STATE OF MICHIGAN

COURT OF APPEALS

FIRST NATIONAL BANK OF MICHIGAN, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED December 12, 2013
v	No. 312861 Van Buren Circuit Court
TERRI A. PETERSON, Defendant/Counter-Plaintiff-Appellant.	LC No. 12-620063-CH

Before: SAWYER, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

Defendant Terri Peterson appeals as of right the trial court's order granting summary disposition in favor of plaintiff on its foreclosure claim and dismissing defendant's counterclaims. We affirm.

Defendant and her late husband, Lance Peterson, owned property in South Haven, Michigan, as tenants by the entirety. In 2007, Lance borrowed money from plaintiff pursuant to a home equity line of credit. Repayment of the line of credit was secured by a future advance mortgage against the South Haven property. The mortgage also secured all other "future advances" made to defendant and Lance, as the "mortgagors." Signatures purporting to be those of the parties appeared on the mortgage. Directly below defendant's signature line, the typewritten words "Terri A. Peterson as waiver of dower" appeared. The mortgage was notarized by Mary Hoag, and it was later discovered that Hoag omitted from the certificate of acknowledgment the date that the signatures were acknowledged. The mortgage was duly recorded by plaintiff.

Lance passed away in November of 2011. On April 25, 2012, plaintiff initiated a judicial foreclosure action to foreclose on the South Haven property. In relevant part, the complaint alleged that Lance had defaulted on the line of credit by failing to make payments before his death. Defendant answered the complaint and alleged that she did not recall signing the mortgage or, in the alternative, she only signed it to waive her rights to dower in the property and therefore was not a party to the mortgage. Defendant also filed counterclaims against plaintiff, alleging common law slander of title and two counts of statutory slander of title pursuant to MCL

565.108 and MCL 600.2907a. Defendant also requested declaratory relief in the form of quiet title.

After the close of discovery, plaintiff moved for summary disposition on its claim and defendant's counterclaims pursuant to MCR 2.116(C)(10), arguing that no material question of fact existed as to whether the mortgage was valid and that defendant's signature appeared on the document. Defendant responded and argued that summary disposition should be granted in her favor pursuant to MCR 2.116(I)(2). After hearing the parties' arguments at the motion hearing, the trial court granted summary disposition in favor of plaintiff and dismissed defendant's counterclaims.

A trial court's determination regarding a motion for summary disposition is reviewed de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Although the trial court did not identify the subrule under which it granted summary disposition, it is apparent that the motion was granted under MCR 2.116(C)(10). *Kosmalski ex rel Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 59; 680 NW2d 50 (2004). In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), this Court considers "affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, in the light most favorable to the party opposing the motion." *Smith*, 460 Mich at 454 (citation omitted). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue with respect to any material fact, and that the moving party is entitled to judgment as a matter of law. *Id.* Summary disposition is properly granted under MCR 2.116(I)(2) if "it appears to the court that the opposing party, rather than the moving party, is entitled to judgment" as a matter of law. MCR 2.116(I)(2).

Defendant first argues that the trial court erred by failing to grant summary disposition in her favor because, pursuant to MCL 565.8, the missing date in the certificate of acknowledgment constituted a defect which invalidated the mortgage. It is well settled that real estate title is transferred by conveyances, not acknowledgment. *Kerschensteiner v Northern Mich Land Co*, 244 Mich 403, 417; 221 NW 322 (1928). Because the purpose of the acknowledgment is to entitle the instrument to record, "in the absence of fraud, duress or coercion," the lack of a formal acknowledgment by the mortgagors does not "vitiate" the mortgage as between the parties. *Turner v Peoples State Bank*, 299 Mich 438, 449-450; 300 NW 353 (1941). Because the record herein is devoid of evidence that fraud, duress, or coercion existed at the time that the mortgage was executed, we find that defendant was not entitled to judgment as a matter of law because the alleged defect in the acknowledgment did not vitiate the mortgage as between the parties. MCR 2.116(I)(2). We further find no merit in defendant's argument that the defect in the acknowledgment removed the presumption that the facts contained in the mortgage were true. MCL 565.603 cures imperfections in the certificate of acknowledgment when it appears that "the person making the same was legally authorized, and that the grantor was personally known to him, and acknowledged such deed to be 'his free act.'" *Buell v Irwin*, 24 Mich 145, 153 (1871). While the notary herein did not specifically recall the signing of the mortgage five years earlier, her undisputed testimony sufficiently supported that defendant was "personally known" to her and appeared before her. The missing date did not destroy the presumption that the signature on the mortgage was defendant's signature.

We next consider defendant's argument that summary disposition in her favor was appropriate because the language of the mortgage established that defendant did not consent to mortgaging the property, thus rendering the mortgage void. "[I]n construing [contractual provisions,] due regard must be had to the purpose sought to be accomplished by the parties as indicated by the language used, read in the light of the attendant facts and circumstances." *W O Barnes Co, Inc v Folinski*, 337 Mich 370, 376-377; 60 NW2d 302 (1953). "[I]f contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate." *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997) (citation omitted).

Here, the plain language of the mortgage established that the parties intended to encumber the South Haven property as security for the line of credit and other future advances made to "the mortgagors." The mortgage document labeled defendant and Lance as the "mortgagors" and acknowledged that they were "husband and wife." In Michigan, "when a deed is conveyed to a husband and wife, the property is held as a tenancy by the entirety," *Walters v Leech*, 279 Mich App 707, 711; 761 NW2d 143 (2008), and "'one tenant by the entirety has no interest separable from that of the other' and 'has nothing to convey or mortgage or to which he alone can attach a lien,'" *Tkachik v Mandeville*, 487 Mich 38, 46; 790 NW2d 260 (2010) quoting *Long v Earle*, 277 Mich 505, 517; 269 NW 577 (1936). Defendant relies on the phrase "Terri A. Peterson as waiver of dower," which appeared below defendant's signature line, to support that she was not a party to the mortgage. However, because "dower confers on a wife a life estate to one-third of her husband's real property after his death," *Zaher v Miotke*, 300 Mich App 132, 142; 832 NW2d 266 (2013), defendant herein did not have a dower interest at the time the mortgage was executed because she and Lance held the property as tenants by the entirety. Because the parties were aware that the South Haven property was held by defendant and Lance as husband and wife, no interpretation of the contract could support that the parties intended defendant to sign the mortgage merely to waive her rights to dower, which did not exist at the time the mortgage was executed. Because the mortgage clearly expressed an intent that defendant and Lance be "mortgagors" and acknowledged that the property was held by them "as husband and wife," which is consistent with a tenancy by the entirety, we do not believe that the waiver of dower language makes the contractual susceptible to two reasonable interpretations requiring further factual development. *Meagher*, 222 Mich App at 721-722. Reasonable minds could not differ that the parties intended to create a valid mortgage on the South Haven property with both Lance and defendant as the mortgagors. Thus, defendant was not entitled to judgment as a matter of law based on her argument that the "waiver of dower language" invalidated the mortgage. MCR 2.116(I)(2).[1]

[1] Because we find that the mortgage was valid, we do not address plaintiff's alternative equitable mortgage theory of relief. Nor do we address plaintiff's argument that the waiver of dower language could be severed from the mortgage pursuant to the severability clause contained in the mortgage.

Defendant next argues that the trial court erred by granting summary disposition in favor of plaintiff when the evidence established that a material question of fact existed as to whether she signed the mortgage. There is a presumption that the facts contained in a document to which a notary public's seal is affixed are true, *Settles v Detroit City Clerk*, 169 Mich App 797, 806; 427 NW2d 188 (1988), and this presumption is rebutted by presenting "clear, positive and credible evidence in opposition," *Vriesman v Ross*, 9 Mich App 102, 106; 155 NW2d 857 (1967). The record establishes that defendant consistently asserted that she did not recall signing the mortgage. However, she testified at a deposition that the signature that appeared on the mortgage looked like her signature and that she had no evidence that it was forged. Hoag testified at a deposition that, in her 30 years of experience as a notary, it was her practice to always verify a person's identity and only notarize a document after she witnessed the party sign it. Although she could not specifically recall meeting defendant and witnessing her sign the mortgage five years before, Hoag confirmed that she would not have notarized the mortgage if defendant had not been present. We find that, based on this record, reasonable minds could not differ as to whether defendant signed the mortgage. Accordingly, defendant failed to create a genuine issue of material fact as to whether she signed the mortgage. *Smith*, 460 Mich at 454-455.

Because an acknowledgment is not required to convey a property interest, *Kerschensteiner*, 244 Mich at 417, and because there was not a material question of fact as to whether defendant signed the mortgage, we find that the trial court properly granted summary disposition in favor of plaintiff on its foreclosure claim. *Smith*, 460 Mich at 454-455. For the same reasons, we find that the trial court did not err in dismissing defendant's counterclaims for common law slander of title, statutory slander of title, and declaratory relief to quiet title.

Affirmed.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Cynthia Diane Stephens