STATE OF MICHIGAN

COURT OF APPEALS

JAMES H. DILUIGI and KRISTA J. DILUIGI,

Plaintiffs-Appellants,

v

RBS CITIZENS N.A. f/k/a CHARTER ONE BANK, N.A. and FREDDIE MAC,

Defendants-Appellees,

and

CCO MORTGAGE,

Defendant.

UNPUBLISHED
September 9, 2014

No. 310886
St. Clair Circuit Court
LC No. 11-000815-CH

Before: STEPHENS, P.J., and M. J. KELLY and RIORDAN, JJ.

PER CURIAM.

Plaintiffs appeal the trial court's order granting defendants' motion for summary disposition. We reverse and remand.

Plaintiffs contend that the trial court erred when it granted defendants' motion for summary disposition because defendants did not comply with the notice requirements of MCL 600.3204 and MCL 600.3205a and plaintiffs were prejudiced by this error. We agree.

Defendants moved for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10). Typically, this Court applies the standard of review for the statutory basis under which the trial court considered the motion. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2009). The order appealed from does not reveal whether the motion was decided under MCR 2.116(C)(8) or MCR 2.116(C)(10). A review of the record also does not reveal which rule the trial court relied on in deciding defendants' motion. However, while the trial court did not specifically cite which rule it relied on, the trial court did specifically state that no genuine issue of material fact existed. Thus, it appears that defendants' motion was decided under MCR 2.116(C)(10).

MCR 2.116(C)(10) provides that a moving party is entitled to judgment as a matter of law if there "is no genuine issue as to any material fact." "This Court reviews de novo a trial

court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). "In relation to a motion under MCR 2.116(C)(10), we similarly review the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Odom v Wayne Co*, 482 Mich 459, 466-467; 760 NW2d 217 (2008) (internal quotations omitted).

"Summary disposition is appropriate only if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* at 467. A genuine issue of material fact "exists when the record leaves open an issue on which reasonable minds might differ." *Jimkoski v Shupe*, 282 Mich App 1, 4-5; 763 NW2d 1 (2008). "This Court is liberal in finding genuine issues of material fact." *Id.* at 5.

This case revolves around the fact that plaintiffs claim they never received notice of the foreclosure process from Trott & Trott, the law firm that handled the foreclosure process for defendant CCO Mortgage (CCO), the mortgage company. Conversely, defendants claimed that the fact that defendants mailed the notices was enough to satisfy the statutory requirements of MCL 600.3204(4) and MCL 600.3205a(1). The trial court agreed with defendants and granted summary disposition in defendants' favor. We disagree.

MCL 600.3204(4) requires, among other things, that notice is sent to a borrower before foreclosure proceedings are commenced. Specifically, these rules include that "[n]otice [must be] mailed to the mortgagor as required by section 3205a." MCL 600.3204(4)(a). Pursuant to MCL 600.3205a(1), "before commencing a proceeding under this chapter to which section 3204(4) applies, the foreclosing party shall serve a written notice on the borrower[.]" This notice must be served by first-class mail and by certified mail, return receipt requested, with delivery restricted to the borrower. MCL 600.3205(a)(3). It must notify the borrower of his opportunity to meet with a designated person "to work out a modification of the mortgage loan to avoid foreclosure." MCL 600.3204(4)(c). The window that plaintiffs have to request a modification is only 14 days "after a notice is mailed to the mortgagor" in order to stall the foreclosure process. MCL 600.3204(4)(c).

We conclude that in order for a plaintiff to establish a claim that notice was insufficient pursuant to MCL 600.3204(4)(a) and MCL 600.3205a, the borrower must show that the notice did not apprise the borrower of his right to modify. In this case, plaintiffs have alleged from the beginning that they never received notices from defendants. This question is at the heart of this appeal because if plaintiffs never received notice, it was impossible for plaintiffs to request a meeting to negotiate a modification of plaintiffs' mortgage in accordance with MCL 600.3205a(1). MCL 600.3204(4)(c).

"In any proceeding involving notice, due process requires that the notice given be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Maxwell v Dep't of Environmental Quality*, 264 Mich App 567, 574; 692 NW2d 68 (2004) (citation and internal quotation marks omitted). Notice by mail is adequate when it is "directed to an address reasonably calculated to reach the person entitled to notice." *Dow v Michigan*, 396 Mich 192, 211; 240 NW2d 450 (1976). In Michigan, it is presumed that "a letter mailed in the due course of business is received." *Good v Detroit Automobile Inter-Ins Exch*, 67 Mich App 270, 274;

NW2d 71 (1976). "Moreover, the fact that a letter was mailed with a return address but was not returned lends strength to the presumption that the letter was received." *Id*. at 276. "While a presumption arises that a letter with a proper address and postage will, when placed in the mail, be delivered by the postal service, this presumption can be rebutted with evidence that the letter was not received." *Goodyear Tire & Rubber Co, v City of Roseville*, 468 Mich 947, 947; 664 NW2d 751 (2003) citing *Barstow v Federal Life Ins Co*, 259 Mich 125, 129; 242 NW 862 (1932). The evidence in this case revealed that notices sent to plaintiffs by certified mail were not delivered to them and were sent back to the post office. Further, plaintiffs contended they never received notices sent by first-class mail and Trott &Trott lacked an established record keeping practice to track returned first-class mail.[1] When such evidence exists, as it does here, "then a question of fact arises regarding whether the letter was received." *Goodyear Tire & Rubber Co*, 468 Mich at 947 (citation omitted). Accordingly, we reverse the trial court's ruling that no genuine issue of material fact existed regarding notice in this case and remand for further proceedings.

On remand, the trial court's analysis should not end with the issue of notice. The next inquiry should be whether the defect in notice caused these plaintiffs to be prejudiced. A defect or irregularity in the foreclosure proceeding that results in a foreclosure is voidable, but the defect must be prejudicial. *Kim v JPMorgan Chase Bank, NA*, 493 Mich 98, 115-116; 825 NW2d 329 (2012). "To demonstrate such prejudice, [plaintiffs] must show that they would have been in a better position to preserve their interest in the property absent defendant's noncompliance with the statute." *Id.* The trial record evidenced that plaintiffs were in communication with defendant CCO regarding modification when their home was foreclosed but had no definitive answer as to whether they would be granted a modification or not. Because plaintiffs did not receive the required statutory notices *before the foreclosure proceedings began*, they were unable to claim the statutory protections within the fourteen days from the mailing of the notices. On remand, the trial court should consider whether these plaintiffs, who were already attempting to modify their mortgage, would have taken the additional opportunity to mediate if it were offered to them.

We reverse in this matter holding that the notice provided to plaintiffs by defendants regarding the foreclosure process was insufficient to apprise plaintiffs of their right to modify. We remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly

[1] Defendants appear to agree that, for some unclear reason, plaintiffs did not receive the notices sent by certified mail. Defendants, however, are uncertain regarding whether plaintiffs received the notices sent by first-class mail.

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Riordan, J. (*dissenting*).

I respectfully dissent. The trial court correctly granted defendants' motion for summary disposition because defendants complied with the service of notice requirements of MCL 600.3204 and MCL 600.3205a.

The "primary goal" of statutory interpretation "is to discern the intent of the Legislature by first examining the plain language of the statute." *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). When the language is clear and unambiguous, "no further judicial construction is required or permitted, and the statute must be enforced as written." *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (quotation marks and citation omitted). A statutory provision must be read in the context of the entire act, and "every word or phrase of a statute should be accorded its plain and ordinary meaning." *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011). "It is a well-established rule of statutory construction that this Court will not read words into a statute." *Byker v Mannes*, 465 Mich 637, 646-647; 641 NW2d 210 (2002).

In this case the majority wishes to abolish the foreclosure statute's service rule by misinterpreting and misapplying the provisions of MCL 600.3204(4)(a), 3205(a)(1) and 3205(a)(3). Along with ignoring the foreclosure statute's service rule, the majority also ignores

Supreme Court precedent, by announcing a new rule that service by mail is insufficient to provide notice in foreclosure proceedings. It does so by turning the statute on its head by requiring that personal service be executed, rather than by mail. While for many this may be a desirable change, it goes beyond the service requirements of the foreclosure statute as enacted by the Legislature.

"Notice [must be] mailed to the mortgagor as required by section 3205a." MCL 600.3204(4)(a). Pursuant to MCL 600.3205a(1), "before commencing a proceeding under this chapter to which section 3204(4) applies, the foreclosing party shall serve a written notice on the borrower[.]" This notice must be served by first-class mail and by certified mail, return receipt requested, with delivery restricted to the borrower. MCL 600.3205(a)(3). Further, notice by mail is adequate when "it is directed to an address reasonably calculated to reach the person entitled to notice." *Dow v Michigan*, 396 Mich 192, 211; 240 NW2d 450 (1976). In Michigan, it is presumed that "a letter mailed in the due course of business is received." *Good v Detroit Auto Inter-Ins Exch*, 67 Mich App 270, 274; 241 NW2d 71 (1976).

When reading a statute, there is no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously. Here, by taking the word "notice" out of context from the statute, the majority needlessly, and without justification, has ruled that the statutory requirements relating to service by mail are insufficient. But, twice, the applicable statutes state that service by mail is adequate and this is exactly what the mortgagors did. Actually, they did it at least three times in this case.

The trial court in this matter took judicial notice that three different times certified letters were mailed by defendants and delivered to the plaintiffs' address: February 11, 2010; February 16, 2010; and February 26, 2010. Further, the court took notice that on each of the three occasions, the U.S. Postal Service left receipts at the plaintiffs' address advising them that there were certified letters from the defendants awaiting pick-up at the local post office. Each of the three times, the served receipts were disregarded and the notices were not claimed.

MCL 600.3204(4) and MCL 600.3205a(1) require only that the defendants serve notice by mail to the plaintiffs, which the defendants did by certified mail. Despite defendants' multiple efforts, the waiting certified letters were ignored.

The defendants complied with the applicable statutory provisions.

I would affirm the trial court.

/s/ Michael J. Riordan