STATE OF MICHIGAN

COURT OF APPEALS

VIRGINIA C. KUKUK,

Plaintiff-Appellant,

v

HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR SEQUOIA MORTGAGE TRUST 2007-3, MERRILL LYNCH CREDIT CORP., PHH MORTGAGE CORP., TROTT & TROTT, P.C., and NEW CENTURY MORTGAGE CORP.,

Defendant-Appellees.

UNPUBLISHED
January 14, 2014

No. 310616
St. Clair Circuit Court
LC No. 10-002949-CZ

Before: M. J. KELLY, P.J., and CAVANAGH and SHAPIRO, JJ.

PER CURIAM.

In this dispute over a note and mortgage, plaintiff Virginia Kukuk appeals of right the trial court's order dismissing her claims. Kukuk sued defendants to prevent the foreclosure sale of her home. Specifically, she alleged that defendants violated Michigan's Regulation of Collection Practices Act (MRCPA), MCL 445.251 *et seq.*, the federal Fair Debt Collection Practices Act (FDCPA), 15 USC 1692 *et seq.*, and committed fraud in the inducement, abuse of process, and intentional infliction of emotional distress by seeking to foreclose against her home when they allegedly lacked the right to do so. Because we conclude that there were no errors warranting relief, we affirm.

I. BASIC FACTS

In 2005, defendant New Century Mortgage Corporation loaned Kukuk $196,300 to purchase her home. Kukuk executed a note for the loan and gave New Century a mortgage to secure the note's repayment. New Century recorded the mortgage in March 2005. In the mortgage, the parties agreed that "[t]he Note or a partial interest in the Note (together with this [Mortgage]) can be sold one or more times without prior notice to Borrower." They also agreed that, in the event Kukuk defaulted on the note, the mortgagee could accelerate the unpaid balance and sell the property.

New Century endorsed and assigned the note and mortgage "in blank" in March 2005 and defendant Merrill Lynch Credit Corporation purchased the note and securitized it with the Sequoia Mortgage Trust 2007-3. Defendant HSBC USA, National Association is the trustee for the Sequoia Mortgage Trust.

Kukuk later failed to make the payments required under the note. In January 2008, defendant PHH Mortgage Services sent Kukuk a letter requiring her to cure the default by paying $3,518.33 plus late charges within 30 days. PHH notified Kukuk that, if she failed to cure the default, they would accelerate the note and begin foreclosure proceedings. Kukuk submitted a $3,518.33 payment in March 2008, but it was returned to her.

In April 2008, defendant Trott & Trott sent a letter on PHH's behalf to Kukuk; it informed her that she had to pay $10,454.39 in order to reinstate her note and mortgage. Thereafter, Trott & Trott began the process of foreclosing by advertisement on the trust's behalf. However, an assignment of mortgage from New Century to the trust was not recorded until May 2008.

In February 2009, Kukuk and PHH agreed to modify the loan. Under the modified terms, Kukuk had to begin making monthly payments March 1, 2009, on the unpaid principal balance of $222,778.88. Kukuk executed three copies of the agreement; one was to be filed with the note and another was to be recorded. Kukuk produced a copy that was dated February 4, 2009, but notarized on February 6, 2009. However, this agreement was not recorded. The document recorded with the register of deeds was altered to show that it was between Kukuk and HSBC.

After Kukuk agreed to the loan modification, the foreclosure sale was cancelled. Kukuk made some payments under the modified loan, but eventually stopped. PHH again sent a default letter to Kukuk through its counsel in July 2010. In November 2010, Trott & Trott published a notice of foreclosure sale on the trust's behalf.

Kukuk sued defendants in that same month. Following discovery, defendants moved for summary disposition. The trial court dismissed Counts I, III, and VI under MCR 2.116(C)(8) and (C)(10), Count V under MCR 2.116(C)(10), and Count II as time-barred. Kukuk then appealed to this Court.

II. SUMMARY DISPOSITION

A. STANDARDS OF REVIEW

This Court reviews de novo the decision to grant a motion for summary disposition and the proper interpretation and application of statutes. *Maple Grove Twp v Misteguay Creek Intercounty Drain Bd*, 298 Mich App 200, 206-207; 828 NW2d 459 (2012). "In the absence of disputed facts, whether a cause of action is barred by the applicable statute of limitations is a question of law, which this Court reviews de novo." *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006). "Summary disposition under MCR 2.116(C)(8) is appropriate if no factual development could justify the plaintiff's claim for relief." *Maple Grove Twp*, 298 Mich App at 206. Summary disposition under MCR 2.116(C)(10) is appropriate when, considering "the evidence and all legitimate inferences in the light most favorable to the nonmoving party," *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006), "there is no genuine

issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law," MCR 2.116(C)(10). Where a trial court looked beyond the pleadings in granting summary disposition under MCR 2.116(C)(8), this Court will treat the motions as having been granted under MCR 2.116(C)(10). *Pippin v Atallah*, 245 Mich App 136, 141; 626 NW2d 911 (2001).

B. FDCPA

Kukuk first argues that the trial court erred when it dismissed her FDCPA claim against Trott & Trott. The trial court dismissed this claim on the ground that it was time-barred, presumably under the one-year statute of limitation set forth in 15 USC 1692k(d). In her complaint, Kukuk alleged, in relevant part, that Trott & Trott violated 15 USC 1692f(6) by unlawfully initiating foreclosure proceedings in 2008 and 2010. Because she sued in 2010, the trial court erred when it dismissed her FDCPA claim in its entirety as untimely; the claim premised on Trott & Trott's initiation of non-judicial foreclosure in 2010 was timely. Nevertheless, for the reasons explained below, this error was harmless because the trial court reached the right result. See *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

Under 15 USC 1692f(6)(A), a "debt collector," as defined in 15 USC 1692a(6), is prohibited from taking or threatening to take "any nonjudicial action to effect dispossession or disablement of property" if there is "no present right to possession of the property claimed as collateral through an enforceable security interest[.]" Kukuk contends that Trott & Trott violated this provision because the trust had "no present right to possession" of her property when it threatened to and eventually did initiate foreclosure.

Here, there is no dispute that by the time of the 2010 foreclosure the trust had obtained ownership of the note at issue. And when the trust acquired ownership of the note, it necessarily acquired ownership of the accompanying mortgage by operation of law. See *Prime Financial Services LLC v Vinton*, 279 Mich App 245, 257; 761 NW2d 694 (2008) (stating that the transfer of a note necessarily includes the transfer of the mortgage with it). Consequently, once Kukuk defaulted on the note, the trust had the right to seek the remedies permitted under both the note and mortgage even in the absence of an assignment of mortgage.

Under Michigan law, Kukuk retained the legal right to possess the property until after foreclosure and the expiration of the redemption period. See *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 660-661; 575 NW2d 745 (1998). Nevertheless, although the trust did not have the legal right to possess the real property as a mere mortgagee, after Kukuk's default it did have an equitable (or conditional) right to possession and had the right to take steps to vest possession in itself. Stated another way, the trust had a present right—even if conditioned on compliance with the foreclosure and redemption procedures—to take possession through an enforceable security interest (the mortgage) after Kukuk's default. See, e.g., *Burnett v Mortgage Electronic Registration Systems, Inc*, 706 F3d 1231, 1236-1238 (CA 10, 2013).

Kukuk also failed to show that there were genuine issues of material fact as to whether Trott & Trott is a "debt collector." Under 15 USC 1692a(6), Kukuk had to prove that Trott & Trott (1) has as its principal business purpose the collection of debts, (2) regularly collects or attempts to collect debts, or (3) has as its principal business purpose the enforcement of security

interests. However, by failing to address this prerequisite on appeal, she abandoned her argument that there is a genuine issue for trial on this element of her FDCPA claim. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Accordingly, on this record, we conclude that the trial court properly dismissed Kukuk's FDCPA claim. *Fisher v Blankenship*, 286 Mich App 54, 70; 777 NW2d 469 (2009).

C. MRCPA

Kukuk also claims that the trial court erred when it dismissed her MRCPA claim. Contrary to her contention, the trial court did not dismiss this claim as untimely. Rather, it granted summary disposition because Kukuk failed to properly allege under MCR 2.116(C)(8) or demonstrate under MCR 2.116(C)(10) that defendants made false representations while taking actions to collect a debt.

Under MCL 445.252(e), a "regulated person" may not make "an inaccurate, misleading, untrue, or deceptive statement or claim in a communication to collect a debt or concealing or not revealing the purpose of a communication when it is made in connection with collecting a debt." The regulated person also may not misrepresent "in a communication with a debtor" the "legal status of a legal action being taken or threatened", or the "legal rights of the creditor or debtor", or that the "nonpayment of a debt will result in the debtor's arrest or imprisonment, or the seizure, garnishment, attachment, or sale of the debtor's property." MCL 445.252(f).

On appeal, Kukuk argues that defendants violated these sections by misrepresenting—through the allegedly fraudulent assignment of mortgage—that the trust had the right to pursue foreclosure-by-advertisement. However, she offers no explanation for why this Court should conclude that the assignment of mortgage or notice of foreclosure sale constitute a "communication to collect a debt" under § 2(e) or a "communication with a debtor" under § 2(f).

Moreover, she failed to show that defendants misrepresented the trust's right to foreclose. Though authorized and limited by statute, the right to foreclose by advertisement is contractual. See *Cramer v Metropolitan S&L Ass'n*, 401 Mich 252, 259; 259 NW2d 20 (1977); *White v Burkhardt*, 338 Mich 235, 239; 60 NW2d 925 (1953). In the mortgage, Kukuk granted the note holder and its representatives the contractual "power of sale" in the event of her default. There is further no dispute that Kukuk defaulted on the note by failing to make the required payments, which triggered the power of sale as required to effect a foreclosure by advertisement. MCL 600.3204(1)(a). It is also undisputed that defendants did not bring any action at law to recover the debt secured by the Mortgage, see MCL 600.3204(1)(b), and that the mortgage was properly recorded, see MCL 600.3204(1)(c).

Kukuk does apparently refer to MCL 600.3204(1)(d) by arguing that the trust lacked the right or "standing" to foreclose. However, she does not contest that the trust owns the note, and thus, is the owner of the indebtedness secured by the mortgage. See MCL 440.3205(2) ("When endorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially endorsed."). She also does not contest that there is a record chain of title showing that the mortgage was ultimately assigned to the trust, but complains that since the assignment was "fraudulent", it corrupted the chain of title and precluded compliance

with MCL 600.3204(3). Specifically, she contends that the blank assignment could not have given the trust any rights because the trust did not exist when the blank assignment was made in 2005.

Again, the right to foreclose, even by advertisement, is conferred by a contractual power of sale. If a mortgagee fails to comply with the statutory limitations on its contractual right, the mortgagor may be able to void the sale, but only upon demonstrating that he or she suffered prejudice as a result of the defects or irregularities. *Kim v JPMorgan Chase Bank, NA*, 493 Mich 98, 115; 825 NW2d 329 (2012). The mortgagor's ability to void a sale does not, however, render the mortgagee's contractual right to foreclose void *ab initio*, such that a mortgagee's pre-sale representation that it had the right to foreclose by advertisement would be deemed false.

Kukuk's claim also fails as a matter of fact because she has not shown that defendants violated MCL 600.3204(3). That section only requires that a record chain of title exist "prior to the date of sale," and it is undisputed that no sale occurred during the trial court proceedings. Regardless, there is a record chain of title showing that the mortgage was assigned from the original mortgagee, New Century, to the trust, which is all that is required. MCL 600.3204(3). Kukuk questions the interim transfer to Merrill Lynch, but the plain language of MCL 600.3204(3) does not require the recording of *all* assignments or transfers, nor does it speak to the propriety of such assignments or transfers; it only requires a record chain evidencing assignment of the mortgage to the foreclosing party. As our Supreme Court explained, "'[o]nly the record holder of the mortgage has the power to foreclose; the validity of the foreclosure is not affected by any unrecorded assignment of interest held for security.'" *Residential Funding Co v Saurman*, 490 Mich 909, 910; 805 NW2d 183 (2011), quoting *Arnold v DMR Fin*, 448 Mich 671, 678; 532 NW2d 852 (1995) (alteration by *Saurman* Court).

And to the extent Kukuk challenges the validity of the assignment, she lacks standing to do so where the parties to the assignment do not contest its validity and she does not contest the assignee's ownership of the indebtedness. As discussed in 6A CJS Assignments § 132, pp 524-525 (2013), a debtor may challenge its creditor's assignments to avoid having to pay the same debt twice, but a debtor cannot challenge defects that would merely render the assignments void at the election of the creditor or the creditor's assignees. See also *Warth v Seldin*, 422 US 490, 499; 95 S Ct 2197; 45 LE2d 343 (1975) (stating that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties").

In *Bowles v Oakman*, 246 Mich 674, 678; 225 NW 613 (1929), the Michigan Supreme Court held that a maker of a note could not defend a payee's action to enforce it by arguing that the assignment to the payee was fraudulent:

> The fraud . . . did not render the transfer void. It was at most voidable at the instance of those defrauded. Plaintiff was the holder of the note, and had title to it at the time of trial. . . .
>
> [The debtor] had no defense of his own to the note. He ought not to have been permitted the defense that an indorsee had been guilty of fraud upon the payee or the equitable owners. An adjudication upon such defense would not bind the

> persons defrauded, as they are not parties hereto, and it would be idle. This action is by the person having legal title to the note. A judgment herein is conclusive. It makes no difference to [the payor] who may have the equitable title to the note, as he has no defense on the merits.

Here, Kukuk admits that she defaulted under the note and loan modification by failing to make her required payments in 2008 and 2010, and she does not deny that this triggered her mortgagee's right to accelerate her debt and invoke the power of sale. Thus, she has no defenses to payment or foreclosure. By arguing only that the assignment was fraudulent, she seeks to assert the rights of third parties, where there is no evidence that any of those parties object to the assignment. Kukuk has the right to ensure that she will not have to pay the same debt twice, but no such danger exists here. She does not argue that the note and mortgage were non-assignable, or that the right to assign—as expressly provided in the mortgage—had been revoked, and she does not deny that the party seeking to foreclose owns the original note.

Even if Kukuk had standing to raise this challenge, she has failed to show that the assignment was improper. There is no evidence that New Century attempted to assign the mortgage to the trust before it existed. Instead, the evidence shows that New Century expressed its intent to assign the mortgage in 2005 to an entity yet to be determined, that Merrill Lynch acquired the note and mortgage in 2006 and securitized the loan with the trust during its existence, and that the assignment was completed and recorded in 2008. And Michigan law permits assignment to be endorsed in blank and completed later by assignees. See *Mason v Lumber Co v Collier*, 74 Mich 241, 248; 41 NW 913 (1889) ("[A]n assignment, like the one in question here, if filled in with the name of an assignee, after deliver[y] in blank, with the consent of the assignor, would become operative and valid in the party whose name was thus inserted."); MCL 440.3115.

The trial court properly dismissed Kukuk's MRCPA claim.

D. FRAUD IN THE INDUCEMENT

The trial court also did not err when it dismissed Kukuk's fraud-in-the-inducement claim. "Fraud in the inducement occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995).

Kukuk argues that there were genuine issues of material fact with respect to her fraud-in-the-inducement claim because there was evidence that defendants led her to believe that she was entering into the loan modification with PHH, but thereafter altered the copy to list HSBC as the contracting party and she only entered into the modification on the assertion that the trust was going to foreclose, when it was clear that the trust had no right to foreclose. However, Kukuk did not present any evidence that the identity of her lender under the loan modification was material to her decision to enter into the loan modification. She does not argue that she would have refused to enter into the loan modification with HSBC and does not maintain that it was important for her to contract with PHH. In fact, she devotes several pages of her brief on appeal to complaining that PHH improperly serviced her loan prior to the modification. Furthermore,

she does not argue that she entered into the loan modification for the specific purpose of avoiding a foreclosure by advertisement, as opposed to a judicial foreclosure. Kukuk acknowledges that the trust could have pursued a judicial foreclosure, which would have provided her with an equal impetus to enter into the loan modification.

Moreover, Kukuk has failed to show that she suffered damage as a result of entering into the loan modification. Despite defaulting under the terms of her original note, the loan modification allowed Kukuk to avoid foreclosure proceedings and gave her a new opportunity to repay her debt. She does not argue that defendants failed or refused to honor the terms of the agreement she admittedly signed, and she admits that she defaulted on her obligations as modified. Even if Kukuk could successfully argue that she was fraudulently induced into signing the loan modification, her remedy would be to void the loan modification, see *Wild Bros*, 210 Mich App at 640, which would place her back in default under the note and allow her mortgagee to pursue foreclosure proceedings.

The trial court properly dismissed Kukuk's fraud-in-the-inducement claim.

E. ABUSE OF PROCESS

Kukuk also claims that the trial court erred when it dismissed her abuse-of-process claim. But since she did not raise this issue in her statement of questions presented, we decline to address it. *Mich Ed Ass'n v Secretary of State*, 280 Mich App 477, 488; 761 NW2d 234 (2008).

F. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Finally, Kukuk claims that the trial court erred when it dismissed her claim for intentional infliction of emotional distress. To recover on a claim for intentional infliction of emotional distress, Kukuk must prove that defendants intentionally or recklessly engaged in extreme and outrageous conduct that caused Kukuk severe emotional distress. *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602; 347 NW2d 905 (1985). "Whether the offending conduct is extreme and outrageous is initially a question of law for the court." *VanVarous v Burmeister*, 262 Mich App 467, 481; 687 NW2d 132 (2004). "The threshold for showing extreme and outrageous conduct is high." *Id.* Qualifying conduct is conduct that is so "outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Roberts*, 422 Mich at 603 (quotation marks and citation omitted). See, e.g., *Margita v Diamond Mtg Corp*, 159 Mich App 181, 190; 406 NW2d 268 (1987).

Kukuk argues that defendants intentionally inflicted emotional distress upon her by falsifying loan modification documents, creating and recording a false assignment of mortgage, and instituting foreclosure-by-advertisement proceedings when the trust lacked the right to do so. While she complains that this conduct was extreme, outrageous, and intentional, she fails to argue or present facts showing that this conduct caused her severe emotional distress. Furthermore, she stated in her deposition that she had not discussed the events described in her verified complaint with any medical professional and had never seen a psychologist or psychiatrist. As such, Kukuk has failed to establish that defendants' conduct was extreme and outrageous. Defendants executed the assignment of mortgage and initiated foreclosure-by-

advertisement proceedings as expressly permitted under Michigan law. While Kukuk understandably objects to defendants' conduct in recording a copy of the loan modification she did not sign after making alterations to the document, we are unwilling to conclude that this was extreme and outrageous under the circumstances. The alteration changed the name of the lender in the recorded document, but there is no evidence that any other terms were changed or that the substituted lender failed to abide by the terms of the agreement. The trust initiated foreclosure proceedings, but only after she defaulted on her modified payment obligations. There is simply nothing extreme and outrageous about those actions.

III. CONCLUSION

The trial court did not err when it dismissed Kukuk's claims.

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh

STATE OF MICHIGAN

COURT OF APPEALS

VIRGINIA C. KUKUK,

Plaintiff-Appellant,

v

HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR SEQUOIA MORTGAGE TRUST 2007-3, MERRILL LYNCH CREDIT CORP., PHH MORTGAGE CORP., TROTT & TROTT, P.C., and NEW CENTURY MORTGAGE CORP.,

Defendant-Appellees.

UNPUBLISHED
January 14, 2014

No. 310616
St. Clair Circuit Court
LC No. 10-002949-CZ

Before: M. J. KELLY, P.J., and CAVANAGH and SHAPIRO, JJ.

SHAPIRO, J. (*concurring*).

I concur in affirming the dismissal of plaintiff's claims.

First, I agree with the majority that the execution of an assignment of a mortgage note in blank does not, in and of itself, create a defect of title when the assignment is later completed and recorded. For this reason, I concur in the conclusion that there was no violation of either the FDCPA or the MRCPA and that there was no actionable fraud in the inducement.

Second, although plaintiff suggests that some of the defendants made misrepresentations to her in 2008 as to how to complete her attempts to bring her loan payments up-to-date, she provides neither evidentiary-supported details of these allegations nor a clear argument linking the allegations to a specific cause of action.

Third, I concur in the dismissal of the abuse of process claim. Plaintiff has clearly demonstrated an improper and possibly felonious[1] act in the alteration of the recorded loan

[1] See MCL 750.248b.

modification agreement after she had signed it. However, plaintiff has not offered any clear allegations, let alone proofs, of an ulterior motive as is required for such a cause of action.

/s/ Douglas B. Shapiro