STATE OF MICHIGAN

COURT OF APPEALS

GARY GAY and TAMMY GAY,

Plaintiffs-Appellants,

v

FANNIE MAE and EVERHOME MORTGAGE COMPANY,

Defendants-Appellees.

UNPUBLISHED
August 26, 2014

No. 315868
Clinton Circuit Court
LC No. 11-010896-CH

Before: SAAD, P.J., and OWENS and K. F. KELLY, JJ.

PER CURIAM.

Plaintiffs appeal the trial court's grant of summary disposition to defendants under MCR 2.116(C)(10). For the reasons stated below, we affirm.

I. FACTS AND PROCEDURAL HISTORY

This contract dispute involves an action by plaintiffs to set aside a foreclosure. Plaintiffs acquired the property at issue in 2001, and financed it with a mortgage that was eventually assigned to defendant EverHome. At various times throughout the 2000s, plaintiffs fell behind in their payments, and in 2007, they executed a loan modification agreement with EverHome. In 2009, plaintiffs again failed to make their mortgage payments and signed a forbearance agreement with Everhome.

The agreement required plaintiffs to make payments of $913.73 for six consecutive months, beginning November 1, 2009. The mortgage itself specified[1]: "Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15." In turn, Section 15 of the mortgage stated: "[a]ny notice in connection with this Security Instrument shall

[1] The forbearance agreement stipulated that capitalized terms used but not defined in the agreement would be defined "in the loan documents," i.e. the mortgage and the note. Section D of the agreement also stated: "I understand that the Agreement is not a forgiveness of payments on my Loan or a modification of the Loan Documents."

not be deemed to have been given to Lender until actually received by lender." In other words, plaintiffs only fulfilled their payment obligation under the agreement when their monthly payment was "actually received" by defendant EverHome. The agreement also indicated EverHome would review plaintiffs' loan and determine if additional default resolution assistance could be offered. If no feasible alternative could be identified, the agreement authorized EverHome to begin or continue foreclosure proceedings.

Plaintiffs sent the November 2009 payment to EverHome via UPS, and paid the December and January payments on schedule. But EverHome apparently never received the November 2009 check. In January 2010, it notified plaintiffs by letter that they had defaulted on the forbearance agreement and had 30 days to make a much larger payment, or face the principal balance ($199,435.39) as due and payable.

In a March 6, 2010 letter, EverHome informed plaintiffs their loan was in default and their file had been closed. An attorney from EverHome also contacted plaintiffs via letter on April 1, 2010, confirmed that their mortgage was in default, and that they owed EverHome $216,085.15. Plaintiffs subsequently contacted EverHome and offered to use some of their savings to make a partial payment and restructure the loan, but EverHome had already started the process of foreclosure by advertisement. EverHome acquired the property at a sheriff's sale held on June 9, 2010, and quitclaimed it to defendant Fannie Mae on June 28, 2010. Plaintiffs were unable to redeem the property during the redemption period and, approximately one year later, Fannie Mae initiated eviction proceedings.

Plaintiffs filed an action in Clinton Circuit Court and alleged, among other things, that EverHome breached the forbearance agreement and the implied covenant of good faith and fair dealing. Eviction proceedings were stayed on October 10, 2011, pending resolution of plaintiffs' lawsuit. On March 8, 2013, defendants moved for summary disposition under MCR 2.116(C)(8) (failure to state a claim) and (C)(10) (no genuine issue of material fact), which the trial court granted.

On appeal, plaintiffs argue that the trial court erred when it awarded summary disposition to defendants because: (1) the covenant of good faith and fair dealing is implied to mortgage contracts under Michigan law; and (2) EverHome's conduct breached the implied covenant of good faith and fair dealing.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). Although defendants moved for summary disposition under both MCR 2.116(C)(8) and (C)(10), because the court considered documentary evidence outside the pleadings, we consider the motion as having been granted pursuant to MCR 2.116(C)(10). *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). The moving party must specifically identify the matters that have no disputed factual issues, and

has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence. *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. *Id*. A mere possibility that the claim might be supported by evidence at trial is insufficient. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Stated another way, "[a]llegations unsupported by some basis in fact may be viewed as sheer speculation and conjecture, and, therefore, ripe for summary disposition." *Easley v Univ of Mich*, 178 Mich App 723, 726; 444 NW2d 820 (1989).

III. ANALYSIS

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement Contracts, 2d, § 205, p 99. This duty requires that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Hammond v United of Oakland, Inc*, 193 Mich App 146, 152; 483 NW2d 652 (1992). This implied covenant "does not create 'independent' rights separate from those created by the provisions of the contract,"[2] nor does it constitute an independent cause of action in Michigan. *In re Leix Estate*, 289 Mich App 574, 591; 797 NW2d 673 (2010). In other words, to invoke the implied covenant of good faith and fair dealing, a litigant must show that a party breached the underlying contract itself. *Id*. "The goal of contract interpretation is to read the document as a whole and apply the plain language used in order to honor the intent of the parties. We must enforce the clear and unambiguous language of a contract as it is written." *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284, 291; 818 NW2d 460 (2012) (citations omitted).

Here, plaintiffs allege that EverHome breached the implied covenant of good faith and fair dealing when it did not apply the November 2009 payment to plaintiffs' account. Under the terms of the forbearance agreement, however, EverHome never "actually received" the payment—which is supported by the fact that EverHome never cashed plaintiffs' check. Accordingly, EverHome did not breach the terms of the agreement.

The fact that EverHome did not breach the terms of the forbearance agreement is fatal to plaintiff's claim, because, again, breach of the implied covenant of good faith and fair dealing is not an independent cause of action in this state. Of course, it is possible to imagine situations where EverHome physically received plaintiffs' November 2009 payment, but did not process it because of negligence or maliciousness. Any such action would have been in breach of the forbearance agreement, and in such a scenario plaintiff could raise the issue of good faith and

[2] 2 Farnsworth, Contracts (3rd ed), § 7.17, p 358. "As the Third Circuit put it, 'courts generally utilize the good faith duty as an interpretive tool to determine the parties' justifiable expectations, and do not enforce an independent duty divorced from the specific clauses of the contract.' " *Id*., quoting *Duquesne Light Co v Westinghouse Electric Co*, 66 F3d 604, 617 (CA 3, 1995).

fair dealing. But plaintiffs make no such allegations,[3] and thus cannot avoid summary disposition on their claim. Accordingly, the trial court properly awarded defendants summary disposition under MCR 2.116(C)(10).

Although EverHome's business practice of accepting payments after the non-payment that created default raises some equitable questions, we are nonetheless bound by the parties' contract. EverHome is entitled to take the action it did under the forbearance agreement, freely entered into by the plaintiffs. "The courts cannot make better agreements for parties they themselves have been satisfied to enter into or rewrite contracts because they operate harshly or inequitably." *Series AGI West Linn of Appian Group Investors DE, LLC v Eves*, 217 Cal App 4th 156, 164; 158 Cal Rptr 3d 193 (2013) (citation omitted).[4]

Affirmed.

/s/ Henry William Saad
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly

[3] Plaintiffs do allege that EverHome failed to tell them it had not received the November 2009 payment, but this assertion is flatly contradicted by the record, which shows that plaintiffs were twice notified that their November 2009 payment had not been received. Likewise, EverHome was not contractually obligated to return plaintiffs' subsequent forbearance payments. And while plaintiffs claim that EverHome planned to foreclose their home throughout the forbearance period, they offer no facts to support this assertion. Again: "Allegations unsupported by some basis in fact may be viewed as sheer speculation and conjecture, and, therefore, ripe for summary disposition." *Easley*, 178 Mich App at 726.

[4] "Cases from other jurisdictions, although not binding, may be persuasive." *Holland v Trinity Health Care Corp*, 287 Mich App 524, 529 n 2; 791 NW2d 724 (2010).