STATE OF MICHIGAN

COURT OF APPEALS

MARIA VASILAKIS and SPYRIDON VASILAKIS,

Plaintiffs-Appellants,

v

TROTT & TROTT, P.C. and HOME LOAN SERVICES, INC. f/k/a ALTEGRA CREDIT CO., INC. d/b/a FIRST FRANKLIN LOAN SERVICES,

Defendants-Appellees,

and

RESIDENTIAL CREDIT SOLUTIONS and FEDERAL NATIONAL HOME LOAN CORP. a/k/a FANNIE MAE,

Defendants.

UNPUBLISHED
November 15, 2012

No. 306122
Macomb Circuit Court
LC No. 2010-005294-CZ

Before: WILDER, P.J., and GLEICHER and BOONSTRA, JJ.

PER CURIAM.

This case involves various statutory, contractual and equitable claims raised by disgruntled debtors who lost their home to foreclosure. Plaintiffs Maria and Spyridon Vasilakis failed to follow the clear procedures delineated in the 2010 version of the foreclosure by advertisement statutes, MCL 600.3204 *et seq.*, to trigger the statutory process to avoid foreclosure. Accordingly, the trial court properly determined that the foreclosure sale was valid and summarily dismissed plaintiffs' claims. We affirm that judgment.

I. BACKGROUND

In 2008, plaintiffs defaulted on their home mortgage loan. Instead of immediately pursuing foreclosure as permitted in the mortgage, the lender, First Franklin Financial Corp.,

negotiated two trial period plans (TPPs) with plaintiffs as contemplated by the federal Home Affordable Modification Plan (HAMP) to assist plaintiffs in retaining their home.[1] Plaintiffs claim that they successfully completed these TPPs, but defendants assert that they again defaulted. Home Loan Services, which serviced the mortgage loan for First Franklin, retained Trott & Trott, P.C. (Trott) to handle the foreclosure process.

On April 19, 2010, Trott notified plaintiffs that their mortgage loan was in default. The notification letter informed plaintiffs, "Within 14 days of the date of this notice, you may request a meeting with the agent designated above [Trott] to attempt to work out a modification of the mortgage loan to avoid foreclosure *by contacting a housing counselor from the list provided* with this notice." (Emphasis added.) The letter indicated that, if plaintiffs requested a loan modification meeting "by contacting a housing counselor" from the provided list, "foreclosure proceedings [would] not be commenced until 90 days after the date of this notice."

Plaintiffs did not contact a housing counselor from the list provided by Trott. Instead, Maria Vasilakis personally telephoned Trott on April 21, 2010, to request a loan modification meeting. Plaintiffs then retained an attorney, and an employee of the law firm contacted Trott on May 13. Despite these contacts, Trott notified plaintiffs of the upcoming foreclosure sale. The sale occurred as advertised on June 18 and First Franklin entered the winning bid.

Plaintiffs filed suit three days before the expiration of the statutory redemption period. In an amended complaint, plaintiffs challenged the various defendants' actions under the foreclosure by advertisement statutes, MCL 600.3205a in particular. Plaintiffs contended that defendants' previous negotiation of two TPPs entitled plaintiffs to a permanent loan modification. Plaintiffs asserted that if defendants' actions in pursuing foreclosure did not violate the statute, plaintiffs were entitled to relief under equitable theories based on the implied promises made by defendants or under a theory that the earlier TPPs modified the mortgage.

The trial court summarily dismissed plaintiffs' claims pursuant to MCR 2.116(C)(8) and (C)(10). In relation to plaintiffs' statutory claims, the trial court ruled that Trott's notification to plaintiffs complied with MCL 600.3205a(1) and (4). The court determined that plaintiffs failed to follow the proper procedure for obtaining a meeting with Trott as they never contacted an authorized housing counselor. The court further noted that "there is nothing in MCL 600.3205 *et seq.* that required defendants to offer a loan modification to plaintiffs." In relation to plaintiffs' other claims, the court determined that they "all arise from defendants' alleged improper conduct

[1] The HAMP is a federal program under the Departments of Treasury and Housing and Urban Development to "help financially struggling homeowners avoid foreclosure by modifying loans." See <http://www.makinghomeaffordable.org/programs/lower-payments/Pages/hamp.aspx>; <https:www.hmpadmin.com/ portal/programs/hamp.jsp> (accessed October 24, 2012). Pursuant to the HAMP, loan servicers may implement TPPs for eligible borrowers under which the servicer "calculate[s] a modification using a 'waterfall' method applying enumerated changes in a specified order until the borrower's monthly mortgage payment ratio dropped 'as close as possible to 31 percent.'" *Wigod v Wells Fargo Bank, NA*, 673 F3d 547, 556-557 (CA 7, 2012).

with respect to the foreclosure by advertisement." As the court found no impropriety in that regard, it dismissed the remaining claims.

II. ANALYSIS

We review de novo a trial court's resolution of a motion for summary disposition. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. 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. [*Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004) (quotation marks and citations omitted).]

We also review issues of statutory interpretation de novo. *In re Complaint of Rovas*, 482 Mich 90, 97; 754 NW2d 259 (2008). The goal of statutory interpretation is to discern the intent of the Legislature based on the language of the statute. "If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997).

Plaintiffs did not comply with the foreclosure by advertisement statutes and defendants were therefore permitted to pursue foreclosure. The foreclosure by advertisement statutes were amended in 2011. 2011 PA 301-302. At the time of the 2010 proceedings, however, MCL 600.3204 allowed a lender or its agent to pursue foreclosure by advertisement as follows:

> (1) Subject to subsection (4), a party may foreclose a mortgage by advertisement if all of the following circumstances exist:
>
> (a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.
>
> (b) An action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage . . . .
>
> (c) The mortgage containing the power of sale has been properly recorded.
>
> (d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage.

* * *

(4) A party shall not commence proceedings under this chapter to foreclose a mortgage of property described in [MCL 600.3205a(1)] if 1 or more of the following apply:

(a) Notice has not been mailed to the mortgagor as required by [MCL 600.3205a].

(b) After a notice is mailed to the mortgagor under [MCL 600.3205a], the time for a housing counselor to notify the person designated under [MCL 600.3205a(1)(c)] of a request by the mortgagor under [MCL 600.3205b(1)] has not expired.

(c) Within 14 days after a notice is mailed to the mortgagor under [MCL 600.3205a], the mortgagor has requested a meeting under [MCL 600.3205b] with the person designated under [MCL 600.3205a(1)(c)] and 90 days have not passed after the notice was mailed.

(d) The mortgagor has requested a meeting under [MCL 600.3205b] with the person designated under [MCL 600.3205a(1)(c)], the mortgagor has provided documents if requested under [MCL 600.3205b(2)], and the person designated under [MCL 600.3205a(1)(c)] has not met or negotiated with the mortgagor under this chapter.

(e) The mortgagor and mortgagee have agreed to modify the mortgage loan and the mortgagor is not in default under the modified agreement.

(f) Calculations under [MCL 600.3205c(1)] show that the mortgagor is eligible for a loan modification and foreclosure under this chapter is not allowed under [MCL 600.3205c(7)].

The conditions to proceed to foreclosure by advertisement, MCL 600.3204(1), were met in this case. Plaintiffs had defaulted on their properly recorded mortgage loan that contained a power of sale and there was no pending action to recover the debt from plaintiffs.

The conditions of MCL 600.3204(4) had also been met. Trott notified plaintiffs as required by MCL 600.3204(4)(a). That subpart directed the lender or its agent to the former MCL 600.3205a. In 2010, MCL 600.3205a provided, in relevant part:

(1) Subject to subsection (6), before proceeding with a sale under this chapter of property claimed as a principal residence . . . , the foreclosing party shall serve a written notice on the borrower that contains all of the following information:

(a) The reasons that the mortgage loan is in default and the amount that is due and owing under the mortgage loan.

(b) The names, addresses, and telephone numbers of the mortgage holder, the mortgage servicer, or any agent designated by the mortgage holder or mortgage servicer.

(c) A designation of 1 of the persons named in subdivision (b) as the person to contact and that has the authority to make agreements under [MCL 600.3205b and 600.3205c].

(d) That enclosed with the notice is a list of housing counselors prepared by the [MSHDA] and that within 14 days after the notice is sent, the borrower may request a meeting with the person designated under subdivision (c) to attempt to work out a modification of the mortgage loan to avoid foreclosure and that the borrower may also request a housing counselor to attend the meeting.

(e) That if the borrower requests a meeting with the person designated under subdivision (c), foreclosure proceedings will not be commenced until 90 days after the date the notice is mailed to the borrower.

(f) That if the borrower and the person designated under subdivision (c) reach an agreement to modify the mortgage loan, the mortgage will not be foreclosed if the borrower abides by the terms of the agreement.

(g) That if the borrower and the person designated under subdivision (c) do not agree to modify the mortgage loan but it is determined that the borrower meets criteria for a modification under [MCL 600.3205c(1)] and foreclosure under this chapter is not allowed under [MCL 600.3205c(7)], the foreclosure of the mortgage will proceed before a judge instead of by advertisement.

(h) That the borrower has the right to contact an attorney, and the telephone numbers of the state bar of Michigan's lawyer referral service and of a local legal aid office serving the area in which the property is situated.

(2) A person who serves a notice under subsection (1) shall enclose with the notice a list prepared by the [MSHDA] under [MCL 600.3205d] of the names, addresses, and telephone numbers of housing counselors approved by the United States department of housing and urban development or the [MSHDA].

There is no dispute that the April 19 notification included all the required information.

Trott complied with MCL 600.3204(4)(b) by waiting 14 days to allow plaintiffs an opportunity to contact it through a housing counselor to request a modification meeting. Plaintiffs never requested a meeting as provided in former MCL 600.3205b(1), which provided:

A borrower who wishes to participate in negotiations to attempt to work out a modification of a mortgage loan shall contact a housing counselor from the list provided under [MCL 600.3205a] within 14 days after the list is mailed to the borrower. Within 10 days after being contacted by a borrower, *a housing*

> *counselor shall inform the person designated under [MCL 600.3205a(1)(c)] in writing of the borrower's request.* [Emphasis added.]

"Shall" is a mandatory term. *Manuel v Gill*, 481 Mich 637, 647; 753 NW2d 48 (2008). According to the plain language of the statute, plaintiffs could not request a meeting personally, through a retained attorney or through a retained financial consultant. The request had to come from an authorized housing counselor.[2]

MCL 600.3204(4)(c) and (d) only precluded a lender from proceeding to foreclosure if the borrower requested a meeting through a housing counselor under MCL 600.3205b(1). As plaintiffs did not request a meeting through such a counselor, defendants were free under MCL 600.3204 to advertise the foreclosure and conduct the sale. Defendants were not precluded from pursuing foreclosure by MCL 600.3204(4)(e) as the parties had yet to reach an agreement to modify the loan. MCL 600.3204(4)(f) did not proscribe foreclosure as plaintiffs made no attempt to establish their eligibility for a loan modification based on the calculations of MCL 600.3205c. In any event, Trott would only have been required to independently consider plaintiffs' qualification for a loan modification if plaintiffs had first contacted a housing counselor. MCL 600.3205c(1).

Defendants did not violate the statutes by conducting the foreclosure sale. Plaintiffs never contacted an authorized housing counselor. No housing counselor contacted defendants on plaintiffs' behalf to request a modification meeting. Accordingly, defendants were within their rights to proceed with the foreclosure.

III. PLAINTIFFS' OTHER CLAIMS

Despite their failure to conform to the statutory requirements, plaintiffs raised several additional challenges to defendants' pursuance of foreclosure. Plaintiffs claim that defendants' history of negotiating TPPs with them amounted to a promise to modify the loan, estopping the foreclosure proceedings. Promissory estoppel is an equitable claim, *Crown Tech Park v D & N Bank, FSB*, 242 Mich App 538, 548; 619 NW2d 66 (2000), which we review de novo. *Tkachik v Mandeville*, 487 Mich 38, 44-45; 790 NW2d 260 (2010). Plaintiffs' claim lacks merit, however, as a promise by a financial institution "to renew, extend, modify, or permit a delay in repayment or performance of a loan" must be in writing. MCL 566.132(2)(b). If the promise is not "in writing," "[a]n action shall not be brought against [the] financial institution to enforce" that promise. MCL 566.132(2). Given the plain language of the statute of frauds, the Legislature did not "intend[] to preserve promissory estoppel as a viable form of action against financial institutions to enforce oral loan modifications." *Crown Tech Park*, 242 Mich App at 552.

Plaintiffs assert that defendants were equitably estopped from pursuing foreclosure given plaintiffs' successful completion of two prior TPPs. "However, equity cannot 'trump an

[2] The statute was amended in 2011, and now permits a homeowner to personally contact the lender's designated agent to request a loan modification meeting. MCL 600.3205b(1), as amended by 2011 PA 302.

unambiguous and constitutionally valid statutory enactment.'" *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280, 293 n 9; 731 NW2d 29 (2007), quoting *Devillers v Auto Club Inc Ass'n*, 473 Mich 562, 591; 702 NW2d 539 (2005). Plaintiffs never triggered the protections of the foreclosure statutes by requesting a modification meeting through a housing counselor and defendants were therefore permitted to pursue foreclosure.

Plaintiffs accuse defendants of fraudulent misrepresentation and of fraudulently inducing them to forego their protections under the foreclosure by advertisement statutes. Plaintiffs never triggered the statute's protections by contacting a housing counselor and having that counselor contact Trott to request a modification meeting. Plaintiffs have not alleged that defendants induced them not to trigger their rights under the statute. Indeed, the April 19 letter informed plaintiffs that they needed to contact a housing counselor to request a meeting on their behalf.

Plaintiffs contend that the parties' prior negotiation of two TPPs modified their mortgage such that defendants could no longer automatically pursue foreclosure in the face of plaintiffs' default. Parties may modify their contracts "[w]hen a course of conduct establishes by clear and convincing evidence that a contracting party, relying on the terms of the prior contract, knowingly waived enforcement of those terms." *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003). Yet, such modification by conduct is not permitted in relation to mortgage loans as the statute of frauds requires a loan modification to be in writing. MCL 566.132(2); *Crown Tech*, 242 Mich App at 549-550.

Plaintiffs are not entitled to the equitable relief of setting aside the foreclosure sale or enjoining their eviction. "Statutory foreclosures should not be set aside without some very good reason therefor." *Detroit Trust Co v Agozzinio*, 280 Mich 402, 406; 273 NW 747 (1937) (quotations marks and citation omitted). "[W]here . . . a statute is applicable to the circumstances and dictates the requirements for relief by one party, equity will not interfere. . . . [I]n the absence of fraud, accident or mistake, the possibility of injustice is not enough to tamper with the strict statutory requirements." *Freeman v Wozniak*, 241 Mich App 633, 637; 617 NW2d 46 (2000). Plaintiffs never established that the foreclosure proceedings were statutorily invalid and therefore are not entitled to set aside the foreclosure sale.

Although plaintiffs do not challenge the trial court's denial of their motion to file a second amended complaint incorporating alleged violations of the HAMP, they continue to assert that defendants' actions violated the federal program. Even if defendants' conduct was contrary to the HAMP, plaintiffs have no private right of action to enforce the program. *Miller v Chase Home Finance, LLC*, 677 F3d 1113, 1116-1117 (CA 11, 2012); *Hart v Countrywide Home Loans, Inc*, 735 F Supp 2d 741, 748 (ED Mich, 2010). Rather, "[t]o assure that servicers comply with the guidelines, the Secretary designated Freddie Mac to conduct compliance assessments of HAMP participants." *Miller*, 677 F3d at 1116.

Finally, plaintiffs' challenge to the dismissal of its negligence per se claim is unavailing. For a court to determine that a statutory violation amounted to negligence per se certain elements must exist. (1) The statute must be "intended to protect against the result of the violation," (2) the plaintiff must be "within the class intended to be protected by the statute," and (3) the statutory violation must be a proximate cause of the plaintiff's injury. *Klanseck v Anderson Sales & Serv, Inc*, 426 Mich 78, 87; 393 NW2d 356 (1986). Even if a violation of the

foreclosure by advertisement statutes could be deemed negligence per se, plaintiffs have established no statutory violation.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher
/s/ Mark T. Boonstra