.

Plaintiff, Deneen Dumas, appeals as of right the trial court's order granting defendant Midland Mortgage Company's motion for summary disposition. We affirm.

I. BACKGROUND

On December 8, 1999, plaintiff was granted an adjustable rate mortgage by North American Mortgage Company. Defendant, Midland Mortgage Company, serviced the loan. In March 2008, the loan was in default for failure to make payments. On February 13, 2009, defendant sent plaintiff a proposed loan modification as an alternative to foreclosure. When plaintiff did not accept the loan modification, defendant initiated foreclosure proceedings on the property. Plaintiff subsequently brought suit against defendant in an effort to invalidate the foreclosure.

II. ANALYSIS

A. APPLICABILITY OF MCL 600.3205a

On appeal, plaintiff argues that the trial court erred in determining that defendant did not violate MCL 600.3205a by not providing adequate notice of the foreclosure. This Court reviews decisions on summary disposition de novo. *Kuznar v Rashka Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). Although the trial court did not specify whether it ruled on this issue pursuant to MCR 2.116(C)(8) or MCR 2.116(C)(10), we will review this issue pursuant to MCR 2.116(C)(8) because the motion challenges the legal sufficiency of the amended complaint. Under MCR 2.116(C)(8), summary disposition is proper if the nonmoving party "has failed to state a claim on which relief can be granted." "Such claims must be so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* at 176

(quotations and citation omitted). In reviewing the decision on a motion brought under MCR 2.116(C)(8), this Court considers the pleadings alone, accepting the factual allegations in the complaint as true and construing them in a light most favorable to the nonmoving party. *Id.*

Under clearly-settled Michigan law, "statutes [and their amendments] are presumed to operate prospectively unless the contrary intent is clearly manifested." *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001) (quotations and citation omitted). "This is especially true if retroactive application of a statute would impair vested rights, create a new obligation and impose a new duty, or attach a disability with respect to past transactions." *Id.* The fact that the Legislature includes no express language regarding retroactivity demonstrates an intent that the law apply only prospectively. *Id.* at 584.

Even if we assume that defendant failed to comply with the certain provisions within MCL 600.3205a, we hold that the statute is not applicable since it was not in effect when these foreclosure proceedings began. Defendant posted notice of foreclosure of plaintiff's property in March 2009, and the statute, 2009 PA 30, came into effect on July 5, 2009. Defendant correctly contends that it would have been impossible to comply with a statute that was not yet in effect, and the Legislature did not intend to impose these statutory requirements retroactively.

Since the statute was not in effect when defendant initiated foreclosure proceedings in March 2009, plaintiff cannot seek relief under MCL 600.3205a. We conclude that the trial court did not err in holding that plaintiff cannot maintain a claim against defendant for violation of MCL 600.3205a.

B. 15 USC 1639a PRIVATE CAUSE OF ACTION

Plaintiff also argues that the trial court erred[1] in determining that plaintiff could not bring a private cause of action against defendant under 15 USC 1639a. Statutory interpretation is a question of law that is reviewed de novo on appeal. *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003). With regard to statutory interpretation, the primary goal is to discern and give effect to the intent of the Legislature. *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 243; 704 NW2d 117 (2005). This Court discerns that intent by examining the specific language of a statute. *TMW Enterprises Inc v Department of Treasury*, 285 Mich App 167, 172; 775 NW2d 342 (2009). If the language is clear, this Court presumes that the Legislature intended the meaning it has plainly expressed and the statute will be enforced as written. *Id.* Unless otherwise defined in the statute, or understood to have a technical or peculiar meaning in the law, every word or phrase of a statute will be given its plain and ordinary meaning. *Id.*

Plaintiff contends that defendant breached a duty owed under 15 USC 1639a and this breach creates a private cause of action for plaintiff against defendant. However, for the reasons discussed below, we hold that (1) plaintiff does not have a private cause of action under the

[1] We likewise address this issue under the standards for a motion for summary disposition brought under MCR 2.116(C)(8).

statute, (2) plaintiff offers no evidence defendant actually breached the duty created by the statute, and (3) even if plaintiff is a member of the class owed a duty, and defendant breached the duty, according to the plain language of the statute defendant would still not be liable to plaintiff for actions taken regarding loan modifications.

15 USC 1639a provides:

> **(a) In general**
>
> Notwithstanding any other provision of law, whenever a servicer of residential mortgages agrees to enter into a qualified loss mitigation plan with respect to one or more residential mortgages originated before May 20, 2009, including mortgages held in a securitization or other investment vehicle –
>
> **(1)** to the extent that the servicer owes a duty to investors or other parties to maximize the net present value of such mortgages, the duty shall be construed to apply to all such investors and parties, and not to any individual party or group of parties; and
>
> **(2)** the servicer shall be deemed to have satisfied the duty set forth in paragraph (1) if, before December 31, 2012, the servicer implements a qualified loss mitigation plan that meets the following criteria:
>
> **(A)** Default on the payment of such mortgage has occurred, is imminent, or is reasonably foreseeable, as such terms are defined by guidelines issued by the Secretary of the Treasury or his designee under the Emergency Economic Stabilization Act of 2008.
>
> **(B)** The mortgagor occupies the property securing the mortgage as his or her principal residence.
>
> **(C)** The servicer reasonably determined, consistent with the guidelines issued by the Secretary of the Treasury or his designee, that the application of such qualified loss mitigation plan to a mortgage or class of mortgages will likely provide an anticipated recovery on the outstanding principal mortgage debt that will exceed the anticipated recovery through foreclosures.
>
> **(b) No liability**
>
> A servicer that is deemed to be acting in the best interests of all investors or other parties under this section shall not be liable to any party who is owed a duty under subsection (a)(1), and shall not be subject to any injunction, stay, or other equitable relief to such party, based solely upon the implementation by the servicer of a qualified loss mitigation plan.

"[F]ederal regulations in and of themselves cannot create a private cause of action unless the action is at least implied from the applicable statute." *Parry v Mohawk Motors of Mich, Inc*, 236 F3d 299, 309 (CA 6, 2000). Plaintiff concedes that the Housing and Economic Recovery

Act is a regulatory statute and does not provide any private cause of action for mortgagors against mortgagees on its own. But, plaintiff argues that she can nevertheless maintain a cause of action against defendant under the act since section 1403 of HERA was included as an amendment to the Truth in Lending Act, section 129A, which does provide a private cause of action for mortgagors. However, the sections plaintiff cites are not relevant to the case at hand. Plaintiff relies on 15 USC 1640, which outlines civil penalties designed to enforce provisions of the act provided in 15 USC 1639. Section 1639 details requirements for certain mortgages, but defendant either complied with these requirements or they were not relevant to the foreclosure. Plaintiff instead alleges violations of 15 USC 1639a, a different section entirely.

15 USC 1639a does not create liability for servicers; rather, it *protects* servicers from claims of a breach of fiduciary duty if they revise or refinance a mortgage that is in default, when the mortgage is part of a mortgage pool. 15 USC 1639a provides protection to the servicer of a mortgage pool so that investors in the pool do not sue servicers when they enter into loan modifications. There is simply no evidence that Congress intended to create a private right of action for borrowers under 15 USC 1639a. Plaintiffs, as borrowers, do not have an interest in a mortgage pool. See *McGrew v Countrywide Home Loans, Inc*, 628 F Supp 2d 1237, 1240-1241 (SD Cal 2009), citing *Chase Manhattan Mtg Corp v Advanta Corp*, unpublished opinion of the United States District of Delaware, issued September 8, 2005 (Docket No. 01-507).[2]

15 USC 1639a does not impose liability on servicers to investors in a mortgage pool, so long as the loan servicer is acting in the investors' best interests by attempting to maximize the value of the investment. Therefore, even if plaintiff, as a mortgagor, were considered an interested party in the mortgage pool, she would have no cause of action against defendant because of the explicit language of section 1639a(b). Indeed, plaintiff offers no evidence that defendant has violated the statute by acting counter to the interests of the investors, and there is nothing to suggest that defendant is doing anything other than attempting to maximize the value of the investment by foreclosing a property in default of payment. Thus, under 15 USC 1639a(b), defendant is not liable to plaintiff for any actions taken regarding a loan modification or workout plan. We conclude that the trial court did not err in holding that plaintiff does not have a private cause of action against defendant under 15 USC 1639a, and that defendant incurs no liability to plaintiff under the statute even if there was a cause of action.

C. 12 USC 1715u PRIVATE CAUSE OF ACTION

Plaintiff's third issue is that the trial court erred in determining that the language of 12 USC 1715u does not create a private cause of action for plaintiff against defendant for failing to modify a mortgage to avoid foreclosure. Statutory interpretation is a question of law that is reviewed de novo on appeal. *Eggleston*, 468 Mich at 32. Summary disposition is proper under MCR 2.116(C)(8) if the nonmoving party "has failed to state a claim on which relief can be granted." "Such claims must be so clearly unenforceable as a matter of law that no factual

[2] Although *McGrew* was published in the advanced sheets as 628 F Supp 2d 1237, it was withdrawn from the bound volume at the court's request.

development could possibly justify recovery." *Kuznar*, 481 Mich at 176 (quotations and citation omitted).

12 USC 1715u provides, in part:

> **(a) Loss mitigation**
>
> Upon default or imminent default, as defined by the Secretary of any mortgage insured under this subchapter, mortgagees shall engage in loss mitigation actions for the purpose of providing an alternative to foreclosure (including but not limited to actions such as special forbearance, loan modification, preforeclosure sale, support for borrower housing counseling, subordinate lien resolution, borrower incentives, and deeds in lieu of foreclosure, as required, but not including assignment of mortgages to the Secretary under section 1710(a)(1)(A) of this title) or subsection (c), as provided in regulations by the Secretary. [Footnotes omitted.]

Plaintiff argues for a private action under 12 USC 1735f-14, which outlines the consequences of failing to comply with 12 USC 1715u.[3] However, nothing in this section creates a private cause of action for mortgagors against mortgagees. Instead, it details the civil money *regulatory* penalties that may be levied against a lender *by the government*, including a penalty for failure to engage in loss mitigation actions as provided in 12 USC 1715u(a). There is nothing in the language of 12 USC 1735f-14 or 12 USC 1715u that suggests a mortgagor has a private cause of action against a mortgagor who does not engage in loss mitigation actions.

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[3] 12 USC 1735f-14 provides, in part:

> **(a) In general**
>
> **(1) Authority**
>
> If a mortgagee approved under the chapter, a lender holding a contract of insurance under subchapter I of this chapter, or a principal, officer, or employee of such mortgagee or lender, or other person or entity participating in either an insured mortgage or subchapter I loan transaction under this chapter or providing assistance to the borrower in connection with any such loan, including sellers of the real estate involved, borrowers, closing agents, title companies, real estate agents, mortgage brokers, appraisers, loan correspondents and dealers, knowingly and materially violates any applicable provision of subsection (b) of this section, the Secretary may impose a civil money penalty on the mortgagee or lender, or such other person or entity, in accordance with this section. The penalty under this paragraph shall be in addition to any other available civil remedy or any available criminal penalty, and may be imposed whether or not the Secretary imposes other administrative sanctions. [Footnote omitted.]

Therefore, we conclude that the trial court did not err in holding that plaintiff does not have a private cause of action against defendant under 12 USC 1715u.

Additionally, we conclude that defendant's actions do not provide plaintiff a defense against foreclosure as an alternative to an offensive action. The key language of 12 USC 1715u is that, in the event of a default, the mortgagee "shall engage in loss mitigation actions for the purpose of providing an alternative to foreclosure[.]" Defendant correctly contends that the language of the statute does not mandate that the mortgagee enter into a loan modification; it merely requires that the lender engage in loss mitigation efforts. The intent of this provision, based on the plain language, is to provide a mortgagor in default an alternative option to foreclosure. It does not state that the mortgagee must continue to make loan modification proposals until the mortgagor finds one a suitable offer to accept. In the instant case, defendant offered a loan modification in compliance with 12 USC 1715u and plaintiff chose not to accept it. Therefore, defendant has not violated the statute and plaintiff cannot use defendant's noncompliance as a "shield"[4] to stop foreclosure.

D. MCR 2.116(C)(10)

Plaintiff argues that there were several genuine issues of fact that precluded the grant of defendant's motion for summary disposition. However, because we have concluded that none of the statutory provisions upon which plaintiff relies offer any relief as a matter of law, whether any factual issues exist is moot. Because plaintiff has not cited any proper legal basis for her claims against defendant, she has no cause of action against defendant so any factual issue is irrelevant.

However, even assuming it was relevant and not moot, we would hold that the trial court did not err in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) because there are no genuine issues of material fact. This Court reviews the grant or denial of a motion for summary disposition under MCR 2.116(C)(10) de novo. *Lind v City of Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Id*. We review the evidence in the light most favorable to the nonmoving party, and grant summary disposition when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*.

Plaintiff argues that the correspondence from defendant on March 25, 2011, demonstrates a genuine issue of material fact pertaining to the amount due and owing, which would invalidate the foreclosure, since the unpaid principal balance in the letter in March was a different amount than in the loan modification sent to plaintiff in February 2009. However, the alleged discrepancy is not relevant to any legal issue preserved on appeal, and furthermore, plaintiff has misinterpreted these letters. There is no genuine issue of material fact as to whether defendant effectuated a valid foreclosure of the property.

[4] Regulatory noncompliance can be used "as a shield against unauthorized foreclosure actions." *Wells Fargo Home Mtg, Inc v Neal*, 398 Md 705, 721 (2007).

The letter in question is one of a series of letters that were sent annually to inform plaintiff of a change in interest rate and payments due, consistent with an adjustable rate mortgage. The differences in the unpaid principal balances in these letters are not evidence of a discrepancy; rather, they demonstrate that the loan has been in default since March 2008. There is no issue regarding the amount due and owing by plaintiff, and no genuine issue of material fact as to whether defendant has effectuated a valid foreclosure of the property. We conclude that the trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

Defendant may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Karen M. Fort Hood
/s/ Patrick M. Meter
/s/ Christopher M. Murray