

STATE OF MICHIGAN

COURT OF APPEALS

GLEN PAUL ALLSTEAD and ANGELA KAY
ALLSTEAD,

Plaintiffs/Counterdefendants-
Appellants,

v

KEVIN KENYANA,

Defendant/Counterplaintiff-Appellee.

UNPUBLISHED
April 23, 2020

No. 347708
St. Clair Circuit Court
LC No. 18-001266-CH

Before: RIORDAN, P.J., and FORT HOOD and SWARTZLE, JJ.

PER CURIAM.

In this mortgage foreclosure action, plaintiffs/counterdefendants (plaintiffs) appeal as of right the trial court’s order denying their motion to set aside foreclosure sales, and granting summary disposition in favor of defendant/counterplaintiff (defendant). We partially reverse and remand for further proceedings consistent with this opinion.

I. PROCEDURAL HISTORY

This case arises out of two houses that plaintiffs bought from defendant in Port Huron, Michigan. Angela bought the 11th Street property for \$40,000, and Glen bought the 16th Street property for \$45,000.¹ Defendant secured mortgages on both homes, and in April 2018, gave plaintiffs notice that the properties would be sold in foreclosure. The foreclosure notice erroneously stated that the sale would occur on May 31, 2018, when in fact, the sale was scheduled to occur on May 24, 2018.²

¹ Plaintiffs lived together at the 11th Street property.

² Defendant asserted below that the legal newspaper printed the incorrect date.

On May 25, 2018, the plaintiffs filed a complaint and a request for a temporary restraining order with the trial court. The trial court granted the temporary restraining order, but when plaintiffs served the restraining order on the Sheriff's Office, plaintiffs learned that the sale had already occurred on May 24. And indeed, at the sale, defendant foreclosed on the 11th Street property and retained title,³ and the 16th Street property was sold to a third party, Graymon Homes, LLC ("Graymon").

Thereafter, plaintiffs appear to have taken no action until November 8, 2018, when they filed a motion to set aside the deeds from the foreclosure sale, claiming that they had fully repaid the mortgage loans. The trial court denied plaintiffs' motion, concluding that it did not have authority to set aside the foreclosure deeds. The court noted that this was particularly true with respect to the 16th Street property because Graymon was not a party in the case, and therefore, the court did not have jurisdiction over Graymon to effectuate any orders with respect to that property.

On January 2, 2019, defendant filed a motion for summary disposition under MCR 2.116(C)(8) and (10), arguing that plaintiffs' claims for breach of contract and quiet title must be dismissed because the redemption period expired on November 24, 2018, and thereafter, plaintiffs no longer had an interest in the properties. Plaintiffs responded that the redemption period was irrelevant because the foreclosure sale was void due to the defects in the foreclosure notice. Plaintiffs also alleged that defendant fraudulently foreclosed on the properties after plaintiffs had paid the mortgages in full. The trial court agreed with defendant and dismissed plaintiffs' complaint.

II. DISCUSSION

Plaintiffs argue that the trial court erred when it (1) failed to find the deeds from the foreclosure sale void or extend the redemption period, (2) granted summary disposition, despite the existence of questions of fact regarding whether the mortgages were satisfied and procedural defects in the foreclosure notice, and (3) dismissed plaintiffs' claim for breach of contract, which was independent of plaintiff's quiet title claim. We agree that the trial court should have extended the redemption period with respect to the 11th Street property, and that the court erred in granting summary disposition with respect to that property. In all other respects, we affirm the trial court.

A. FORECLOSURE SALE

Plaintiffs first argue that the trial court erred when it did not set aside the deeds from the foreclosure sale when there was a defect in the foreclosure notice. We disagree that there was a defect in the foreclosure notice that rendered the deeds void. However, we agree that the trial court should have extended the redemption period on the basis of the claimed irregularity in the foreclosure process that plaintiffs had satisfied the mortgage on the 11th Street property. We discern no error with respect to the 16th Street property.

³ Defendant contends that plaintiffs still occupy the 11th Street property.

Actions to quiet title are equitable in nature and are reviewed de novo. *Mich Nat Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992).⁴ The trial court’s factual findings are reviewed for clear error. *McFerren v B&B Investment Group (After Remand)*, 253 Mich App 517, 522; 655 NW2d 779 (2002). Clear error occurs when this Court is left with a definite and firm conviction that a mistake has been made. *Jonkers v Summit Twp*, 278 Mich App 263, 265; 747 NW2d 901 (2008) (quotation marks and citation omitted).

“The right to foreclosure by advertisement is statutory.” *Church & Church Inc v A-1 Carpentry*, 281 Mich App 330, 339; 766 NW2d 30 (2008), aff’d on other grounds 483 Mich 885 (2009); see also MCL 600.3201 *et seq.* “A mortgagee who uses this method of foreclosure must follow the statutory requirements found in MCL 600.3201 concerning the initial mortgage and procedural requirements, the publication and posting requirements found in MCL 600.3208, and the sales procedure requirements found in MCL 600.3216.” *Cheff v Edwards*, 203 Mich App 557, 560; 513 NW2d 439 (1994). “[D]efects or irregularities in a foreclosure proceeding result in a foreclosure that is voidable, not void *ab initio*.” *Kim v JPMorgan Chase Bank, NA*, 493 Mich 98, 115; 825 NW2d 329 (2012).

Plaintiffs rely on *Jackson Investment Corp v Pittsfield Prod, Inc*, 162 Mich App 750; 413 NW2d 99 (1987), to support their argument that the trial court erred when it did not void the deeds from the foreclosure sale. In *Jackson Investment Corp*, the defendant entered into a mortgage contract with the plaintiff for a property owned by the defendant. *Id.* at 751. The defendant eventually began foreclosure proceedings, properly published the foreclosure notice over the course of four weeks, and gave actual notice to the plaintiff as well. *Id.* at 752. However, the foreclosure sale occurred 23 days after the date of the first published notice, five days less than was required by MCL 600.3208. *Id.* Thereafter, the plaintiff sought to vacate the sale. *Id.* The trial court determined that, although the foreclosure sale was defective, the defect did not render the sale automatically void because “[a]fter examining the equities of the case, the court found plaintiff guilty of laches for waiting until five months of the six-month redemption period had passed before bringing suit to invalidate the sale.” *Id.* at 752-753. However, the trial court did determine that the plaintiff was entitled to an extension of the redemption period by 43 days. *Id.* at 753. On appeal, the plaintiff argued that a notice defect rendered the foreclosure sale “void and without effect.” *Id.* This Court disagreed, holding that a defect in notice merely rendered the foreclosure sale voidable. *Id.* at 755. This Court explained:

By holding that a defect renders a foreclosure sale voidable, rather than void, more security is given to the title of real property. Such a holding also allows for an examination of whether any harm was caused by the defect. In situations where it is evident that no harm was suffered, in that the mortgagor would have been in no better position had notice been fully proper and the mortgagor lost no potential opportunity to preserve some or any portion of his interest in the property, we see little merit in the rule of law which Jackson advocates. Such a rule would

⁴ Defendant briefly suggests that a trial court’s decision whether to set aside a voidable foreclosure sale is reviewed for an abuse of discretion. However, defendant provides no actual support for this contention.

automatically nullify the sale without regard to or consideration of the intervening interests of other parties. We conclude that the trial court correctly held that the notice defect rendered the sale voidable and not void. [*Id.* at 756.]

Accordingly, contrary to plaintiffs' assertion, the defect in the notice in this case rendered the sales voidable, not void. *Id.* at 755. And, we note that plaintiffs did not suffer any harm caused by the defect because they did not lose an opportunity to preserve their interest in the properties. Plaintiffs were fully able to challenge the validity of the foreclosure, on the basis of their assertion that they satisfied the mortgages. Instead, plaintiffs waited until November 8, 2018, three weeks before the expiration of the redemption period, to challenge the foreclosure sale. Nothing about the incorrect foreclosure sale date in the notice caused plaintiffs to lose a "potential opportunity to preserve some or any portion of [their] interest in the property" *Id.* at 756. Plaintiffs were aware that the foreclosure sale occurred days after the sale took place, which was before the date on the foreclosure notice. Yet, plaintiffs failed to act on this information for months. Therefore, plaintiffs were not prejudiced by the notice defect, and the trial court did not err when it declined to void the deeds from the foreclosure sale.

That having been said, plaintiffs' right to redeem the properties is derived from MCL 600.3240, and the general rule is that the right to redeem cannot be "enlarged or abridged by the courts." *Gordon Grossman Bldg Co v Elliott*, 382 Mich 596, 603; 171 NW2d 441 (1969). However, an equitable extension period to redeem a property may be had with "a clear showing of fraud, or irregularity." *Schulthies v Barron*, 16 Mich App 246, 247-248; 167 NW2d 784 (1969) (footnote omitted).

At the hearing on plaintiffs' motion to set aside the deeds from the foreclosure sale, plaintiffs asserted that the foreclosures were improper because plaintiffs had already satisfied the mortgages. Plaintiffs attached to their complaint a copy of defendant's handwritten ledger for the 11th Street property. At the bottom of defendant's ledger are two statements: "Glen & Angela Allstead paid [\$]61,000 on 5-[indiscernible]-2014," and "House paid on 5-16-14." These statements on defendant's ledger establish, at a minimum, an irregularity in the foreclosure process related to the 11th Street property. See MCL 600.3201. Accordingly, we conclude that the trial court should have extended the redemption period with respect to the 11th Street property on the basis of evidence showing a possible irregularity in the foreclosure process.

We note that plaintiffs have advanced no evidence that would support their argument that the mortgage for the 16th Street property was similarly paid off. Moreover, Graymon was not a party to the litigation, and was a necessary party because Graymon had a real interest in the litigation, as the buyer of the 16th Street property. See *Mason Co v Dep't of Community Health*, 293 Mich App 462, 489; 820 NW2d 192 (2011) (explaining that MCR 2.205(A) requires joinder of a party when "their presence in the action is essential to permit the court to render complete relief," to ensure that all parties with an interest in the litigation are present). Accordingly, the trial court properly denied plaintiffs' motion with respect to the 16th Street property because there was no evidence that the mortgage on the property had been satisfied, and Graymon was not a party to the litigation.

We also note defendant's argument that the trial court denied plaintiffs' motion to set aside the foreclosure sale deeds because of plaintiffs' long delay in requesting court intervention.

Indeed, the trial court did express concern as to why plaintiffs waited over five months to bring the issue before the trial court. However, the trial court never stated that it denied plaintiffs' motion on the basis of the long delay. Instead, the trial court stated:

[Graymon is] not [a] part[y] so I don't think I have jurisdiction to take any action against them. With regard to the other matter, I don't know that I've got the authority to take any of the actions that are requested here. I'll deny the request, and I'll leave it to the parties to the point where maybe you can negotiate something, but I don't feel that I am in a position to order anything.

The trial court denied plaintiffs' motion on the basis of the erroneous belief that it did not have the authority to void the foreclosure deeds or extend the redemption period. However, as discussed above, the trial court had the authority to both find the foreclosure deeds voidable and extend the redemption period, although only extending the redemption period was proper.

B. QUIET TITLE

Plaintiffs next argue that the trial court erred when it granted summary disposition in favor of defendant because there were issues of fact concerning the improper notice of the foreclosure sale and whether plaintiffs satisfied the mortgages before defendant foreclosed the properties. We disagree with respect to the notice of the foreclosure sale, but agree that summary disposition was improper with respect to the 11th Street property on the basis of the existence of an issue of fact whether plaintiffs satisfied the mortgage on that property.

This Court reviews a trial court's decision to grant or deny summary disposition de novo. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). Defendant moved for summary disposition under MCR 2.116(C)(8) and (10). "The trial court did not indicate under which subrule it granted defendant summary disposition. However, because it appears that the court looked beyond the pleadings in making its determination, this Court will consider the motion granted pursuant to MCR 2.116(C)(10)." *DeHart v Joe Lunghamer Chevrolet, Inc*, 239 Mich App 181, 184; 607 NW2d 417, 419 (1999). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "[T]he circuit court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). "A motion for summary disposition under MCR 2.116(C)(10) shall be granted if there is no genuine issue regarding any material fact and the movant is entitled to judgment as a matter of law." *Bazzi v Sentinel Ins Co*, 502 Mich 390, 398; 919 NW2d 20 (2018). "If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Quinto v Cross & Peters Co*, 451 Mich 358, 363; 547 NW2d 314 (1996).

Plaintiffs' first contend that summary disposition was improper because of the defect in the foreclosure notice. We reject this argument for the reasons discussed earlier in Section A. To reiterate, the defect in the foreclosure notice of the incorrect sale date did not prejudice plaintiffs because plaintiffs did not lose a "potential opportunity to preserve some or any portion of [their] interest in the property" *Jackson Investment Corp*, 162 Mich App at 756. Plaintiffs had

notice of the occurrence of the foreclosure sale and had the opportunity to redeem the properties over the following six months, but failed to do so.

Plaintiffs next argue that there was an issue of fact regarding whether plaintiffs paid off the mortgages. Defendant foreclosed on plaintiffs' properties claiming that plaintiffs owed \$10,000 on each of the two mortgages. When plaintiffs received the foreclosure notices, plaintiffs filed a complaint in the trial court. Again, plaintiffs attached a handwritten ledger showing the balance owed on plaintiffs' mortgage for the 11th Street property. At the bottom of the ledger are two notes that state, "Glen & Angela Allstead paid [\$]61,000 on 5-[indiscernible]-2014," and "House paid on 5-16-14." Additionally, plaintiffs submitted evidence of the prior lawsuit instituted by defendant, where defendant claimed plaintiffs owed \$25,000 for the 16th Street property, and \$20,000 on the 11th Street property on the basis of land contracts on each property. The land contract case was dismissed for defendant to provide a final accounting. However, plaintiffs assert that the amounts that defendant claimed plaintiffs owed on the properties in that case also raises a question of fact concerning the amount that plaintiffs owed during the present lawsuit.

Considering defendant's notations in the light most favorable to plaintiffs, we conclude there was an issue of fact concerning whether the mortgage on the 11th Street property was satisfied on May 16, 2014. We also would agree that plaintiffs submitted evidence that could raise an issue of fact related to the amount owed on the 16th Street property, however, there is no evidence that the 16th Street mortgage had been satisfied in full. Accordingly, the trial court erred when it granted summary disposition in favor of defendant, insofar as it relates to the 11th Street property, but did not err in dismissing the claim with respect to the 16 Street property.

C. BREACH OF CONTRACT

Plaintiffs lastly argue that the trial court erred when it granted summary disposition and dismissed the breach-of-contract claim on the basis of the breach-of-contract claim not being distinctive from the quiet-title claim. The trial court granted summary disposition and dismissed plaintiffs' breach-of-contract claim because it "tied in together" with plaintiffs' claim for quiet title, and both claims "have to do with the sale of the property." Plaintiffs argue that they alleged separate and distinct claims. We disagree.

A trial court is not bound by the labels that a party assigns to its claims. *Stephens v Worden Ins Agency, LLC*, 307 Mich App 220, 228-229; 859 NW2d 723 (2014). "Rather, we must consider 'the gravamen' of the suit on the basis of a reading of the complaint as a whole." *Id.* at 229. We agree with the trial court that the gravamen of plaintiff's breach-of-contract claim is the improper foreclosure of the 11th Street and 16th Street properties, which is also the basis for the quiet-title action. Both claims are premised on plaintiffs having paid the mortgages in full and on plaintiffs being the rightful owners of the properties because of that fact. Moreover, both claims ultimately seek the same relief: a ruling that the foreclosure sales were improper, an order discharging the mortgages, and a declaration that plaintiffs are the rightful owners of the properties. Because plaintiffs' breach-of-contract claim was not distinct from its quiet-title claim, we discern no error from the trial court's dismissal of the former.

III. CONCLUSION

The trial court should have extended the redemption period for the 11th Street property because of the clear irregularity in the foreclosure process, where plaintiffs provided evidence of defendant's handwritten ledger stating that plaintiffs paid off the mortgage on the 11th Street property. The trial court erred when it granted summary disposition in favor of defendant with respect to the 11th Street property for that reason. That having been said, we discern no similar factual issue with respect to the 16th Street property, and accordingly, the trial court did not err in dismissing plaintiffs' claims with respect to that property. We also agree with the trial court that summary disposition was appropriate with respect to the breach-of-contract claim because the claim was, fundamentally, the quiet-title claim by another name.

We partially reverse and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Karen M. Fort Hood
/s/ Brock A. Swartzle

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SWARTZLE, J. (*concurring*).

I fully concur in the majority's opinion and judgment. I write separately to point out that the parties' factual dispute on whether the mortgage on the 11th Street property has been satisfied could impact which statutory-redemption period applies on remand. The majority opinion correctly observes that "plaintiffs' right to redeem the properties is derived from MCL 600.3240." Under that provision, the amount owed on the outstanding mortgage of a residential property could determine the redemption period that applies. See MCL 600.3240(8)-(12). Because there is a factual dispute regarding the amount plaintiffs' owe, if any, on the 11th Street property, and because neither party has disputed on appeal that the statutory-redemption period is six months, this Court does not have a record to conclude whether a different statutory redemption period should apply on remand. See, e.g., MCL 600.3240(12) (catch-all subsection providing for a one-year redemption period).

/s/ Brock A. Swartzle